

STATE OF NORTH CAROLINA
_____ COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.

THE STATE OF NORTH CAROLINA)

v.)

,
Defendant.)

)
) **MOTION FOR RELEASE PENDING**
) **APPEAL**
) **DUE TO DEFENDANT’S RISK**
) **ASSOCIATED WITH THE COVID-19**
) **PANDEMIC**
)
)
)

NOW COMES Defendant-Appellant _____, by and through undersigned trial counsel, to request this Court for immediate release pending her appeal. Ms. XYZ requests that the Court grant the motion, or, alternatively, hold an emergency hearing on this motion.

As the novel coronavirus that causes COVID-19 has spread across the globe, hundreds of thousands of people have been infected and thousands of people have died.¹ There is no known cure. Development of a vaccine is likely at least 12 months away.² In the face of this unprecedented public health crisis, Governor Roy Cooper declared North Carolina under a state of emergency on March 10, 2020, and ordered all mass gatherings to cease and schools to close on March 14, 2020.³ The Chief Justice of the Supreme Court of North Carolina, declaring that

¹ The World Health Organization has officially classified the spread of Covid-19 as a global pandemic. *See* World Health Organization, Director-General Opening Remarks (March 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

² Saralyn Cruickshank, “Experts Discuss Covid-19 and Ways to Prevent Spread of Disease,” *John Hopkins Mag.* (Mar. 17, 2020), <https://hub.jhu.edu/2020/03/17/coronavirus-virology-vaccine-social-distancing-update>

³ Executive Order No. 116, *Declaration of a State of Emergency to Coordinate Response and Protective Actions to Prevent the Spread of COVID-19* (Mar. 10, 2020); Executive Order No. 117, *Prohibiting Mass Gatherings and Directing the Statewide Closure of K-12 Public Schools to limit the spread of COVID-19* (Mar. 14, 2020).

“catastrophic conditions” exist in this state, suspended all but essential state court hearings for a period of no less than 30 days to assist in reducing the spread of infection on March 13, 2020.⁴

The North Carolina Department of Public Safety has never confronted a global health pandemic like this one.⁵ In fact, the Department has ordered that certain inmates who are to be scheduled to be released in 2020 serve the remainder of their sentences under community supervision, including female inmates over age 50 with underlying health conditions. Ms. XYZ is 53 years old and her current projected release date is _____, according to the Department of Public Safety’s Offender Search website. While this emergency policy does not apply to inmates convicted of violent crimes, Ms. XYZ was convicted on setting fire to her own house with the knowledge that no one was present. Even if the offense of which she was convicted would technically be considered a “violent offense,” given the circumstances surrounding the offense that were presented at trial the conduct was clearly not intended to physically harm anyone. The Department’s policy of releasing certain inmates clearly suggests that North Carolina’s prisons are unequipped either to prevent transmission of COVID-19 among inmates and staff or to isolate and treat individuals who become infected. For the reasons set forth below, Ms. XYZ’s current detention poses an imminent threat to Ms. XYZ’s life and to the health and safety of the community from a deadly infectious disease.

Under these unique circumstances, the Court must release Ms. XYZ pending her appeal on appropriate conditions, at least until the resolution of this outbreak.

⁴ Order of the Chief Justice of the Supreme Court of North Carolina (Mar. 13, 2020).

⁵ Given COVID-19’s contagiousness and relatively high death rate, particularly in vulnerable populations, the President ordered a 15-day directive to avoid gatherings in groups of more than 10 people. The President’s Coronavirus Guidelines for America, Whitehouse.gov (Mar. 16, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

I. BACKGROUND

A. Procedural History

1. Ms. XYZ was convicted on November 7, 2019, of _____. The same day, she was sentenced to _____ with the two charges consolidated for sentencing.

