

**FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE**

YESENIA EVANS,

Petitioner,

v.

No.

**STATE OF NEW MEXICO and
WARDEN DEREK WILLIAMS,**

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Yesenia Evans (“Petitioner”), through her counsel, the American Civil Liberties Union of New Mexico (Lalita Moskowitz and Leon Howard), files this Petition for Writ of Habeas Corpus pursuant to Article II, Section 7 of the New Mexico Constitution and advises the Court of the following, as required by Rule 5-802:

- a. **Conviction:** On or about October 17, 2019, Petitioner was sentenced for a probation violation for Failure to Report. She is currently serving a twelve (12) month sentence with a provision precluding her from earning good time. Her sentence is due to conclude August 21, 2020, at which point she would be released free of conditions. Ms. Evans’ underlying conviction is related to multiple counts of forgery in the Santa Fe County First Judicial Court, cause number D-101-CR-2013-00378 (consolidated).
- b. **Venue:** Petitioner is detained by Warden Derek Williams at the Santa Fe County Jail in Santa Fe, New Mexico.
- c. **Exhaustion of Remedies:** Petitioner has filed various medical requests and grievances related to her medical condition in recent months, but has not received a response on many of them. She believes grievance of this issue would be similarly futile. Because of

the immediate danger presented to Petitioner by COVID-19, it is urgent that this petition be heard as soon as possible.

- d. **Prior Petitions:** Petitioner has not filed any other petitions regarding the sentence she is currently serving.
- e. **Purpose of Petition:** This petition challenges conditions of confinement as outlined further below and seeks Petitioner's immediate release.
- f. **Issues Presented in this Petition:** Whether continuing to confine Petitioner, who is especially vulnerable to COVID-19, in the Santa Fe County Jail without the ability to take proper precautions to protect herself violates the New Mexico Constitution's prohibition on cruel and unusual punishment, N.M. Const. art. II, § 13 and its Due Process clause, N.M. Const. art. II, § 18. Relief pursuant to N.M. Const. art. II, § 7 is proper in that Petitioner challenges the constitutionality of the conditions of her confinement.

INTRODUCTION

At age thirteen, Petitioner was diagnosed with a rare and serious autoimmune disease known as linear scleroderma. As she has grown older, the disease has progressed to a heightened level of seriousness known as systemic sclerosis. This advanced form of the disease now affects Petitioner's entire body, and the ramifications may impact the function of her internal organs, including her digestive system, heart, lungs, and kidneys. Petitioner's condition makes her especially vulnerable to COVID-19, which has already reached the Santa Fe County Jail.¹

Petitioner is currently serving a twelve (12) month sentence on a probation violation. She was sentenced in 2013 for a non-violent crime related to substance abuse issues, which she

¹ See Jeff Proctor, *COVID-19 touches NM justice system*, Santa Fe Reporter, <https://www.sfreporter.com/news/2020/03/25/covid-19-touches-nm-justice-system/> (Mar. 25, 2020).

received treatment for prior to her current incarceration. Petitioner is a mother of three (3) children under the age of four (4) years old. She is seeking relief from this Court that could save her life and ensure that she is able to return home to her children.

Public officials and courts across the country have already recognized that COVID-19 presents an unprecedented circumstance and threat to incarcerated people. They have also recognized that the only way to prevent devastation and senseless deaths is to reduce the population behind bars and to release as many people as possible, including those individuals most vulnerable to the virus.² Petitioner asks this Court to do the same.

STATEMENT OF FACTS

A. The COVID-19 pandemic Presents a Grave Risk of Harm, Including Serious Illness and Death, to People Over Age 50 and Those With Certain Medical Conditions

1. COVID-19 is a novel coronavirus that has reached pandemic status. As of the afternoon of April 1, 2020, over 930,819 people worldwide have confirmed diagnoses, including over 211,408 people in the United States and 363 in New Mexico. Over 46,782 people have died, including at least 4,718 in the United States and 6 in New Mexico. On April 1 alone, 22,878 new cases and 665 new deaths were reported in the United States.

² See, e.g., Larson, Seaborn, “Montana Supreme Court to city, county judges: Release inmates if possible,” Montana Standard, March 23, 2020, found at: <https://bit.ly/2QDTxvM>; *In the Matter of the Request to Commute or Suspend County Jail Sentences*, Docket No. 084230 (S. Ct. N.J. March 22, 2020) (recognizing the extreme risk posted to incarcerated persons by COVID-19 and ordering the release of any New Jersey inmate serving a county jail sentence as a condition of probation or as a result of a municipal court conviction); *U.S. v. Stephens*, 19cr95, 2020 WL 1295155, (A.J.N) (S.D.N.Y. Mar. 19, 2020), Dkt. No. 2798, (“[U]nprecedented and extraordinarily dangerous nature of the COVID-19 pandemic” which may place inmates, in particular, at “heightened risk.” Ordering “the Defendant released subject to the additional conditions of 24-hour home incarceration and electronic location monitoring as directed by the Probation Department.”); *In The Matter Of The Extradition Of Alejandro Toledo Manrique*, 2020 WL 1307109, (N.D. Cal. March 19, 2020) (Ordering release on bond of individual held in San Mateo County Jail due to facilities lack of preparedness plan for COVID-19); *United States v. Barkman*, 2020 U.S. Dist. LEXIS 45628 (D. Nev. Mar. 17, 2020) (“With confirmed cases that indicate community spread, the time is now to take action to protect vulnerable populations and the community at large.”).

