

VIRGINIA :

IN THE ARLINGTON COUNTY CIRCUIT COURT

COMMONWEALTH OF VIRGINIA)	
)	Case Nos. Various (see below)
v.)	
)	
Various Defendants (see below).)	
)	

EMERGENCY MOTION FOR RECONSIDERATION OF SENTENCE

COMES NOW Defendants, by counsel,¹ and petition this Court to reconsider Defendants' sentences previously imposed, and to grant a reduction in those sentences allowing for their immediate release, either on the papers or, in the alternative, following a hearing, pursuant to Virginia Code § 19.2-303. Regarding procedure, counsel recommends that the Court call each of the Defendants' cases in court during a hearing the week of April 27, 2020, in order to assess whether it would be appropriate to suspend the remainder of the sentences imposed, or order alternative relief.²

The Defendants for whom this motion is filed are as follows:

BLANGO, LEON: CR17001250-01, CR17001079-01

BULLOCK, GLENDA: CR19001136-00, CR19001137-00, CR19001221-00

CARTER, RICARDO: CR13002008-00, CR13002007-00, CR13002006-00, CR13002010-00, CR13002009-00, CR13002005-00

COX, MAURICE: CR03000039-02

ELLWOOD, BRAD: CR15B00676-00, CR19000563-00

¹ Counsel from the Lawyers' Committee for Civil Rights Under Law and the Office of the Public Defender acknowledge the aid provided by pro bono counsel from O'Melveny & Myers LLP. Counsel from O'Melveny & Myers LLP substantially assisted in the research underlying, and preparation of, this pleading.

² This pleading has been filed electronically under the first named defendant's case. Motions for the remaining defendants will be filed as hard copies on Monday, April 27, 2020. In addition, as referenced in the pleading, The Lawyers' Committee and the Office of the Public Defender intend to file a similar motion for approximately 40 other defendants. That motion will likewise be filed on Monday, April 27, 2020.

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STATEMENT OF FACTS

1. SARS-CoV-2, colloquially known as the novel coronavirus, and the dangerous disease that it causes, COVID-19, are tearing through the United States. Until April 23, 2020, the Arlington County Detention Facility seemed safe from this pandemic. That safety no longer exists: an Arlington County Deputy Sheriff recently contracted COVID-19.³ As a result, there now exists the real danger that every law enforcement employee, as well as every incarcerated person housed, at the Arlington County Detention Facility has been exposed—directly or indirectly—to COVID-19.

2. While the virus poses a significant threat to the community at large, it presents an especially imminent and lethal health risk to incarcerated persons. Defendants in this case are part of a subcategory of incarcerated persons at the Arlington County Detention Facility, which, as United States Attorney General William Barr has acknowledged, “are non-violent and pose minimal likelihood of recidivism” and therefore “might be safer serving their sentences in home confinement.”⁴ As of the date of this filing, the Commonwealth’s Attorney is reviewing the records for these defendants and, undersigned counsel anticipate, will communicate whether she supports their release at a hearing on this motion.

3. Housed in close quarters with no way to engage in “social distancing,” inmates in the Arlington County Detention Facility are particularly vulnerable to contracting COVID-19. The Detention Facility has neither the capability to prevent the spread of COVID-19 nor the capability to provide the kind of medical care needed to treat the life-threatening conditions caused by COVID-19 across a prison population of hundreds of people. If Defendants do contract the

³ See Arlington County Sheriff’s Office Press Release (Apr. 23, 2020).

⁴ See U.S. DEP’T JUSTICE, OFFICE OF THE ATTORNEY GENERAL, MEMORANDUM FOR DIRECTOR OF BUREAU PRISONS (Mar. 26, 2020), <https://www.justice.gov/file/1262731/download>.

virus while incarcerated, it would jeopardize not only their own health but also that of the Detention Facility's staff and the Arlington community at large, especially since Defendants are eligible to be released within a relatively short time. In other words, Defendants remain at extreme risk in jail and pose little to no risk outside of it.

The risk to the Detention Facility's law enforcement employees and residents is no longer speculative or fanciful. The Deputy Sheriff's positive test for COVID-19 is a harbinger of what might happen if this Court does not take steps to stem the spread of this deadly disease. For their safety and the safety of the Arlington community, this Court should exercise its broad statutory discretion under Virginia Code § 19.2-303 and release Defendants to serve the remainder of their sentences at home under a term of probation.

A. COVID-19 Is an Unprecedented Threat to Everyone, But Especially to Those Who Are Incarcerated.

4. COVID-19 is an illness caused by a virus that spreads easily and aggressively from person to person.⁵ The symptoms can range from mild (or no symptoms) to severe, including illness resulting in death. COVID-19 has been characterized as a pandemic by the World Health Organization due to its "alarming levels of spread and severity."⁶ Individuals can become infected by coming into close contact with a person who has COVID-19, even if they are asymptomatic.⁷ The number of infected persons balloons if one infected person goes about their daily life, coming into contact with a number of other people or shared surfaces.⁸ To date, there have been 888,002

⁵ See *Coronavirus Disease 2019 (COVID-19) Situation Summary*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html> (last visited Apr. 18, 2020).

⁶ See *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 – 11 March 2020*, WORLD HEALTH ORG. (Mar. 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>.

⁷ See *Coronavirus Disease 2019 (COVID-19) How COVID-19 Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Apr. 18, 2020).