2. Ms. XYZ gave notice of appeal the same day.

B. The Public Health Crisis

3. In North Carolina, as of March 30, 2020, there are more than 800 cases of COVID-19 in two-thirds of the state's counties. Four people have died.⁶

4. Governor Cooper stated at a news conference on March 27, 2020, "As expected, our numbers continue to increase rapidly. This is a highly contagious virus." Governor Cooper called [the stay at home order] "truly a matter of life or death."⁷

5. At the same conference, North Carolina Department of Health and Human Services Secretary Mandy Cohen said, "We do not have the luxury of time. Our best weapon is social distancing. What we do today can save lives in the weeks and months to come."⁸

6. Ms. Mitchell is incarcerated at North Carolina Correctional Institution for Women, which is located in Wake County. Wake County reported 24 new cases of COVID-19 as of March 30, 2020, which brings the county's total to 170.⁹ Wake County has the second highest number of COVID-19 cases of counties in North Carolina, second only to Mecklenburg County.¹⁰

⁶ "Stay-at-Home Order Issued for North Carolina" Raleigh News and Observer (March 30, 2020) <https://www.newsobserver.com/news/coronavirus/article241469211.html>

⁷ *Id.*

⁸ *Id.*

⁹ "24 New Cases of COVID-19 Reported by Wake County on Monday" Raleigh News and Observer (March 30, 2020), <https://www.newsobserver.com/news/coronavirus/article241604381.html>

¹⁰ See <https://www.ncdhhs.gov/covid-19-case-count-nc>

7. As of March 30, 2020, 140,904 people have been diagnosed with COVID-19 in the United States, with 2,405 deaths confirmed.¹¹

8. On March 11, 2020, the World Health Organization declared a global pandemic.¹² Citing “deep[] concern[] both by the alarming levels of spread and severity, and by the alarming levels of inaction,” it called for countries to take “urgent and aggressive action.”¹³

9. The number of people infected is growing exponentially. The death toll in Italy, which began experiencing this epidemic about a week earlier than the first diagnosed American case, saw a rise of 30% overnight in the 24 hours between March 5, 2020, and March 6, 2020 and a rise of 25% on March 15 alone—a day that killed 368 people in Italy.¹⁴ Experts predict similar rapid growth in the United States.

10. The numbers of people diagnosed reflect only a portion of those infected;¹⁵ very few people have been tested, and many are asymptomatic transmitters.¹⁶ Thousands of people are carrying a potentially fatal disease that is easily transmitted—and few are aware of it.

¹¹ Centers for Disease Control, Coronavirus 2019, <https://www.cdc.gov/coronavirus/2019-ncov/cases-in-us.html>

¹² “Coronavirus: COVID-19 Is Now Officially A Pandemic, WHO Says,” NPR (March 11, 2020), <https://www.npr.org/sections/goatsandsoda/2020/03/11/814474930/coronavirus-covid-19-is-now-officially-a-pandemic-who-says>.

¹³ *Id.*

¹⁴ “Italy coronavirus deaths near 200 after biggest daily jump,” Crispian Balmer & Angelo Amante, Reuters (Mar. 6, 2020), <https://www.reuters.com/article/us-health-coronavirus-italy/italy-coronavirus-deaths-near-200-after-biggest-daily-jump-idUSKBN20T2ML>.

¹⁵ Melissa Healy, “True Number of US Coronavirus Cases is Far Above Official Tally, Scientists Say,” L.A. Times (Mar. 10, 2020), <https://www.msn.com/en-us/health/medical/true-number-of-us-coronavirus-cases-is-far-above-official-tally-scientists-say/ar-BB110qoA>.

¹⁶ Roni Caryn Rabin, “They Were Infected with the Coronavirus. They Never Showed Signs,” N.Y. Times (Feb. 26, 2020, updated Mar. 6, 2020), <https://www.nytimes.com/2020/02/26/health/coronavirus-asymptomatic.html>; Aria Bendix, “A Person Can Carry And Transmit COVID-19 Without Showing Symptoms, Scientists Confirm,” Bus. Insider (Feb. 24, 2020), <https://www.sciencealert.com/researchers-confirmed-patients-can-transmit-the-coronavirus-without-showing-symptoms>.

11. The current estimated incubation period is between 2 and 14 days.¹⁷ Approximately 20% of people infected experience life-threatening complications, and between 1% and 3.4% die.¹⁸

12. The virus is thought to spread through respiratory droplets or by touching a surface or object that has the virus on it.¹⁹ Thus, infected people—who may be asymptomatic and not even know they are infected—can spread the disease even through indirect contact with others.

