

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division

IN RE SENTENCED MISDEMEANANTS:

[Case Number Pending]

Chief Judge Robert Morin

**EMERGENCY MOTION FOR ORDER TO SHOW CAUSE WHY PERSONS SERVING
MISDEMEANOR SENTENCES AT THE DEPARTMENT OF CORRECTIONS
CENTRAL DETENTION FACILITY AND CORRECTIONAL TREATMENT
FACILITY SHOULD NOT BE RELEASED FORTHWITH IN LIGHT OF THE CRISIS
CREATED BY THE COVID-19 PANDEMIC**

The Public Defender Service (PDS) moves the Court to issue an order to show cause directed at prosecution authorities, the United States Attorney for the District of Columbia (USAO) and the Office of the Attorney General (OAG), ordering them to show cause, if any, why all sentenced misdemeanants currently serving sentences at the Department of Corrections (DOC) Central Detention Facility (CDF) or Correctional Treatment Facility (CTF) should not have their sentences forthwith commuted or suspended to reduce the jail population in light of the Covid-19 world pandemic.¹ We implore the Court to follow the example of the New Jersey Supreme Court, which on March 20, 2020 issued an order to show cause to similar effect to address the moral, health, and legal crisis created by the pandemic.²

According to the DOC, on March 24, 2020, CDF and CTF combined housed 94 sentenced misdemeanants. By definition, these individuals are going to be released in the near future, and have not committed serious crimes. Jails, in particular, have been aptly described as

¹ See Ex. A, Proposed Order to Show Cause.

² See Ex. B, New Jersey Show Cause and Consent Orders; *see also* Tracey Tully, *1,000 Inmates Will Be Released From N.J. Jails to Curb Coronavirus Risk*, N.Y. Times, March 23, 2020, available at <https://www.nytimes.com/2020/03/23/nyregion/coronavirus-nj-inmates-release.html>.

“petri dishes” for Covid-19.³ Throughout the country, urgent efforts are underway to reduce jail populations to forestall devastation.⁴ On March 25, 2020, DOC revealed that a twenty-year old man housed at CTF tested positive for Covid-19. DC DOC Statement of 3-25-20. That man was in a double occupancy cell as recently as six days prior to March 25, *see id.* (stating that he was in a single occupancy cell only starting five days prior to March 25), and undoubtedly came into contact not only with his cellmate, but countless other residents and staff while highly

³ Dr. Ross Quinn, *Letters to the Editor: A prison doctor’s stark warning on coronavirus, jails, and prisons*, L.A. Times, March 20, 2020, available at <https://www.latimes.com/california/story/2020-03-20/prison-doctors-stark-warning-on-coronavirus-and-incarceration> (a physician with 30 years of experience working in correctional facilities reports that prisons are densely packed “petri dishes for contagious respiratory illness”); *see, e.g.*, Sandhya Kejeepeeta, Seth J. Prins, *Why Coronavirus in Jails Should Concern All of Us*, The Appeal, March 24, 2020, available at <https://theappeal.org/coronavirus-jails-public-health/> (epidemiologists offer studies showing a correlation between the rates of incarceration and mortality rates in the community from infectious diseases, including HIV and tuberculosis, and describe how infections spread quickly at jails because of overcrowding, poor ventilation, lack of hygiene and cleaning supplies, and limited access to healthcare); *United States v. Barkman*, 19-cr-0052, 2020 U.S. Dist. LEXIS 45628 (D. Nev. March 17, 2020) (suspending jail time as a condition of probation because of the threat posed by coronavirus and noting that “[t] here is ample opportunity for a virus to enter a prison or jail, and for it to go back out into the community [and] [o]nce a contagious illness enters, conditions in correctional facilities are highly conducive to it spreading.”).

⁴ *See* Ex. C, Report of Jurisdictions that have acted to downsize their incarcerated populations; *see also* Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody, last updated March 25, 2020, available at <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf> (over 30 prosecutors across the nation have called for “reduc[ing] the prison population . . . to promote the health and safety of staff, those incarcerated, and visitors”); Letter from Montana Chief Justice of Montana to Courts of Limited Jurisdiction Judges, March 20, 2020, available at <https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333> (urging courts, “[b]ecause of the high risk of transmittal of COVID-19, not only to prisoners within correctional facilities but staff and defense attorneys as well, . . . [to] review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for non-violent offenses.”).

contagious.⁵ Even more troubling, according to the Director of the Department of Corrections, Quincy Booth, the individual who tested positive has been detained since July 2019, and DOC has not determined how he was exposed to the virus, making it a virtual certainty that other infected individuals are currently residing in DOC facilities. In turn, such potentially infected contacts pose an extreme risk of exponentially multiplying the sick and infectious within the DOC and the community at large.⁶ Under these dire circumstances, it is imperative that the Court implement all measures within its power to reduce the jail population immediately and to the greatest extent possible consistent with public safety.