⁸ *Id.*

cases in the United States and 50,319 deaths.⁹ Globally, there have been 2,753,627 cases and 192,326 deaths. COVID-19 has already significantly impacted Virginia and its surrounding areas. Virginia reports 11,594 positive test results in the Commonwealth, resulting in more than 1,837 hospitalizations and more than 410 deaths.¹⁰ While there are no reported cases of COVID-19 among the Arlington County Detention Facility's incarcerated population, because of and as evidenced by the Arlington Deputy Sheriff's positive test, infiltration is inevitable. *United States v. Barkman*, No. 3:19-cr-0052-RCJ-WGC, 2020 U.S. Dist. LEXIS 45628, at *4 (D. Nev. Mar. 17, 2020) ("While measures are being taken in facilities all over the world, no facility is prepared.").

5. The structural conditions of jails do not allow for social distancing or other measures recommended by the U.S. Centers for Disease Control and Prevention: inmates are confined to closed spaces with a number of other inmates; facilities are communal, and involve sharing daily necessities including cells, toilets, showers, telephones, eating areas, and recreation areas. Moreover, staff must be in close physical proximity to inmates in order to do their jobs, which includes fingerprinting, handcuffing, and supervising inmates. While social distancing is crucial to prevent the spread of COVID-19, it cannot be implemented in jails.¹¹ And because the virus can be spread by asymptomatic persons, it is impossible for jails to prevent its spread by quarantining all infected inmates, staff, or visitors.¹² Once an outbreak occurs, it is also likely to

⁹ See WORLDOMETER, <https://www.worldometers.info/coronavirus/country/us> (last visited Apr. 24, 2020).

¹⁰ See *COVID-19 in Virginia*, VA. DEP'T. OF HEALTH, <http://www.vdh.virginia.gov/coronavirus> (last visited Apr. 24, 2020).

¹¹ See *Coronavirus Disease 2019 (COVID-19) Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited Apr. 18, 2020); Keri Blakinger, *Coronavirus Restrictions Stoke Tensions in Lock-ups Across U.S.*, MARSHALL PROJECT (Apr. 2, 2020), <https://www.themarshallproject.org/2020/04/02/coronavirus-restrictions-stoke-tensions-in-lock-ups-across-u-s>.

¹² See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 8; Josiah Bates, 'We Feel Like All of Us Are Gonna Get Corona.' *Anticipating COVID-19 Outbreaks, Rikers Island Offers Warning for U.S. Jails, Prisons*, TIME (Mar. 24, 2020), <https://time.com/5808020/rikers-island-coronavirus>.

be *deadlier* inside jails, where the population disproportionately has health conditions that make inmates more susceptible to the virus.¹³ In effect, “any jail sentence right now could be a death sentence.”¹⁴

6. Jail administrators, courts, and state authorities throughout the nation—including Virginia’s neighboring jurisdictions of Washington, D.C.,¹⁵ Maryland,¹⁶ West Virginia,¹⁷ Kentucky,¹⁸ and North Carolina¹⁹—have all concluded that widespread release is a necessary intervention to protect the public interest and have taken the appropriate steps to slow the spread of COVID-19 by releasing certain classes of incarcerated persons.²⁰ Just recently, a federal corrections institution in Otisville, New York announced that it is preparing to release the majority of its population into home confinement.²¹

¹³ See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011-12 (2016), <https://www.bjs.gov/content/pub/pdf/mpsfj1112.pdf>; see also Bates, *supra* note 9.

¹⁴ Irene Oritseweyinmi Joe & Ben Miller, *When Every Sentence Is a Possible Death Sentence: Public Defenders Speak from the Front Lines About COVID-19* at 5, JUSTICE COLLABORATIVE INST. (Apr. 2020), https://tjc.institute.com/wp-content/uploads/2020/04/20.04_PD-in-COVID19-Crisis.pdf.

¹⁵ Sophie Kaplan, *Bowser Grants Early Release to Several Inmates at the D.C. Jail*, WASH. TIMES (Apr. 10, 2020), <https://www.washingtontimes.com/news/2020/apr/10/bowser-grants-early-release-to-several-inmates-at->.

¹⁶ Ann E. Marimow, *Maryland’s Chief Judge Orders Release of Young Offenders to Reduce COVID-19 Risk*, WASH. POST (Apr. 14, 2020), https://www.washingtonpost.com/local/legal-issues/marylands-chief-judge-orders-release-of-young-offenders-to-reduce-covid-19-risk/2020/04/14/a16a0cce-7e54-11ea-9040-68981f488eed_story.html.

¹⁷ Leslie Rubin, *W. Va. Takes Steps to Reduce Inmate Population Amid COVID-19 Pandemic*, WCHSTV.COM (Apr. 1, 2020), <https://wchstv.com/news/coronavirus/wva-taking-steps-to-reduce-inmate-population-amid-covid-19-pandemic>.

¹⁸ *Kentucky Plans to Release More Than 900 Prisoners Because of the COVID-19 Outbreak*, WDRB.COM (Apr. 2, 2020), https://www.wdrb.com/news/kentucky-plans-to-release-more-than-900-prisoners-because-of-the-covid-19-outbreak/article_aef84282-7541-11ea-8a18-cfe5a8cf107d.html.