13. Accordingly, officials and experts urge “social distancing”—isolating oneself from other people as much as possible.²⁰

14. Other federally recommended precautions include frequent hand-washing, alcohol-based hand sanitizers, and frequent cleaning *and* disinfecting of any surfaces touched by any person.²¹

C. COVID-19 and Prisons

15. It is virtually impossible to engage in these basic preventive measures in prison. During pandemics, prison facilities become “ticking time bombs” as “[m]any people crowded together, often suffering from diseases that weaken their immune systems, form a potential breeding ground and reservoir for diseases.”²² As Dr. Jaimie Meyer, an expert in public health in jails and prisons, recently explained, “[T]he risk posed by COVID-19 in jails and prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and

¹⁷ “Coronavirus Disease COVID-19 Symptoms,” Centers for Disease Control (updated: Feb. 29 2020), <https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html>.

¹⁸ Vox, *Why Covid-19 is worse than the flu, in one chart*, <https://www.vox.com/science-and-health/2020/3/18/21184992/coronavirus-covid-19-flu-comparison-chart>.

¹⁹ Centers for Disease Control, Coronavirus Factsheet (Mar. 3, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>.

²⁰ *Id.*

²¹ Centers for Disease Control, Steps to Prevent Illness: https://www.cdc.gov/coronavirus/2019-ncov/about/prevention.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fabout%2Fprevention-treatment.html

²² See Saint Louis University, “Ticking Time Bomb,” *Prisons Unprepared For Flu Pandemic*, ScienceDaily (2006), <https://www.sciencedaily.com/releases/2006/09/060915012301.htm>.

harm to individuals who become infected.” See Exhibit 3, Declaration of Dr. Jaimie Meyer (“Meyer Decl.”) ¶ 7 (Mar. 15, 2020). This is due to a number of factors: the close proximity of individuals in those facilities; their reduced ability to protect themselves through social distancing; the lack of necessary medical and hygiene supplies ranging from hand sanitizer to protective equipment; ventilation systems that encourage the spread of airborne diseases; difficulties quarantining individuals who become ill; the increased susceptibility of the population in jails and prisons; the fact that jails and prisons normally have to rely heavily on outside hospitals that will become unavailable during a pandemic; and loss of both medical and correctional staff to illness. *Id.* ¶¶ 7-19.²³

16. When coronavirus suddenly exploded in China’s prisons, there were reports of more than 500 cases quickly spreading across five facilities in three provinces.²⁴ In Iran, 54,000 prisoners were temporarily released to protect them and to protect the community from propagation of an outbreak.²⁵

17. Incarcerated people:

- a. Are typically housed in close proximity to others and unable to distance themselves;
- b. Spend significant time in communal spaces, such as eating areas, recreation rooms, bathrooms, and cells or holding areas, and they are unable to choose to do otherwise;
- c. Live in spaces with open toilets within a few feet of their beds, and unable to access a closed toilet that would not aerosolize bodily fluids into their living spaces;

²³ “The pathway for transmission of pandemic influenza between jails and the community is a two-way street. Jails process millions of bookings per year. Infected individuals coming from the community may be housed with healthy inmates and will come into contact with correctional officers, which can spread infection throughout a facility. On release from jail, infected inmates can also spread infection into the community where they reside.” *Pandemic Influenza and Jail Facilities and Populations*, American Journal of Public Health, October, 2009; See also Dr. Anne Spaulding, Coronavirus and the Correctional Facility: for Correctional Staff Leadership, Mar. 9, 2020, https://www.ncchc.org/filebin/news/COVID_for_CF_Administrators_3.9.2020.pdf

²⁴ Claudia Lauer & Colleen Long, “US prisons, jails on alert for spread of coronavirus,” AP News (Mar. 7, 2020), <https://apnews.com/af98b0a38aaabedbc059092db356697>.