2. The World Health Organization has declared COVID-19 a pandemic.³ On March 11, 2020, the Governor of the State of New Mexico issued Executive Order Number 2020-004, declaring a public health emergency for the entire state.⁴ On March 23, 2020, the Cabinet Secretary of the New Mexico Department of Health, with authority from the Governor, issued an order closing all non-essential businesses in the state and prohibiting gatherings of five (5) or more people.⁵ On March 13, 2020, the Mayor of Santa Fe also declared a state of emergency. On March 23, 2020, the Mayor of Santa Fe issued a proclamation updating his declaration of emergency and emphasizing the Governor's restrictions on gatherings larger than five people, among other restrictions.⁶ The President of the United States has also officially declared a national emergency.⁷

3. The transmission of COVID-19 is expected to grow exponentially. Nationally, projections by the Center for Disease Control and Prevention ("CDC") indicate that over 200 million people in the United States could be infected with COVID-19 over the course of the pandemic without effective public health intervention, with as many as 1.5 million deaths in the most severe projections.⁸

³ Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, WALL ST. J. (Mar. 11, 2020, 11:59 PM), <https://www.wsj.com/articles/u-s-coronavirus-cases-top-1-000-11583917794>.

⁴ New Mexico Governor Michelle Lujan Grisham, *Executive Order 2020-004: Order Declaring a State of Public Health Emergency and Invoking the Powers Provided by the All Hazard Emergency Management Act and the Emergency Licensing Act*, available at <https://www.governor.state.nm.us/wp-content/uploads/2020/03/Executive-Order-2020-004.pdf> (Mar. 11, 2020).

⁵ New Mexico Department of Health Cabinet Secretary Kathyleen M. Kunkel, *Public Health Emergency Order Closing All Businesses and Non-Profit Entities Except for those Deemed Essential and Providing Additional Restrictions on Mass Gatherings Due to COVID-19*, available at <https://www.governor.state.nm.us/wp-content/uploads/2020/03/COVID-19-DOH-Order-fv.pdf> (Mar. 23, 2020).

⁶ Santa Fe Mayor Alan M. Webber, *Proclamation of Emergency II- COVID-19*, available at https://www.santafenm.gov/news/detail/proclamation_of_emergency_ii_-_covid_-_19_3232020 (Mar. 23, 2020).

⁷ Derek Hawkins et al., *Trump Declares Coronavirus Outbreak a National Emergency*, WASH. POST (Mar. 13, 2020, 10:46 AM), <https://www.washingtonpost.com/world/2020/03/13/coronavirus-latest-news/>.

⁸ Chas Danner, *CDC's Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead*, N.Y. Mag. (Mar. 13, 2020), <https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html>.

4. COVID-19 is a particularly contagious disease. A recent study showed that the virus could survive for up to three hours in the air, four hours on copper, up to twenty-four hours on cardboard, and up to two to three days on plastic and stainless steel.⁹ Indeed, a new study of an early cluster of COVID-19 cases in Wuhan, China revealed the dangers of indirect transmission resulting from infected people contaminating common surfaces—in the study, it was a communal mall bathroom.¹⁰ New research also shows that controlling the spread of COVID-19 is made even more difficult because of the prominence of asymptomatic transmission—people who are contagious but who exhibit limited or no symptoms, rendering ineffective any screening tools dependent on identifying symptomatic behavior.¹¹

5. There is no vaccine for COVID-19. No one is immune.

6. Certain underlying medical conditions increase the risk of serious COVID-19 disease for people of any age – including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and pregnancy.¹²

⁹ *Novel Coronavirus Can Live on Some Surfaces for Up to 3 Days, New Tests Show*. TIME (<https://time.com/5801278/coronavirus-stays-on-surfaces-days-tests/>) (last visited Mar. 19, 2020).

¹⁰ Cai J, Sun W, Huang J, Gamber M, Wu J, He G. Indirect virus transmission in cluster of COVID-19 cases, Wenzhou, China, 2020. *Emerg Infect Dis*. 2020 Jun. (<https://doi.org/10.3201/eid2606.200412>) (last visited Mar. 18, 2020).

¹¹ *Coronavirus: Are People Who Are Asymptomatic Still Capable of Spreading COVID-19?* Independent, available at <https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html> (last visited Mar. 18, 2020).

¹² Medical information in this and the petition paragraphs that follow are drawn from the expert testimony of two medical professionals filed in a recent filed federal case in Washington State, as well the website of the Harvard Medical School. See Expert Declaration of Dr. Marc Stern: <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern>; Expert Declaration of Dr. Robert Greifinger: <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-robert-greifinger>; Expert Declaration of Dr. Jonathan Golob <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-jonathan-golob?redirect=dawson-v-asher-expert-declaration-dr-jonathan-golob>; HARVARD MEDICAL SCHOOL, CORONAVIRUS RESOURCE CENTER, *As coronavirus spreads, many questions and some answers*, <https://www.health.harvard.edu/diseases-and-conditions/coronavirus-resource-center>, (last visited Mar. 19, 2020).