¹⁹ Lindsay Marchello, *North Carolina to Start Releasing Inmates to Slow Spread of COVID-19 in Prisons*, CAROLINACOASTONLINE (Apr. 14, 2020), https://www.carolinacoastonline.com/regional/article_fbce5822-7e44-11ea-9cd4-cf4869bb9fe5.html.

²⁰ See *Responses to the COVID-19 Pandemic*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> (last visited Apr. 14, 2020) (compiling state and local agencies taking meaningful steps to slow the spread of COVID-19 by releasing large numbers of persons in jails and prisons).

²¹ Benjamin Weiser & William K. Rashbaum, *Michael Cohen Is Among Prisoners to Be Released Because of Virus*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/nyregion/michael-cohen-release-prison-otisville-virus.html>.

B. The Arlington County Detention Facility Is Not Equipped to Withstand the Threat of COVID-19.

7. The structure of the Arlington Detention Facility is not unique—like a typical jail, it is cramped and designed to require a frequent level of contact among inmates and staff.²² At its peak, Arlington County housed 500 inmates. The Detention Facility has both single and double occupancy cells, and currently houses up to **39** inmates in each unit (one section of a floor) or up to **92** inmates on each floor. Inmates have daily recreational time, in which they commingle in shared spaces. And in order to transport inmates—for professional visitation, court appointments, or medical appointments, for example—Arlington County correctional staff must accompany inmates to their appointments, share elevators, and have physical contact with them.

8. The facility also has limited access to the masks, gloves, and medical equipment necessary to prevent the spread of the virus. At least some inmates currently do not have access to masks and/or gloves as of the date of this filing. Moreover, the jail’s medical facility itself is small and incapable of caring for multiple inmates at a time if an outbreak occurs. The facility has three examination rooms with a table, but any inmates requiring serious medical attention have to be transported to the local hospitals. There are no physicians permanently on staff and the personnel performing medical exams are nurses. The jail lacks the necessary respiratory equipment to care for an inmate suffering from complications from COVID-19.

9. Additionally, inmates, staff, and visitors cycle in and out of Arlington County Detention Facility on a daily basis.²³ The jail currently houses 223 inmates or pretrial detainees. Dozens of court-involved individuals enter and leave the jail each week. On top of these numbers,

²² The information contained in ¶¶ 7-9 regarding the Arlington County Detention Facility was obtained from persons knowledgeable about the facility. Evidence presented at a hearing would establish the veracity of this information.

²³ See also Anna Flagg & Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, N.Y. TIMES (Mar. 31, 2020), <https://www.nytimes.com/2020/03/31/upshot/coronavirus-jails-prisons.html>.

the Detention Facility's staff consists of over 250 employees who return each day to their homes in over 100 different zip codes.

C. Detention Facilities Across the Country and the World Serve as a Cautionary Tale for the Arlington County Detention Facility.

10. COVID-19 “exploded” in China’s prisons with reports of more than 500 cases rapidly spreading across five facilities in three provinces.²⁴ Similarly, the situation became so dire in Iran’s correctional institutions that on March 9, 2020, it temporarily freed approximately 70,000 prisoners to combat the spread of COVID-19 in jails.”²⁵ And on March 25, 2020, the United Nations High Commissioner for Human Rights issued a statement calling on courts and detention facilities throughout the world to release as many detainees as possible to facilitate social distancing.²⁶

11. The situation in U.S. prisons is following a similar path. Many detention facilities across the country have made urgent changes to reduce prison populations in response to the virus.²⁷ In Chicago, Cook County’s sheriff and other officials agreed to release hundreds of inmates awaiting trial or serving less than a year with low-level crimes in response to an outbreak of COVID-19 that infected 500 inmates and staff in the Cook County Jail.²⁸ On March 27, Governor Cuomo said that New York State would release about 400 inmates incarcerated at Rikers

²⁴ See Claudia Lauer & Colleen Long, *U.S. Prisons, Jails on Alert for Spread of Coronavirus*, NBC WASH. NEWS (Mar. 7, 2020), <https://www.nbcwashington.com/news/coronavirus/us-prisons-jails-spread-of-coronavirus/2233762>.

²⁵ See *Iran Temporarily Releases 70,000 Prisoners as Coronavirus Cases Surge*, REUTERS WORLD NEWS (Mar. 9, 2020), <https://www.reuters.com/article/us-health-coronavirus-iran/iran-temporarily-releases-70000-prisoners-as-coronavirus-cases-surge-idUSKBN20W1E5>.

²⁶ Michelle Bachelet, *Urgent Action Needed to Prevent COVID-19 “Rampaging Through Places of Detention,”* UNITED NATIONS HUMAN RIGHTS: OFF. OF THE HIGH COMMISSIONER (Mar. 25, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>.

²⁷ See PRISON POL’Y INITIATIVE, *supra* note 17 (tracking changes in Colorado, California, Hawaii, Michigan, West Virginia, Pennsylvania, New York, Louisiana, New Jersey, Utah, Arizona, South Carolina, Florida, Washington, Texas, and Ohio, among other places).

²⁸ Cheryl Corley, *The COVID-19 Struggle in Chicago’s Cook County Jail*, NAT’L PUB. RADIO (Apr. 13, 2020), <https://www.npr.org/2020/04/13/833440047/the-covid-19-struggle-in-chicagos-cook-county-jail>.