The Court should not be hampered by the normal ways of conducting business because these are not normal times. The Court has already demonstrated its resolve to attempt to stem the crisis by exercising emergency powers in an unprecedented manner to shut down almost all court proceedings. The Court presumably hastened to take such sweeping action to protect the community, even at a high cost to the administration of justice. No lesser consideration should

⁵ Inmates at CTF continuously come into contact with other inmates. Cells are grouped into units containing common areas where inmates spend time together when not confined to their cells. When inmates are taken to locations outside their cells, such as to the visitation hall for legal visits or to the location where Suboxone is disbursed, they are grouped together. The visitation hall is comprised of a large room with rows of tables and chairs. The hall also contains three small rooms, each with one table and several chairs, which are reserved for legal visits. Adjacent to the hall is a small hallway with a cell where inmates waiting for legal visits are confined together.

⁶ Projection models, based on how quickly the virus spread in China and Italy, show exponential growth in the number of infected individuals. This is because even in a non-correctional institution environment each infected person is expected to infect “around 2.5” people, and each of the newly infected people will go on to infect an additional 2.5 people, and so on. *See* Umair Irfan, *Vox*, “The math behind why we need social distancing, starting right now,” (March 15, 2020), available at <https://www.vox.com/2020/3/15/21180342/coronavirus-covid-19-us-social-distancing>.

be given to the DOC community. And as we have learned from a pandemic that began thousands of miles away in the Wuhan Province and rapidly made its way to our doorsteps, Covid-19 knows no boundaries. For this potentially deadly disease that has thrown our hospitals and economy into chaos, the DOC community is indistinct from the community at large; it is only less likely to be able to contain infection, or to provide appropriate medical care.

The individuals targeted by this motion do not pose difficult questions of public safety. They will rejoin the community in any event in short order. Undoubtedly they would not have been sentenced to jail time in the first instance had they been sentenced now in the throes of the exponentially accelerating danger. The Court should act now to reduce the jail population for the benefit of the entire community and to protect the health of these low risk inmates. The Court should proceed by order to show cause rather than wait for piecemeal litigation of motions to reduce or alter sentence by this low-risk group whose cases are closed and who do not necessarily have active counsel. The piecemeal approach is wholly ineffective and unnecessary for this subset of prisoners. Under Super. Ct. Crim. R. 35 (b) (2) the Court is empowered to sua sponte “reduce a sentence without motion.” By issuing the proposed Order To Show Cause, the Court would be availing itself of its authority to reduce a sentence in these low-risk situations, while still giving the government the opportunity to object on a case-by-case basis.⁷

⁷ The Court should brook no argument nor have any concern that some portion of the targeted group may be outside the 120-day time limitation for a Rule 35 reduction. We trust that the government will not throw hyper-technical elbows, but would limit any objection to the merits and the safety of the community. First, the sentences involved are short and thus the reduction is likely to be timely anyway. Second, on March 19, 2020, the Court ordered that “all deadlines and time limits in statutes, court rules, and standing and other orders issued by the court that would otherwise expire before May 15, 2020 including statutes of limitations, are suspended, tolled, and extended during the period of the current emergency.” Order, Mar. 19, 2020, at 2. That Order also creates leeway for some cases. Lastly and more globally, the Court retains broad discretion to relax the 120-day limit in Rule 35(b) because that time limit is neither jurisdictional nor mandatory. *See Smith v. United States*, 984 A.2d 196, 200 (D.C. 2009). In *Smith*, the Court

In light of the rapidly expanding pandemic, all persons housed at DOC facilities with a misdemeanor sentence of jail time only should have their sentences reduced to time served and be released forthwith. All such persons with a split sentence of jail time to be followed by a probationary period should have the remaining amount of executed time be suspended so they can immediately be released and commence the probationary period of the sentence. For example, a sentence of “120 days ESS all but 60 days to be followed by 1 year of probation” would be converted to “120 days ESS all but time served to be followed by 1 year of probation.”

WHEREFORE, in light of the exigent circumstances, it is respectfully requested that the Court order that the Office of the Attorney General for the District of Columbia and the Office of the U.S. Attorney for the District of Columbia file a response, if any, to this motion by 4:00pm on Monday, March 30, 2020, and that the Court issue the proposed Order To Show Cause forthwith.

of Appeals held that Rule 35(b)'s time limit “can be relaxed by the Court in the exercise of its discretion.” *Id.* (citation omitted). The present extraordinary circumstances justify the Court reducing a sentence beyond the ordinary 120-day limit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion and exhibits were served via email on Timothy Shea, United States Attorney for the District of Columbia, 555 Fourth Street, NW, Washington, D.C. 20530, and Karl Racine, Attorney General for the District of Columbia, on this 26th day of March, 2020. The Motion and Exhibits will also be served electronically via the court's electronic filing system when the case is docketed.

/s/ Jonathan Anderson
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