7. COVID-19 can cause severe damage to lung tissue, sometimes leading to a permanent loss of respiratory capacity, and can damage tissues in other vital organs including the heart and liver. Patients with serious cases of COVID-19 require advanced medical support, including positive pressure ventilation and extracorporeal mechanical oxygenation in intensive care. Patients who do not die from serious cases of COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurological damage and loss of respiratory capacity.

8. COVID-19 may also target the heart muscle, causing a medical condition known as myocarditis, or inflammation of the heart muscle. Myocarditis can affect the heart muscle and electrical system, reducing the heart's ability to pump. This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits exercise tolerance and ability to work.

9. Emerging evidence suggests that COVID-19 can also trigger an over-response of the immune system, further damaging tissues in a cytokine release syndrome that can result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury.

10. These complications can manifest at an alarming pace. Patients can show the first symptoms of infection in as little as two days after exposure, and their condition can seriously deteriorate in as little as five days or sooner.

11. Most people in higher risk categories who develop serious disease will need advanced supportive care requiring highly specialized equipment that is in limited supply, and an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians. This level of support can quickly exceed local health care resources.

Patients in high-risk categories should expect a prolonged recovery, including the need for extensive rehabilitation for profound reconditioning, loss of digits, neurologic damage, and the loss of respiratory capacity.

12. The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 than from influenza. According to recent estimates, the fatality rate of people infected with COVID-19 is about ten times higher than a severe seasonal influenza, even in advanced countries with highly effective health care systems. According to preliminary data from China, 20 percent of people in high-risk categories who contracted COVID-19 there died.¹³

13. There is no cure for COVID-19 nor is there any known medication to prevent or treat infection.

14. The only known methods to reduce the risk for vulnerable people of serious illness or death from COVID-19 are to prevent infection in the first place through social distancing and improved hygiene, including washing hand frequently with soap and water.

B. People Imprisoned in New Mexico Prisons and Jails Face an Elevated Risk of COVID-19 Transmission

15. COVID-19 has already reached the Santa Fe County Jail. On March 25, 2020, the Law Offices of the Public Defender announced that one of its Santa Fe attorneys had tested

¹³ *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 28, 2020), at 12, <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> (finding fatality rates for patients with COVID-19 and co-morbid conditions to be: “13.2% for those with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer”); Wei-jie Guan et al., *Comorbidity and its impact on 1,590 patients with COVID-19 in China: A Nationwide Analysis*, medRxiv (Feb. 27, 2020), at 5, <https://www.medrxiv.org/content/10.1101/2020.02.25.20027664v1.full.pdf> (finding that even after adjusting for age and smoking status, patients with COVID-19 and comorbidities of chronic obstructive pulmonary disease, diabetes, hypertension, and malignancy were 1.79 times more likely to be admitted to an ICU, require invasive ventilation, or die, the number for two comorbidities was 2.59); Fei Zhou et al., *Clinical course and risk factors for mortality of adult inpatients with COVID-19 in Wuhan, China: a retrospective cohort study*, *Lancet* (March 11, 2020), tb. 1, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30566-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext) (finding that among hospital patients, who tended to be older, of those who had COVID-19 and died, 48% had hypertension, 31% had diabetes, and 24% had coronary heart disease).

positive for the virus.¹⁴ The Public Defender, Jennifer Burrill, came into contact with at least twelve (12) county-jail inmates during the time when she may have been carrying the virus.¹⁵ Ms. Burrill was Petitioner’s Public Defender at the time that she contracted COVID-19 and visited the jail.

16. In the Bernalillo County Metropolitan Detention Center (MDC) an inmate has already tested positive. MDC is releasing inmates who are vulnerable and do not have charges that are considered violent in nature.¹⁶

17. Infectious diseases that are communicated by air or touch are more likely to spread in congregate environments such as jails – places where people live, eat, and sleep in close proximity.

18. The highest known person-to-person transmission rate for COVID-19 to date took place in a skilled nursing home facility in Kirkland, Washington, and on afflicted cruise ships in Japan and off the coast of California.

19. The conditions of New Mexico jails pose a higher risk of the spread of COVID-19 than in non-carceral locations like a nursing home or cruise ship. Jails have a greater risk because of closer quarters, the proportion of vulnerable people detained, and scant medical care resources. According to an epidemiology professor quoted recently in *The New Yorker*, “If you wanted to set up a situation that would promote rapid transmission of a respiratory virus, you would say prison: it’s close quarters, unsanitary, individuals in frequent contact.”¹⁷

¹⁴ Jeff Proctor, The Santa Fe Reporter, *High Risk and Confirmed Positive*, available at <https://www.sfreporter.com/news/2020/03/25/high-risk-and-confirmed-positive/> (Mar. 26, 2020).

¹⁵ *Id.*

¹⁶ Rodriguez, Christina, *Inmate at MDC tests Positive for COVID-19*, KOB 4, <https://www.kob.com/albuquerque-news/mdc-detainee-tests-positive-for-covid-19-/5687646/> (Mar. 30, 2020).

¹⁷ Daniel A. Gross, “*It Spreads Like Wildfire*”: *The Coronavirus Comes to New York’s Prisons*, *The New Yorker*, <https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorksprisons> (Mar. 24, 2020).