Island for minor parole violations, after an outbreak of COVID-19 infected over 800 inmates and staff.²⁹ And a Washington, D.C., facility recently released inmates incarcerated for misdemeanor convictions in an attempt to save lives.³⁰

12. The above three jurisdictions learned that delays caused by government officials in reducing the prison population, and needlessly exposing inmates, staff and the broader community to the virus, are deadly. Three inmates died from COVID-19 in Cook County.³¹ Inmate Ray Riviera—who was incarcerated at Rikers Island on a minor parole violation—died of the virus on April 10.³² And Deon Crowell, who was awaiting trial in a Washington, D.C., detention facility when he was hospitalized with COVID-19 on April 7, died on April 13.³³ This Court has the ability to prevent similar situations from happening in the Arlington County Detention Facility. Action must be fast if Arlington is to avoid the same fate as Chicago, New York, and Washington, D.C.

D. Virginia Officials Have Already Recognized that COVID-19 Poses a Grave Danger to Prison Populations, but Defendants Cannot Wait for Them to Act.

13. On March 12, 2020, Governor Northam declared a State of Emergency in Virginia based on the pandemic.³⁴ On March 19, 2020 a joint statement from public safety agencies in

²⁹ Jan Ransom & Alan Feuer, “*We’re Left for Dead*”: *Fears of Virus Catastrophe at Rikers Jail*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/nyregion/coronavirus-rikers-nyc-jail.html>.

³⁰ See Jack Moore & Rick Massimo, *Coronavirus Update: DC Grants Early Release to Eligible Inmates; Worldwide Deaths Surge Past 100,000*, WASH.’S TOP NEWS (Apr. 10, 2020), <https://wtop.com/coronavirus/2020/04/coronavirus-updates-dc-maryland-virginia-april-10>.

³¹ Corley, *supra* note 26.

³² See Jan Ransom, *Jailed on a Minor Parole Violation, He Caught the Virus and Died*, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/nyregion/rikers-coronavirus-deaths-parolees.html>.

³³ Saliqa Khan & Nathan Baca, *D.C. Central Detention Facility Records First Inmate Death After COVID-19 Diagnosis*, WUSA9 (Apr. 13, 2020), <https://www.wusa9.com/article/news/health/coronavirus/first-inmate-death-from-covid-19-at-dc-central-detention-facility/65-27a72234-b444-43b4-b042-61c6df510a4a>.

³⁴ *Governor Northam Declares State of Emergency, Outlines Additional Measures to Combat COVID-19*, OFF. OF THE GOVERNOR (Mar. 12, 2020), <https://www.governor.virginia.gov/newsroom/allreleases/2020/march/headline-853537-en.html>.

Virginia, including the Office of Governor Northam, the Virginia Association of Commonwealth's Attorneys, Virginia Association of Regional Jails, Virginia Department of Corrections, Virginia Indigent Defense Commission, and the Virginia Sheriffs Association, called for all agencies to respond to the COVID-19 pandemic by working "collaboratively to identify opportunities to prevent spread that are consistent with public safety."³⁵ On March 30, Governor Northam issued Executive Order 55, a statewide stay-at-home order until June 10, 2020.³⁶ As of March 31, the Virginia Department of Health reported widespread community transmission across the state. In short, COVID-19 is spreading widely in communities across Virginia.³⁷

14. On April 10, Governor Northam recognized the particular vulnerability of inmates and prison staff to the virus by proposing an amendment to the state budget that would allow the Department of Corrections to release state prison inmates who have a year or less left on their sentences and who are not a threat to public safety, which is applicable to about 2,000 inmates.³⁸ The move required the approval of the General Assembly, and lawmakers approved this budget amendment at the special session in Richmond on April 23, 2020.³⁹ While that legislation applies to Department of Corrections inmates, this Court has the authority to act now for local jail inmates.

E. Defendants Are Low-Level Offenders Who Pose Minimal Risk to the Community.

15. The Defendants seeking release have been selected as low-level offenders

³⁵ JOINT STATEMENT FROM PUBLIC SAFETY AGENCIES IN VIRGINIA (Mar. 19, 2020), https://cdn.ymaws.com/members.vasheriff.org/resource/resmgr/FINAL_-_Joint_Statement_from.pdf.

³⁶ *Governor Northam Issues Statewide Stay at Home Order*, OFF. OF THE GOVERNOR (Mar. 30, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-855702-en.html>.

³⁷ VA. DEP'T OF HEALTH, *supra* note 7.

³⁸ *Northam Seeks Early Release for Nearly 2,000 Inmates*, VA. LAWS. WKLY. (Apr. 13, 2020), <https://valawyersweekly.com/2020/04/13/northam-seeks-early-release-for-nearly-2000-inmates>.

³⁹ Elizabeth Tyree, "Lawmakers Approve Plan to Release 2,000 Inmates to Stop Spread of COVID-19," ABC13News (Apr. 23, 2020), <https://wset.com/news/coronavirus/lawmakers-pass-proposal-to-release-2000-inmates-to-stop-spread-of-covid-19>; *see also* VA. DEP'T OF CORR. COVID-19 RESPONSE INMATE EARLY RELEASE PLAN (Apr. 23, 2020), <https://vadoc.virginia.gov/media/1506/vadoc-covid19-early-release-plan.pdf>.

incarcerated mainly for misdemeanors, nonviolent offenses or probation violations. Many of the inmates were sentenced to one year or less in jail. Almost all are serving sentences of fewer than two years.⁴⁰ Consequently, many of the inmates are scheduled to be released this year—some within the next few months and as soon as the beginning of May, with the majority of their offenses consisting of probation violations and almost all of the remaining offenses are nonviolent.