²⁵ *Id.*

- d. Are constantly within six feet of other people, likely none of whom have been tested for COVID-19, and they are unable to choose to do otherwise;
- e. Must physically touch others or be touched by others, such as correctional officers and medical staff, many of whom have not been tested for COVID-19, and they are unable to opt out of this contact;
- f. Are frequently subjected to intimate contact by correctional staff, many of whom have not been tested for COVID-19, during searches of their person, including having those staff place their hands inside of people's mouths and other body cavities;
- g. Lack recommended access to soap, water, tissues, and paper towels;
- h. Lack access to hand sanitizer that complies with CDC guidelines.

18. People in prisons also lack access to quality, efficient medical care. Although an incarcerated person can request to see a member of the medical staff, those requests take significant time to process.

19. This combination of lack of adequate sanitation, close quarters, and limited medical capacity create an intolerably dangerous situation, putting detainees, prison staff, and the communities they belong to at greater risk of illness and death—without any compelling need. The constant cycling of people in and out of the prison²⁶ makes containment impossible, even if visitations are stopped.²⁷

20. Science shows that, within jails and prisons, isolation, segregation, and lockdown are ineffective against COVID-19, Meyer Decl. ¶ 10, and regardless, prisons do not have the physical space to accomplish these efforts for the current prison population. COVID-19 can survive in the air, so separation in a facility where there is still other movement of people, and occasional interaction, will not contain it. Surfaces are still touched—inside cells, in bathrooms, and in transport, at the very least. Further, the reality is that some contact with others, whether

²⁶ See Peter Wagner & Emily Widra, “No need to wait for pandemics: The public health case for criminal justice reform,” Prison Policy Initiative (Mar. 6, 2020), <https://www.prisonpolicy.org/blog/2020/03/06/pandemic>.

²⁷ Premal Dharia, “The Coronavirus Could Spark a Humanitarian Disaster in Jails and Prisons,” Slate (Mar. 11, 2020), <https://slate.com/news-and-politics/2020/03/coronavirus-civil-rights-jails-and-prisons.html>

through close proximity or actual contact, is inevitable. Kitchen staff, intake staff, officers and medical staff all interact with incarcerated people as a matter of course, even on lockdown.

D. Release Serves Public Health and Community Safety

21. In Dr. Meyer’s words, “[r]educing the size of the population in jails and prisons is crucially important to reducing the level of risk both for those within those facilities and for the community at large.” Meyer Decl. ¶ 37. In this unique moment, release *enhances* the safety of other people and the community—and is necessary to protect Ms. Mitchell’s own health and safety.

22. It is the best interest of the community to reduce infections among those most likely to be hospitalized because one of the great dangers imposed by COVID-19 is that the exponential increase in cases over a short period of time places an unbearable strain on hospital resources. Thus, every person who does not become seriously ill frees up precious medical resources for those who unavoidably become seriously ill.²⁸

23. Ms. XYZ must be able to exercise self-protective measures in a sanitary, disinfected space, and to maintain social distance from other community members to flatten the curve of the virus’s spread.

²⁸ “State-by-state models released by the University of Washington predict that the outbreak in North Carolina will peak in about three weeks [from March 30, 2020]. The analysis shows that the state could have a shortage of nearly 300 Intensive Care Unit beds. [North Carolina Secretary of Department of Health and Human Services Dr. Mandy] Cohen said the latest data suggest North Carolina’s hospitals have the capacity to care for COVID-19 patients right now, but they’re still preparing for a surge of cases in the next few weeks.” DHHS Secretary Implores NC: ‘Staying Home Will Save Lives’ <https://www.wunc.org/post/dhhs-secretary-implores-nc-staying-home-will-save-lives>

II. ARGUMENT

A. N.C.G.S. § 15A-536 gives the trial court authority to order Ms. XYZ's Release.

Under N.C.G.S. § 15A-536, the trial court has the authority to release Ms. XYZ pending her appeal. “The statute permits but does not require a judge to order release of a convicted defendant pending appeal. The matter of granting or denying post-trial bond is within the trial court’s discretion.” *State v. Smith*, 196 N.C. App. 518, 675 S.E.2d 155 (2009) (internal quotations omitted). In making its determination, “the judge must take into account all evidence available to him which he considers reliable and is not strictly bound by the rules of evidence applicable to criminal trials.” N.C.G.S. § 15A-536(f). Finally, if the judge orders release under this provision, he must issue an order containing the conditions imposed, inform the defendant in writing of the penalties for violation, and advise her that she will be immediately arrested upon violation. N.C.G.S. § 15A-536(e).