20. Severe outbreaks of contagious illness regularly occur in jails. For example, during the H1N1 epidemic in 2009, many jails and prisons saw a particularly high number of cases.¹⁸ H1N1 is far less contagious than COVID-19. Not surprisingly, Chinese prison officials report that over five-hundred (500) COVID-19 cases in the current outbreak stemmed from the Hubei province prisons.¹⁹ The rate of incarceration in China is far lower than in the United States, suggesting the problem here will be much worse. Experts predict that “[a]ll prisons and jails should anticipate that the coronavirus will enter their facility[.]”²⁰

21. In New Mexico jails, jail design and operations make it impossible for inmates and detainees to engage in the necessary social distancing required to mitigate the risk of transmission. Many people live in dormitory-like sleeping arrangements. They have limited freedom of movement and no control over the movements of others with whom they are required to congregate on a daily basis. They are unable to maintain anything close to the recommended distance of 6 feet from others.

22. Petitioner also cannot maintain adequate levels of preventive hygiene. She is required to share or touch objects used by others. Toilets, sinks and showers are shared, without disinfection between each use.

¹⁸ Nicole Westman, *Prisons and jails are vulnerable to COVID-19 outbreaks*, The Verge, available at <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap> (Mar. 12 2020). See also David M. Reutter, *Swine Flu Widespread in Prisons and Jails, but Deaths are Few*, PRISON LEGAL NEWS, (Feb. 15, 2020) at <https://www.prisonlegalnews.org/news/2010/feb/15/swine-flu-widespread-in-prisons-and-jails-butdeaths-are-few/>.

¹⁹ Evelyn Cheng and Huileng Tan, *China Says More than 500 Cases of the New Coronavirus Stemmed from Prisons*, CNBC, Feb. 20, 2020, available at <https://www.cnbc.com/2020/02/21/coronavirus-china-says-two-prisons-reported-nearly-250-cases.html>

²⁰ *Id.* (quoting Tyler Winkelman, co-director of the Health, Homelessness, and Criminal Justice Lab at the Hennepin Healthcare Research Institute in Minneapolis).

23. Food preparation and service is communal, served by other incarcerated workers drawn from many different housing areas within the jail, with little opportunity for surface disinfection.

24. Petitioner lacks ready access to soap and water for washing hands. If a sink in her housing area is broken, she does not have a choice to walk to an area with a working sink. Upon information and belief, soap and paper towels are not provided by the jail. Often, the only means to access soap is by purchasing it in commissary—which is not an option for many detainees who lack access to funds. There is no recourse if another person takes a vulnerable person’s bar of soap.

25. Hand sanitizer capable of killing COVID-19 contains alcohol, which has been treated as contraband in jails.

26. New Mexico jails lack adequate infrastructure to address the spread of infectious disease and the treatment of people most vulnerable to illness.

27. Santa Fe County Jail has not implemented protocols sufficient to screen, detect, or identify incarcerated people or staff who have been infected.

28. The County’s COVID-19 Action Plan outlines a plan for Santa Fe County Jail that is woefully inadequate to contain the inevitable outbreak of COVID-19 at the facility. The plan indicates that new inmates will undergo a medical screening and that “[i]nmates presenting with severe respiratory symptoms including fever, dry cough and shortness of breath will be given a loop face mask immediately.”²¹ The County’s plan also addresses testing for inmates who present symptoms.

²¹ Santa Fe County COVID-19 Task Force, *Santa Fe County COVID-19 Action Plan* at 19-20, available at [https://go.boarddocs.com/nm/sfc/Board.nsf/files/BMYW338365D5/\\$file/Santa%20Fe%20County%20COVID-19%20Action%20Plan.pdf](https://go.boarddocs.com/nm/sfc/Board.nsf/files/BMYW338365D5/$file/Santa%20Fe%20County%20COVID-19%20Action%20Plan.pdf) (Mar. 2020).

29. This screening and testing process overlooks the fact that many who are infected with COVID-19 do not show signs of illness.²² The dangers of asymptomatic transmission continue within the Santa Fe County Jail. The County has revealed only symptom-reactive policies—that incarcerated people will be separated and treated if they display symptoms—which are ineffective to stop the rampant asymptomatic transmission of the disease.²³

30. The County’s plan is noticeably silent regarding measures to screen and isolate jail staff.

31. It appears that Santa Fe County also plans to warehouse all of its symptomatic detainees together, in communal living spaces, a measure that will do little to avoid transmission among detainees.

32. The Santa Fe County COVID-19 plan indicates that the county will provide “hygiene education” to all inmates and staff²⁴—a measure that is meaningless without access to adequate hygiene supplies.

33. Even if all of these problems could be resolved, however, they would not sufficiently address the risk of serious medical harm to Petitioner. As Dr. Homer Venters, former chief medical officer of New York City jails, recently said, “[i]n ordinary times, crowded jails overlook prisoners’ medical problems and struggle to separate them based on their security

²² CDC, *Coronavirus Disease 2019 (COVID-19) Symptoms*, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last visited Mar. 19, 2020); see also Yale New Haven Health, *Coronavirus (COVID-19) vs. Influenza (Flu)*, <https://www.ynhhs.org/patient-care/urgent-care/flu-or-coronavirus> (last visited Mar. 19, 2020).