16. Moreover, a number of the inmates have high-risk medical conditions, often caused by age or poor health. Their conditions range from a history of pneumonia and other respiratory issues such as asthma or bronchitis, to HIV and Hepatitis, to blood clots and high blood pressure. Many of these conditions are precisely the types of immuno-comprising conditions that render an individual dangerously susceptible to contracting COVID-19.⁴¹ Furthermore, some inmates have families and sick relatives who require special care and support.

LEGAL STANDARD

17. Pursuant to Virginia Code § 19.2-303, “[i]f a person is sentenced to jail upon conviction of a misdemeanor or a felony, the court may, at any time before the sentence has been completely served, suspend the unserved portion of any such sentence, place the person on probation for such time as the court shall determine, or otherwise modify the sentence imposed.” Additionally, in cases in which the person has been sentenced for a felony to the Department of Corrections but has not yet been transferred to a receiving unit of the Department, the court may suspend or otherwise modify a sentence “if it appears compatible with the public interest and there

⁴⁰ There are several different categories of outliers to these general statements, for example: some Defendants received a longer sentence with the hope that they would receive a future sentence reduction following completion of a program, such as the ACT Unit; others received abnormally high probation violation sentences; some others have pending probation revocation hearings or sentencing hearings that this Court is not holding under the current judicial emergency.

⁴¹ See *Coronavirus Disease 2019 (COVID-19) People Who Are at Higher Risk for Severe Illness*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last visited Apr. 17, 2020).

are circumstances in mitigation of the offense.” *Id.*

18. The discretion to suspend or modify a sentence is broad. *Marshall v. Commonwealth*, 202 Va. 217, 219 (1960) (“These [sentencing] statutes are highly remedial and are to be liberally construed.”); *Richardson v. Commonwealth*, 131 Va. 802, 811 (1921) (holding that drafters intended to give judge discretion to suspend a sentence). “The combined effect of . . . [sentencing] statutes is that ‘the punishment as fixed by the jury is not final or absolute, since its finding on the proper punishment is subject to suspension by the trial judge, in whole or in part, on the basis of any mitigating facts that the convicted defendant can marshal.’” *Thomas v. Commonwealth*, 296 Va. 301, 304–05 (2018). By giving trial courts such discretionary authority, the Virginia legislature “intended to leave the consideration of mitigating circumstances to the court.” *Duncan v. Commonwealth*, 2 Va. App. 342, 345 (1986) (superseded by statute on other grounds).

19. Although “[t]he General Assembly has not defined the phrase ‘circumstances in mitigation of the offense’ for the purposes of Code § 19.2–303[,] [g]enerally, mitigating circumstances include evidence of a good previous record, and extenuating circumstances tending to explain, but not excuse, the commission of the crime.” *Wilson v. Commonwealth*, 54 Va. App. 631, 641 (2009) (internal quotation marks omitted). Mitigating facts have “no bearing on the actual guilt or innocence of the accused but rather relates only to the degree to which punishment is appropriate.” *Id.*

20. Virginia Code § 19.2–303 also authorizes reasonable conditions upon the suspension of a sentence, including any period of probation. “The sole statutory limitation placed upon a trial court’s discretion in its determination of such conditions is one of reasonableness.” *Du v. Commonwealth*, 292 Va. 555, 563 (2016). “The reasonableness standard takes into account

the ‘nature of the offense, the defendant’s background, and the surrounding circumstances.’” *Id.*

21. Courts have also recognized that the objective of Virginia Code § 19.2-303 is broad in scope. The Commonwealth “extends to [the defendant] the opportunity . . . to repent and reform” and “desires the reformation of the criminal *and in furtherance of that purpose its statutes provide for suspension and probation in cases where there are mitigating circumstances or when it is compatible with the public interest.*” *Marshall*, 202 Va. at 219 (internal quotations omitted) (emphasis added); *see also Word v. Commonwealth*, 41 Va. App. 496, 507 (2003) (“The true objective of suspended sentencing [and probation] is to rehabilitate and to encourage a convicted defendant to be of good behavior.”).

22. In the midst of this unprecedented threat to public health, the public interest requires removing Defendants from incarceration before they contract COVID-19 and giving them the opportunity to safely quarantine upon release. **Accordingly, Defendants ask the Court to order their release to allow them to serve the remainder of their sentences at home under a term of probation.**

ARGUMENT

23. Governor Northam and the General Assembly expressed their commitment to enacting emergency measures for the release of inmates.⁴² However, waiting for DOC to calculate release dates and create release plans for local jail inmates, if it even intends to include them in its initiative, could cause irrevocable harm by way of increased suffering and avoidable death. This Court should therefore join others across the country and exercise its broad discretion to suspend Defendants’ active jail sentences because (1) the current COVID-19 pandemic creates unique

⁴² *See* Caleb Stewart, *Gov. Northam Announces Plans for Inmate Releases, Nursing Home Task Force*, WHSV NEWS (Apr. 10, 2020), <https://www.whsv.com/content/news/Gov-Northam-addresses-Virginians-on-COVID-19-569542331.html>.

extenuating circumstances that warrant Defendants’ release and (2) it is consistent with statutory objectives and the public interest to release Defendants.