N.C.G.S. § 15A-536 requires that if the trial court orders release pending appeal,

the judge must impose the conditions set out in G.S. 15A-534(a) which will reasonably assure the presence of the defendant when required and provide adequate protection to persons and the community. If no single condition gives the assurance, the judge may impose the condition in G.S. 15A-534(a)(3) in addition to any other condition and may also, or in lieu of the condition in G.S. 15A-534(a)(3), place restrictions on the travel, associations, conduct, or place of abode of the defendant.

N.C.G.S. § 15A-536(b).

Furthermore,

In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution

or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

N.C.G.S. § 15A-534(c).

Ms. XYZ has reported numerous health issues and the circumstances surrounding the offense for which she was convicted do not support a characterization of the conduct as violent. She is indigent and is on disability due to her physical and mental health. Due to Ms. XYZ's indigency, requiring a money bond in this case would require her to remain incarcerated at the risk of her life. Thus, Ms. XYZ requests that this Court "[r]elease [her] upon [her] execution of an unsecured appearance bond" as allowed under N.C.G.S. § 15A-534.

Ms. XYZ acknowledges that in light of all of the circumstances, this Court may elect to also "place restrictions on [her] travel, associations, conduct, or place of abode." N.C.G.S. § 15A-534. In fact, even without additional restrictions required by this court, under the state-wide stay-at-home order, Ms. XYZ would be required to stay at home except for "essential activities."²⁹ This court could order Ms. XYZ to follow the state-wide stay-at-home order and place additional restrictions such as requiring her to stay at home except to procure food, medicine, and medical services.

B. Under Ms. XYZ's specific circumstances, the Constitution requires her release.

Under normal circumstances, "[t]here is no constitutional right to bond pending appeal." *In re Reddy*, 16 N.C. App. 520, 525, 192 S.E.2d 621, 625 (1972). However, due to the unprecedented nature of the COVID-19 public health crisis and Ms. XYZ's age and reported health issues, continued incarceration of Ms. XYZ is unconstitutional because it unnecessarily and arbitrarily places her life at risk.

²⁹ March 27, 2020, Executive Order No. 121, Stay at Home Order And Strategic Directions For North Carolina In Response To Increasing COVID-19 Cases. <https://files.nc.gov/governor/documents/files/EO121-Stay-at-Home-Order-3.pdf>

The Due Process Clause imposes obligations on the government to meet the basic needs of the people it imprisons, who rely on the government for food, clothing, and necessary medical care. For example, a failure to provide sustenance for inmates “may [] produce physical ‘torture or a lingering death.’” *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (internal quotation omitted).

And the Eighth Amendment prohibits “incarcerat[ion] under conditions posing a substantial risk of serious harm,” and “‘deliberate indifference’ to inmate health or safety.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal citation omitted); *see, e.g., Hardy v. District of Columbia*, 601 F.Supp.2d 182, 190 (D.D.C. 2009) (constitution violated where officials “knowingly disregarded a substantial risk of serious harm of which they were aware”).

Continuing to detain Ms. XYZ where alternatives exist to protect the community and prevent flight and where doing so places Ms. XYZ in mortal danger of contracting and spreading an infectious disease would constitute deliberate indifference to Ms. XYZ’s health and safety. Ms. XYZ’s continued incarceration under the current unprecedented circumstances will violate her rights to Due Process and to be free from cruel and unusual punishment.

III. Conclusion

WHEREFORE, for the reasons stated above, as well as any other reasons that become apparent to the Court, Ms. XYZ respectfully requests that the Court grant this Motion and order that Ms. XYZ be released on appropriate conditions pending her appeal.

This the ____ day of _____, 2020.

Signature Block

CERTIFICATE OF SERVICE

Signature Blocfk