²³ *Coronavirus: Are People Who Are Asymptomatic Still Capable of Spreading COVID-19?* Independent. Available at <https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html>.

²⁴ Santa Fe County COVID-19 Task Force, *Santa Fe County COVID-19 Action Plan* at 19-20, available at [https://go.boarddocs.com/nm/sfc/Board.nsf/files/BMYW338365D5/\\$file/Santa%20Fe%20County%20COVID-19%20Action%20Plan.pdf](https://go.boarddocs.com/nm/sfc/Board.nsf/files/BMYW338365D5/$file/Santa%20Fe%20County%20COVID-19%20Action%20Plan.pdf) (Mar. 2020).

classification...[i]f jails have to add quarantines and sequestration of high-risk prisoners to the mix...they will find managing a COVID-19 outbreak ‘*simply almost impossible.*’”²⁵

C. Petitioner is at Elevated Risk of Contracting COVID-19 and is Particularly Vulnerable to the Virus

34. At age thirteen, Petitioner Yesenia Evans was diagnosed with a rare and serious autoimmune disease known as linear scleroderma. This disease is characterized by rapid overproduction of collagen, causing significant inflammation of the limbs and subsequent shrinking, hardening, and tightening of the skin and connective tissues in the affected areas. As Ms. Evans has grown older, the disease has progressed to a heightened level of seriousness known as systemic sclerosis. This advanced form of the disease now affects Ms. Evans’s entire body, and the ramifications impact the function of her internal organs, including her digestive system, heart, lungs, and kidneys.

35. Because she is living with systemic sclerosis, Petitioner is at heightened risk of death if she contracts COVID-19.²⁶

36. Respondents are aware of Petitioner’s medical condition and the threat posed by COVID-19 to individuals suffering from autoimmune disorders.²⁷

D. Release is Required to Address the Risk of Serious Harm

²⁵ Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, Mother Jones (Mar. 12, 2020), https://www.motherjones.com/crime-justice/2020/03/coronavirus-jails-bail-reform-arrests/?utm_source=The+Appeal&utm_campaign=0a31827f48-EMAIL_CAMPAIGN_2018_08_09_04_14_COPY_01&utm_medium=email&utm_term=0_72df992d84-0a31827f48-58432543.

²⁶ *3/30 UPDATE Statement: COVID-19 (Coronavirus) Information & Recommendations from the Scleroderma Foundation’s Medical & Scientific Advisory Board Leadership Committee*, available at https://www.scleroderma.org/site/SPageServer/?pagename=patients_covid19_msab#MSAB (Mar. 30, 2020).

²⁷ In September 2019, attorneys for Petitioner wrote a letter to Respondents regarding appropriate medical care for Petitioner’s condition. Petitioner’s attorneys have received updates from the Santa Fe County Attorney regarding the same. Santa Fe County’s COVID-19 Action Plan discusses the virus and particular at-risk populations.

37. Because risk mitigation is the only known strategy to protect vulnerable groups from COVID-19, public health officials and correctional oversight boards around the country are urging correctional institutions to use any means available to immediately reduce the prison and jail populations.²⁸

38. Confronted with this reality, at least fourteen (14) state and local court systems—in Alabama, California, Kentucky, Maine, Michigan, Montana, New Jersey, New York, Ohio, South Carolina, Texas, Utah, Washington, and Wyoming—as well as the District of Columbia, have already taken steps to limit incarceration during this crisis.²⁹ Responses include taking steps

²⁸ See *Guidance for Preventative Measures to Coronavirus for Jails, Prisons, Immigration Detention Centers and Youth Facilities*, <https://www.vera.org/downloads/publications/coronavirus-guidance-jails-prisons-immigration-youth.pdf>; Andrew Naughtie, *Coronavirus: US Doctors Demand Immediate Release of Prisoners and Detainees to Avert Disaster*, Independent <https://www.independent.co.uk/news/world/americas/coronavirus-us-prison-release-doctors-medical-workers-symptoms-a9410501.html> (Mar. 9, 2020).