I. COVID-19 HAS CREATED EXTENUATING CIRCUMSTANCES THAT WARRANT DEFENDANTS’ RELEASE.

24. An unprecedented threat to public health and safety like the COVID-19 pandemic requires a commensurate response. As noted previously, the United States has already taken drastic steps to prevent the spread of the virus. The pandemic has had such incredible reach that the vast majority of U.S. states and territories have closed down entire sections of their economies and required all of their residents—316 million people—to stay at home, except in limited circumstances to perform essential services.⁴³ The rarity of the moment has created extenuating circumstances that necessitate Defendants’ immediate release.

25. It is widely recognized that jails, prisons, and other detention facilities pose a “unique challenge” in the effort to control the spread of COVID-19 and further contribute to the extenuating circumstances that counsel in favor of Defendants’ release.⁴⁴ County jails were simply “not designed with pandemics in mind.” *Rafael L.O. v. Tsoukaris*, No. 20-3481 (JMV), 2020 WL 1808843, at *3 (D.N.J. Apr. 9, 2020).⁴⁵ And once the virus hits a jail or prison “it’s going to spread like wildfire.”⁴⁶ As described in detail above, the Arlington County Detention Facility is no

⁴³ See Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

⁴⁴ CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 8.

⁴⁵ Although decisions by federal courts are not binding, this Court may consider them as persuasive authority. See *Toghill v. Commonwealth*, 289 Va. 220, 227 (2015) (citing *ACE Prop. & Cas. Ins. Co. v. Comm’r of Revenue*, 437 Mass. 241, 248 (2002)) (“Although we are not bound by decisions of Federal courts . . . we give respectful consideration to such lower Federal court decisions as seem persuasive.”) (internal quotations omitted); *Owsley v. Peyton*, 352 F.2d 804, 805 (4th Cir. 1965) (State courts may, but are not obliged to, “for policy reasons follow the decisions of the Court of Appeals whose circuit includes their state.”). Here, the extraordinary and novel circumstances caused by COVID-19 especially weigh in favor of considering the reasoning of federal courts that have recently had a chance to address the issue.

⁴⁶ Peter Wagner & Emily Widra, *California Jails, Prisons on Alert for Coronavirus. Fear It will ‘Spread Like Wildfire,’* SACRAMENTO BEE (Mar. 6, 2020), <https://www.sacbee.com/news/california/article240962761.html>.

different—it contains hundreds of people and is designed for repeated physical contact. Quite frankly, the Detention Facility is kindling for COVID-19, and it is only a matter of time before it causes numerous deaths in the facility and the surrounding community.

26. The structure of the Arlington County Detention Facility prohibits the type of social distancing necessary to prevent the spread of COVID-19. Although several jurisdictions have isolated incarcerated people in their cells in an attempt to contain the disease,⁴⁷ this solution is not only untenable but it also raises serious mental health concerns. Epidemiologists agree that COVID-19 will persist and that a vaccine will not be available for twelve to eighteen months⁴⁸—an extraordinarily long time to require any corrections facility to impose solitary confinement on its incarcerated population. Additionally, solitary confinement threatens the mental health of people placed into it. “[I]t is well documented that such prolonged solitary confinement produces numerous deleterious harms.” *Glossip v. Gross*, 135 S. Ct. 2726, 2765, 192 L. Ed. 2d 761 (2015) (Breyer, J., dissenting).⁴⁹ The harm caused by solitary confinement is well-documented: “Prisoners reported difficulties concentrating on even simple tasks, experienced headaches, mental and physical deterioration, emotional flatness, lability, breakdowns, hallucinations, paranoia, hostility and rage, and some were beset with thoughts of self-mutilation and suicide (which, in some instances, they acted upon).” Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC.

⁴⁷ See Keri Blakinger, *What Happens When More Than 300,000 Prisoners Are Locked Down?*, THE MARSHALL PROJECT (April 15, 2020), <https://www.themarshallproject.org/2020/04/15/what-happens-when-more-than-300-000-prisoners-are-locked-down>.

⁴⁸ See Laura Spinney, *Coronavirus vaccine: when will we have one?*, THE GUARDIAN (April 5, 2020), <https://www.theguardian.com/world/2020/apr/19/coronavirus-vaccine-when-will-we-have-one>.

⁴⁹ See also Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQUENCY 124, 130 (2003) (cataloguing studies finding that solitary confinement can cause prisoners to experience “anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations,” among many other symptoms); Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH U. J. L. & POLICY 325, 331 (2006) (“[E]ven a few days of solitary confinement will predictably shift the [brain’s] electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium”);

CHANGE 477, 512–13 (1997). For decades, scholars have likened solitary confinement to a form of torture.⁵⁰ This Court should not force incarcerated people in the Arlington County Detention Facility to trade potentially reduced exposure to COVID-19 for their mental health. To this end, large-scale reduction of the Detention Facility’s incarcerated population like that proposed in this motion is the only humane way to limit the spread of COVID-19.

27. As noted, Governor Northam and state legislators have already recognized that a necessary and appropriate response to such extenuating circumstances is to release state prison inmates who are not a threat to public safety and who have only a year or less remaining on their sentence.⁵¹ Defendants fit precisely within that population.