²⁹ See, e.g., Larson, Seaborn, *Montana Supreme Court to city, county judges: Release inmates if possible*, Montana Standard, found at: <https://bit.ly/2QDTxvM> (Mar. 23, 2020); *In the Matter of the Request to Commute or Suspend County Jail Sentences*, Docket No. 084230 (S. Ct. N.J. March 22, 2020) (recognizing the extreme risk posted to incarcerated persons by COVID-19 and ordering the release of any New Jersey inmate serving a county jail sentence as a condition of probation or as a result of a municipal court conviction); *U.S. v. Stephens*, 19cr95, 2020 WL 1295155, (AJN) (S.D.N.Y. Mar. 19, 2020), Dkt. No. 2798, (“[U]nprecedented and extraordinarily dangerous nature of the COVID-19 pandemic” which may place inmates, in particular, at “heightened risk.” Ordering “the Defendant released subject to the additional conditions of 24-hour home incarceration and electronic location monitoring as directed by the Probation Department.”); *In The Matter Of The Extradition Of Alejandro Toledo Manrique*, 2020 WL 1307109, (N.D. Cal. March 19, 2020) (Ordering release on bond of individual held in San Mateo County Jail due to facilities lack of preparedness plan for COVID-19); *United States v. Barkman*, 2020 U.S. Dist. LEXIS 45628 (D. Nev. Mar. 17, 2020) (“With confirmed cases that indicate community spread, the time is now to take action to protect vulnerable populations and the community at large.”); Minute Order, *United States v. Jaffee*, No. 19-cr-88 (RDM) (D.D.C. Mar. 26, 2020), <https://drive.google.com/file/d/1AYfIU6QKCOEIpX5Vh3Af6BDqO8goZ5WE/view> (recognizing that “incarcerating the defendant while the current COVID-19 crisis continues to expand poses a greater risk to community safety than posed by Defendant’s release to home confinement”); Scott Buffon, *Coconino County Jail Releases Nonviolent Inmates in Light of Coronavirus Concerns*, Arizona Daily Sun, https://azdailysun.com/news/local/coconino-county-jail-releases-nonviolent-inmates-in-light-of-coronavirus/article_a6046904-18ff-532a-9dba-54a58862c50b.html (updated Mar. 25, 2020); Kyle C. Barry, *Some Supreme Courts Are Helping Shrink Jails to Stop Outbreaks. Others Are Lagging Behind.*, The Appeal, <https://theappeal.org/politicalreport/some-supreme-courts-are-helping-shrink-jails-coronavirus> (Mar. 25, 2020); John Cheves, *Chief Justice Pleads for Kentucky Inmate Release Ahead of COVID-19 but Progress Slow*, Lexington Herald Leader, <https://www.kentucky.com/news/coronavirus/article241428266.html> (Mar. 23, 2020); Joint Statement of Chief Justice Bridget M. McCormack, Mich. Sup. Ct. and Sheriff Matt Saxton, Exec. Dir., Mich. Sheriff Ass’n, [https://courts.michigan.gov/News-Events/press_releases/Documents/CJ%20and%20MSA%20Joint%20Statement%20draft%202%20\(003\).pdf](https://courts.michigan.gov/News-Events/press_releases/Documents/CJ%20and%20MSA%20Joint%20Statement%20draft%202%20(003).pdf) (Mar. 26, 2020); Am. Order, *In the Matter of Statewide Response by Washington State Courts to the Covid-19 Public Health Emergency*, No. 25700-B-607 (Wash. Mar. 20, 2020), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Supreme%20Court%20Emergency>

to facilitate the release of elderly and sick prisoners, release of non-violent offenders and prisoners close to their release date, and to reduce jail populations by refusing the admission to jails of individuals arrested on certain charges.³⁰ U.S. Attorney General William Barr has directed the Bureau of Prisons to increase the use of home confinement for inmates in an effort to slow the spread of coronavirus in federal prisons.³¹ In Iran, one of the first countries to see the outbreak of COVID-19, 85,000 inmates were temporarily released back to their communities amid virus concerns.³²

39. In a recent court filing seeking the release of federal immigration detainees, Dr. Marc Stern, a correctional health expert, has concluded that “[f]or detainees who are at high risk of serious illness or death should they contract the COVID-19 virus, release from detention is a critically important way to meaningfully mitigate that risk.” For that reason, Dr. Stern has recommended the “release of eligible individuals from detention, with priority given to the

[%20Order%20re%20CV19%20031820.pdf](#); WLWT5, *Release Ohio Jail Inmates Vulnerable to Coronavirus, Chief Justice Urges*, <https://www.wlwt.com/article/release-ohio-jail-inmates-vulnerable-to-coronavirus-chief-justice-urges/31788560#> (Mar. 19, 2020); Memorandum from Chief Justice Beatty, Sup. Ct of S.C to Magistrates, Mun. Judges, and Summary Ct. Staff, <https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461>; (March 16, 2020); Ryan Autullo, *Travis County Judges Releasing Inmates to Limit Coronavirus Spread*, Statesman <https://www.statesman.com/news/20200316/travis-county-judges-releasing-inmates-to-limit-coronavirus-spread?fbclid=IwAR3VKawwn3bwSLSO9jXBxXNRuaWd1DRLsCBFc-ZkPN1INWW8xnzLPvZYNO4> (Mar. 16, 2020).

³⁰ See, e.g., Alene Tchekmedyian et al, *L.A. County releasing some inmates from jail to combat coronavirus*, L.A. Times, (Mar. 16, 2020, 7:25 PM), <https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus>; Cory Shaffer, *Cuyahoga County official will hold mass plea, bond hearings to reduce jail population over coronavirus concerns*, CLEVELAND.COM (Mar. 12, 2020), <https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html>; WKBN Staff, *Local county jails making changes due to coronavirus outbreak*, WKBN (Mar. 12, 2020) (“The Mahoning County [Ohio] Sheriff’s Office is refusing all non-violent misdemeanor arrests at the county jail”), <https://www.wkbn.com/news/coronavirus/mahoning-county-jail-refusing-some-inmates-due-to-coronavirus-outbreak/>; see also Charles Scudder, *Facing coronavirus concerns, Collin County [Texas] Sheriff asks police not to bring petty criminals to jail*, DALLAS MORNING NEWS (Mar. 12, 2020 5:57 PM), <https://www.dallasnews.com/news/public-health/2020/03/12/facing-coronavirus-concerns-collin-county-sheriff-asks-police-not-to-bring-petty-criminals-to-jail/>.

³¹ *Barr tells federal prisons to use home confinement*, CBS News, available at <https://www.cbsnews.com/video/barr-tells-federal-prisons-to-use-home-confinement-amid-virus-outbreak/?ftag=CNM-00-10aac3a> (Mar. 27, 2020).

³² *Hard-hit Iran frees more prisoners amid coronavirus outbreak*, AL JAZEERA (Mar. 17, 2020), <https://www.aljazeera.com/news/2020/03/hard-hit-iran-frees-prisoners-coronavirus-outbreak-200317110516495.html>.

elderly and those with underlying medical conditions most vulnerable to serious illness or death if infected with COVID-19.”³³

40. Another correctional health expert in that same court case, Dr. Robert Greifinger, concluded that “even with the best-laid plans to address the spread of COVID-19 in detention facilities, the release of high-risk individuals is a key part of a risk mitigation strategy.”

Accordingly, in his opinion, “the public health recommendation is to release high-risk people from detention, given the heightened risks to their health and safety, especially given the lack of a viable vaccine for prevention or effective treatment at this stage.”³⁴

41. In a recent court filing in Massachusetts, a group of fourteen (14) experts in epidemiology, infectious diseases, public health, and healthcare for incarcerated people urged the Massachusetts Supreme Court “to act in the best interests of public health and safety and grant [the] request to safely release as many people as possible from confinement.”³⁵

42. Here in New Mexico, a group of sixty (60) medical professionals wrote a letter urging state officials to release people convicted of non-violent crimes in order to avoid a COVID-19 outbreak in the prisons and jails.³⁶ In the letter, New Mexico medical providers agreed with experts across the country that “The safest way to ensure that a jail or prison does not become a site for COVID-19 to spread is to reduce the number of people who are incarcerated.”³⁷

³³ Decl. of Dr. Marc Stern ¶¶ 9, 11, *Dawson v. Asher*, (No. 2:20-CV-409-JLR-MAT) (Mar. 16, 2020), <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern>.

³⁴ Decl. of Dr. Robert Greifinger ¶ 13, *Dawson v. Asher*, (No. 2:20-CV-409-JLR-MAT) (Mar. 16, 2020), <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-robert-greifinger>

³⁵ Letter on behalf of Amici, *Committee for Public Counsel Services, et. al v. Chief Justice of the Trial Court*, (No. SJ-2020-0115) (March 24, 2020), https://www.aclum.org/sites/default/files/field_documents/amici_letter_-_public_health_experts_-_cpcs_macdl_v._chief_of_trial_court_1.pdf.

³⁶ Phaedra Haywood, *Medical providers ask state to release inmates*, Santa Fe New Mexican, https://www.santafenewmexican.com/news/coronavirus/medical-providers-ask-state-to-release-inmates/article_28ec48ee-7089-11ea-8873-5b52a107906d.html (Mar. 30, 2020).

³⁷ *Id.*

43. Release protects the people with the greatest vulnerability to COVID-19 from transmission of the virus and also allows for greater risk mitigation for all people held or working in prisons and jails.

44. Release of the most vulnerable people also reduces the burden on New Mexico's limited health care infrastructure, as it lessens the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time.

E. Failure to Release Petitioner Constitutes Deliberate Indifference to Substantial Risk of Serious Harm in Violation of Article II, Section 13 of the New Mexico Constitution

45. Continuing to incarcerate Petitioner, who has been deemed by the CDC to be especially vulnerable to a deadly pandemic, in conditions where taking the only known steps to prevent transmission are virtually impossible, constitutes deliberate indifference to serious medical harm in violation of the United States and New Mexico constitutions.

46. The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment and requires prisons and jails to protect those in their custody from the substantial risk of serious harm. *See generally Farmer v. Brennan*, 511 U.S. 825 (1994); *see also Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (“[I]t is cruel and unusual punishment to hold convicted criminals in unsafe conditions.”). The analysis of Petitioner’s rights under Article II, Section 13 of the New Mexico Constitution parallels her rights under the Eighth Amendment. *See Bevan v. Santa Fe County*, 2017 WL 4119615, at *9 (D.N.M. Sept. 15, 2017) (“[T]he analysis of [plaintiffs’] rights under the New Mexico Constitution does not differ from the analysis under the Eighth and Fourteenth Amendments.”). Therefore, prison or jail officials violate Article II, Section 13 when they are “deliberately indifferent to a substantial risk of serious harm to an inmate.” *Farmer*, 511 U.S. at 828.

47. Deliberate indifference “does not require a finding of express intent to harm.” *Mitchell v. Maynard*, 80 F.3d 1433, 1442 (10th Cir. 1996). Rather, deliberate indifference is shown when a prison or jail official “knew of and disregarded an excessive risk to inmate health or safety.” *Id.* (internal citations and quotation marks omitted). The U.S. Supreme Court has recognized that “exposure of inmates to a serious, communicable disease” constitutes an “unsafe, life-threatening condition” that threatens “reasonable safety.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

48. Respondents are well aware of the extraordinary risk COVID-19 poses to people in New Mexico jails. Indeed, Santa Fe County’s COVID-19 response plan acknowledges the vulnerability of people in its jail.³⁸

49. Additionally, on March 10, 2020, the American Civil Liberties Union of New Mexico sent a letter to Warden Williams and the other New Mexico county jail wardens, explaining the risks to incarcerated people presented by COVID-19 and requesting information about what preventive measures the jail was taking.