II. THE PUBLIC INTEREST WEIGHS IN FAVOR OF RELEASING CERTAIN CLASSES OF INCARCERATED PERSONS LIKE DEFENDANTS.

28. Almost all Defendants occupy a discrete and identifiable sub-population of incarcerated persons: those who have committed nonviolent offenses, probation violations, or who have pending probation violations or sentencing hearings, and who are serving their sentences locally. The public interest counsels in favor of releasing them for two reasons. *First*, Defendants will suffer significant harm, including potentially death, because of their increased risk of contracting COVID-19 the longer they remain incarcerated, and that harm outweighs any benefit to their continued incarceration since they pose little to no danger to society. *Second*, the community at-large will suffer greater harm if Defendants are not granted early release; the longer Defendants remain incarcerated, the greater the chance that COVID-19 will infiltrate the Arlington County Detention Facility, which will likely become a “hot spot” for the virus and then spread into

⁵⁰ See, e.g., W.E. Lucas, *Solitary Confinement: Isolation as Coercion to Conform*, 9 AUSTL. & N.Z. J. CRIMINOLOGY 153, 155 (1976) (asking “Is Solitary Confinement Torture?”); Tim Shallice, *Solitary Confinement: A Torture Revived?*, NEW SCIENTIST (Nov. 28, 1974).

⁵¹ VA. LAWS. WKLY., *supra* note 36.

the community.

A. The Increased Harm Defendants Will Suffer if They Remain Incarcerated Outweighs Any Risk to Society They May Pose Upon Release.

29. The danger to society if Defendants are released now, *before* they are infected and *before* the Arlington facility becomes a hot spot, is minimal. Defendants are low-level offenders—most of their offenses are nonviolent and related to probation violations, and many are scheduled for release or likely to be released within a year anyway. Defendants will agree to be released into home-confinement and incentivized to avoid social contact to reduce their risk of contracting the virus. Indeed, many suffer from high-risk medical conditions related to age and poor health, giving them all the more reason to adhere to social distancing. Additionally, Virginia’s stay-at-home order remains in effect until at least June 10, 2020, violation of which can result in imprisonment for up to a year and/or a \$2,500 fine.⁵² The stay-at-home order grants further assurance that social contact—and any risk that would accompany such contact—is minimized, if not zero.

30. But the danger to Defendants, and ultimately to the community, from continued incarceration is significant. As noted, there is a significantly higher chance of contracting COVID-19 in jail once the virus takes hold there. Subjecting Defendants to a heightened risk of contracting a deadly virus for the sake of completing their remaining sentences for a low-level offense is an inequity this Court should reject. And it would not be an anomaly to do so—courts across the nation have already recognized that the harm of continued incarceration of persons in Defendant’s sub-population outweighs the harm to society at-large that might exist upon their release. *See United States v. Rodriguez*, No. 2:03-cr-00271-AB-1, 2020 U.S. Dist. LEXIS 58718, at *26 (E.D. Pa. Apr. 1, 2020) (granting compassionate release in light of COVID-19, in part, because

⁵² Antonio Olivio, Ovetta Wiggins, & Gregory S. Schneider, *Hogan, Northam, Bowser Order Residents in Maryland, Virginia, D.C. to Stay at Home*, WASH. POST (Mar. 30, 2020), https://www.washingtonpost.com/local/hogan-northam-coronavirus-stay-home-orders/2020/03/30/5f36e146-722f-11ea-85cb-8670579b863d_story.html.

“[k]eeping [defendant] in prison for one more year ma[de] a marginal difference to [defendant’s] punishment[,]” while “the difference to [defendant’s] health could be profound”); *United States v. Daniels*, No. 19-cr-00709-LHK (NC), 2020 WL 1815342, at *4 (N.D. Cal. Apr. 9, 2020) (granting compassionate release in light of COVID-19, because Defendant was at a heightened risk of contracting the virus while imprisoned and would be motivated to remain at home upon release, thereby reducing the risk of danger his release might pose to society).

B. The Public Interest Requires Resentencing Because Defendants’ Continued Incarceration Poses a Greater Risk to the Community At-Large Than Does Their Early Release.

31. Not only does continued incarceration pose a significant and avoidable risk to Defendants themselves, it poses a risk to the broader Arlington community and beyond. Since Defendants have only a short amount of time remaining on their sentences, it is only a matter of time before they are reintroduced into society, increasing the chance that they will transmit the virus to the community upon their release.⁵³

32. Additionally, the longer they remain incarcerated, the greater the risk that the jail’s 266 staff members will contract the virus and spread it further, adding yet another conduit through which the virus may be needlessly spread to the community. *United States v. Davis*, No. ELH-20-09, 2020 U.S. Dist. LEXIS 55310, at *13-14 (D. Md. Mar. 30, 2020) (“Once infected, staff may also transmit the virus back into the communities and their families.”).⁵⁴ When corrections staff go home after their shifts, they are going to homes in 112 different zip codes.⁵⁵ That represents 112 communities to which corrections workers could spread the virus if they contract COVID-19

⁵³ See Flagg & Neff, *supra* note 20 (“[T]he churn of people moving in and out [of jails] threatens to accelerate the spread of the disease, endangering the incarcerated, the staff and the larger community.”).

⁵⁴ Josiah Rich et al., *We Must Release Prisoners to Lessen the Spread of Coronavirus*, WASH. POST (Mar. 17, 2020), <https://wapo.st/2JDVq7Y> (warning that a failure to act swiftly to release inmates from jails and prisons threatens prisoners, corrections workers, and the community at-large).

⁵⁵ See *supra* ¶ 9.

from Defendants.

33. This avoidable danger to the community posed by Defendants' continued incarceration is reason alone to grant this motion. *See United States v. Harris*, No. 19-356, 2020 U.S. Dist. LEXIS 55339, at *1-2 (D.D.C. Mar. 26, 2020) (finding that continued incarceration posed "a far greater risk to community safety than the risk posed by Defendant's release to home confinement"); *Davis*, 2020 U.S. Dist. LEXIS 55310 at *16 (finding that Defendant's "continued incarceration poses a greater risk to community safety than his release").

34. Moreover, an outbreak of COVID-19 in a congregate environment such as the Arlington County Detention Facility could also overwhelm local healthcare services.⁵⁶ As one federal judge noted, it is in the public interest to preserve "critical medical resources necessary to combat the pandemic." *Tsoukaris*, 2020 WL 1808843, at *9. It is, therefore, in the public interest to prevent the spread of COVID-19—and, in turn, preserve critical resources—by releasing certain classes of incarcerated persons. And Defendants are of the class best-suited for such release.

35. Such an outbreak could also result in workforce shortages in the Arlington County Detention Facility. *Davis*, 2020 U.S. Dist. LEXIS 55310, at *13-14 ("As jail, prison, and detention center health care staff themselves get sick with COVID-19, workforce shortages will make it even more difficult to adequately address all the health care needs in facilities."). Workforce shortages would place both correctional staff and inmates at an increased risk of harm, as demonstrated by the riots and jail outbreaks that have occurred across the nation due to the spread of COVID-19 and the fears that accompany it.⁵⁷ Indeed, the Washington, D.C., jail union recently announced that "officers would no longer make security rounds, citing concerns about a lack of testing and

⁵⁶ See Brie Williams & Leann Bertsch, *A Public Health Doctor & Head of Corrections Agree: We Must Immediately Release People from Jails & Prisons*, THE APPEAL (Mar. 27, 2020), <https://theappeal.org/a-public-health-doctor-and-head-of-corrections-agree-we-must-immediately-release-people-from-jails-and-prisons/>.

⁵⁷ Blakinger, *supra* note 8.

personal protective equipment, as well as a growing number of quarantine and sickness-related absences.”⁵⁸

36. The release of defendants will also positively benefit the health of the County in the months to come. Regardless of whether COVID-19 is controlled in the community, the nature of well-populated jails means that the risk of the pandemic will persist in the Arlington County Detention Facility. As social gathering restrictions ease across the Commonwealth in the relatively near future, the risk of infections in detention centers will not only remain constant but might increase. Court hearings and in-person visitation will resume, once more increasing the threat of the disease’s introduction into the jail.⁵⁹ Unfortunately, crime will also increase with relaxed social restrictions,⁶⁰ resulting in people cycling in and out of the Detention Facility. The only way to control the spread of COVID-19 in the Arlington County Detention Facility is to reduce the current baseline population of incarcerated people, beginning with the defendants identified in this motion. In this way, the Detention Facility will be able to control the pandemic’s spread even with the inevitable relaxation of social restrictions. The Court’s reduction of the current incarcerated population is, in this way, an investment in the future health of both those who are locked up as well as the County as a whole.

37. In short, it is very much in the public interest to grant Defendants’ Motion to Reconsider Sentencing. Continued incarceration poses a greater risk to Defendants, the Arlington County community and correctional staff, and those serving on the front lines providing healthcare

⁵⁸ *Id.*

⁵⁹ See Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (Mar. 23, 2020) (“There are many opportunities for COVID-19 to be introduced into a correctional or detention facility, including daily staff ingress and egress; transfer of incarcerated/detained persons between facilities and systems, to court appearances, and to outside medical visits; and visits from family, legal representatives, and other community members.”), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

⁶⁰ See Edith Lederer, *Crime Rates Plummet Around the World as the Coronavirus Keeps People Inside*, TIME (Apr. 11, 2020), available at <https://time.com/5819507/crime-drop-coronavirus>.

services. This Court should take steps now to protect the community of Arlington County and to avoid fostering illegal and unsafe conditions for Defendants. *See, e.g., Helling v. McKinney*, 509 U.S. 25, 33 (1993) (acknowledging that “prison authorities may not . . . ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering”); *Johnson v. Epps*, 479 F. App’x 583, 589-92 (5th Cir. 2012) (allegations that prisoner was exposed to “serious communicable diseases” and that prison officials were aware of the risk and did nothing to prevent it were sufficient to state a claim for Eighth Amendment rights).

CONCLUSION

38. Defendants ask the Court to grant their motion to reconsider and suspend the balance of their sentences imposed, or order alternative relief as deemed appropriate.

Respectfully submitted⁶¹,
/s/
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Public Defender for Arlington County
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⁶¹ It is anticipated that prior to arguing the motion to the court, the following attorneys from the Lawyers’ Committee for Civil Rights Under Law will submit applications to assist the Defendants *pro hac vice* as co-counsel. Those defendants who were not originally represented by the Office of the Public Defender have consented to the filing of this motion on their behalf, as have their prior counsel.

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2020, I delivered a copy of the foregoing notice and motion to the Arlington County Commonwealth's Attorney via TrueFiling.

/s/

Bradley R. Haywood, Esq.