50. On or around March 23, 2020, an inmate at the Santa Fe County Jail and his attorney sent a tort claims notice to the County detailing the dangerous conditions in the jail and failures of jail administrators to take basic safety precautions in light of COVID-19.³⁹

51. Whatever steps Respondents have taken to manage the risk of COVID-19 will fail because, as pleaded above, Respondents are not capable of managing that risk in a jail environment.

³⁸ Santa Fe County COVID-19 Task Force, *Santa Fe County COVID-19 Action Plan* at 19-20, available at [https://go.boarddocs.com/nm/sfc/Board.nsf/files/BMYW338365D5/\\$file/Santa%20Fe%20County%20COVID-19%20Action%20Plan.pdf](https://go.boarddocs.com/nm/sfc/Board.nsf/files/BMYW338365D5/$file/Santa%20Fe%20County%20COVID-19%20Action%20Plan.pdf) (Mar. 2020).

³⁹ See Amanda Martinez, *County jail inmate alleges COVID-19 exposure, files tort claim*, Santa Fe New Mexican, https://www.santafenewmexican.com/news/coronavirus/county-jail-inmate-alleges-covid--exposure-files-tort-claim/article_1f1032ec-6d21-11ea-8f68-c7ab550e29cc.html (Mar. 23, 2020).

52. Respondents' intentional failure to release Petitioner while actually aware of the substantial risk of COVID-19 plainly constitutes deliberate indifference.

53. The affirmative obligation to protect against infectious disease empowers Courts to provide remedies designed to prevent imminent harm to future health. *Helling*, 509 U.S. at 33 (“It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”).

54. The writ of habeas corpus is a right rooted in common law and release is available as a remedy to address constitutional violations arising from circumstances or conditions of confinement. *See* N.M. Const. art. II, § 7. *See also In re Forest*, 1941-NMSC-019, ¶ 11, 113 P.2d 582, 585; *Dickerson v. Walsh*, 750 F.2d 150, 153 (1st Cir. 1984).

F. Failure to Release Petitioner Violates Her Due Process Rights Under Article II, Section 18 of the New Mexico Constitution

55. Continuing to incarcerate Petitioner, who is especially vulnerable to a deadly pandemic, constitutes a violation of her substantive due process rights under Article II, Section 18 of the New Mexico Constitution. Violations of Article II, Section 18 of the New Mexico Constitution are analyzed using the same standard as federal due process claims. *See Montoya ex rel. S.M. v. Espanola Pub. Sch. Dist. Bd. of Educ.*, 968 F. Supp. 2d 1117, 1120 (D.N.M. 2013).

56. Incarcerated people have a constitutionally-protected liberty interest in avoiding “atypical and significant hardship... in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484 (1995); *see also id.* (a hardship may “exceed[] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force”); *Cordova v. LeMaster*, 2004-NMSC-026, ¶ 20, 136 N.M. 217, 223 (adopting the “atypical and significant hardship” standard). “Whether a particular restraint imposes an ‘atypical and

significant hardship’ depends, in turn, on its ‘duration and degree.’” *Torres v. Comm’r of Corr.*, 427 Mass. 611, 618 (1998), cert denied, 525 U.S. 1017 (quoting *Sandin*, 515 U.S. at 486).

57. This situation is far from typical. A serious threat of contracting a severe, life-threatening illness is “a dramatic departure from the basic conditions” of prison life. *Sandin*, 515 U.S. at 485. Contraction of COVID-19 was not “within the sentence imposed upon” Petitioner or any other New Mexican by the trial courts prior to the pandemic. See *Montanye v. Haymes*, 427 U.S. 236, 242 (1976). People confined in our jails and prisons currently face permanent injury or loss of life that was not imposed pursuant to due process of law.

58. Continuing to incarcerate Petitioner, who has been deemed by the CDC to be especially vulnerable to a deadly pandemic, in conditions where taking the only known steps to prevent transmission are virtually impossible, represents a dramatic departure from the sentence imposed upon Petitioner by a court of law. Indeed, such circumstances could ultimately become a death sentence.

59. Therefore, Petitioner’s continued incarceration in the Santa Fe County Jail violates her due process rights under the Fourteenth Amendment and Article II, Section 18 of the New Mexico Constitution.

PRAYER FOR RELIEF

WHEREFORE, Petitioner requests that this Court issue a writ of habeas corpus pursuant to Article II, Section 7 of the New Mexico Constitution and order Petitioner’s immediate release on the grounds that her continued detention violates Article II, Sections 13 and 18 of the New Mexico Constitution. In the alternative, for the compelling reasons detailed herein, Petitioner requests that this Court remove the provision from her sentence in D-101-CR-2013-00378

(consolidated), which precludes her from earning good time credit. Instating good time into her current sentence would result in Petitioner's immediate release.

Respectfully Submitted,

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Certificate of Service

I hereby certify that on the 2nd day of April 2020, I filed the foregoing electronically and caused the following parties to be served via email:

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