

No. 20-50074

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD RIMMEL,

Defendant-Appellant.

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Appeal from the  
United States District Court  
for the Southern District of California  
Honorable Cynthia A. Bashant Presiding,  
USDC Case No. 20-CR-0818-BAS

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APPELLANT'S FRAP 9(a) MEMORANDUM OF FACTS AND LAW

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## INTRODUCTION

Ronald Rimmel appeals to this Court for his pretrial release so he can take measures to avoid serious illness or death. Mr. Rimmel is a 73-year-old man recovering from a fall last year that left him with a bad hip and a concussion. He is squarely in the group of people most at risk of dying from COVID-19 because of his age and chronic health conditions. But Mr. Rimmel currently sits in pretrial detention as the coronavirus pandemic spreads across the country and into jails.

The government recognized the significant danger to Mr. Rimmel's safety from continued detention and joined Mr. Rimmel in moving for his pretrial release. A magistrate judge granted the parties' joint motion, but Mr. Rimmel unfortunately remains in custody. The *only* hang up: the court insisted that he live with a family member in the United States, and he can't make that happen. Surviving on social security checks, Mr. Rimmel maintains no close family relationships and has been forced to live in Mexico, where he owns an affordable condominium.

Mr. Rimmel sought review of his release order with a district judge, begging that she allow him to live either at his home in Mexico or at a halfway house while he looks for housing in the United States. But the court denied his request. Without any government response to Mr. Rimmel's motion and without an evidentiary hearing, the court found that the risk of contracting COVID-19 at a

halfway house is “equivalent or greater than remaining in custody.” And the court concluded that a personal signature bond permitting Mr. Rimmel to live in Mexico was insufficient to assure his appearance.

The district court’s order is based on clearly erroneous facts and legal error. First, while the district court concluded that allowing Mr. Rimmel to reside in Mexico would be “insufficient to secure his appearance at future proceedings,” it offered no facts to support that conclusion. Nothing in the Bail Reform Act prohibits Mr. Rimmel from residing in Mexico. And here, the coronavirus pandemic, Mr. Rimmel’s related health concerns, his complete financial dependence on social security, and his 73 years of law-abiding conduct justify permission for him to live at home in Mexico.

Moreover, the district court’s finding that a jail is as safe, or safer, than a halfway house is wrong and unsupported by any evidence in the record. Experts, courts, and even executive officials across the country have recognized the impending public health disaster that awaits our jail and prison system. Despite the best efforts of Mr. Rimmel’s jailers, nothing presents more danger to his safety than pretrial detention. And even if the halfway house is not ideal, temporary residence at the halfway house is an essential first step towards finding a safe place to live.

This Court should reverse.

### STATEMENT OF JURISDICTION

Mr. Rimmel is charged with one count of importation of methamphetamine, in violation of 21 U.S.C. §§ 952, 960, Ex. G, and he appeals the district court's order denying his bail review motion under 18 U.S.C. § 3145(c) and Fed. R. App. P. 9(a). Ex. A, B. The district court had original jurisdiction for this offense against the United States under 18 U.S.C. § 3231.

This Court has jurisdiction over a timely appeal from a final order entered in the Southern District of California, within the Ninth Circuit's geographical jurisdiction. 28 U.S.C. §§ 1291 & 1294(1). Although Mr. Rimmel's case remains pending, 18 U.S.C. § 1345(c) expressly provides for a direct appeal of an order of detention consistent with § 1291. *See Stack v. Boyle*, 342 U.S. 1, 4 (1951) (holding that a decision setting bail is appealable under 28 U.S.C. § 1291 as a "final decision").

The district court entered its order denying Mr. Rimmel's motion for bail review on March 25, 2020. Ex. B. Mr. Rimmel timely filed a Notice of Appeal on March 27, 2020. Ex. A. *See* Fed. R. App. P. 4(b)(1)(A)(i) (appeal timely if filed within 14 days of entry of judgment).

### BAIL STATUS

Mr. Rimmel is currently in the custody of the United States Marshal because he is unable to meet the conditions of release ordered by the magistrate judge. He has no scheduled release date, since his case is not yet final.

### RELEVANT PROVISIONS

The addendum to this brief contains a copy of 18 U.S.C. § 3142 under Ninth Circuit Rule 28-2.7.

### ISSUES FOR REVIEW

In light of the coronavirus pandemic and the likelihood of spread to pretrial detention facilities, should this Court order Mr. Rimmel released to live at his home in Mexico or, in the alternative, a halfway house given that his age and physical infirmities greatly increase his risk of hospitalization or death upon developing COVID-19?

### STATEMENT OF THE CASE

#### A. Background.

Mr. Rimmel is 73 years old. Ex. F1-2. He survives on monthly \$1200 social security checks. *Id.* He is a United States citizen, but lives in San Felipe, Mexico—a two and a half hour drive south of the border—where housing is more affordable. *Id.* In July 2019, Mr. Rimmel suffered a fall and injured his hip. *Id.* While recovering

from that initial injury, he suffered several concussions and eventually ended up bed-ridden for two months. *Id.*

On February 9, 2020, Mr. Rimmel drove from Mexico into the United States at the Calexico West Port of Entry in California. Ex. H3. Customs and Border Protection discovered methamphetamine in the gas tank of his car and arrested him. *Id.* at 3-4. The government charged him with one count of importation of methamphetamine. *Id.* at 1.

**B. The magistrate judge granted the government’s motion to detain.**

The government moved to detain Mr. Rimmel at his initial appearance based on a risk of flight and the presumption of detention attendant to the charged offense. CR2.<sup>1</sup> The magistrate judge conducted a detention hearing and granted the government’s motion. CR13. Mr. Rimmel was and remains detained at GEO’s Western Region Detention Facility (“GEO”) in San Diego, California. Ex. F4.

Mr. Rimmel has no prior criminal convictions, Ex. F2, and he has pled not guilty to the pending charges, CR 17.

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<sup>1</sup> “CR” refers to the District Court clerk’s record, included in Appellant’s Exhibits.

C. **After the coronavirus outbreak, the magistrate judge granted the parties' joint motion for pretrial release but insisted that Mr. Rimmel live with a family member in the United States.**

As the coronavirus pandemic began to spread across California and Mr. Rimmel waited for trial in jail, Governor Newsom declared a state of emergency.<sup>2</sup> Federal public health officials identified people over age 65 and those with chronic medical conditions as especially at risk of serious illness or death, cautioning that they “take actions to reduce [their] risk of getting sick with the disease.”<sup>3</sup> The Centers for Disease Control and Prevention (“CDC”) explained that people in this higher risk category must “[a]void crowds as much as possible” and “stay home as much as possible,” particularly once COVID-19 arrived in their community.<sup>4</sup>

Recognizing that Mr. Rimmel’s age and health problems put him in this at-risk category of people, the government and Mr. Rimmel jointly sought his release from custody in a March 16, 2020, motion. Ex. F. Mr. Rimmel explained:

GEO is unable to protect the health and safety of defendants in their custody. GEO is a large pretrial detention facility, housing several hundred people. Detainees are housed in open dormitories that house dozens of inmates without the ability to separate. Medical care at GEO

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<sup>2</sup> See Proclamation of State of Emergency, Executive Department, State of California (March 4, 2020), available at <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

<sup>3</sup> Centers for Disease Control and Prevention, *People at Risk for Serious Illness from COVID-19*, available at <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>.

<sup>4</sup> *Id.*

often requires off site hospitalization and an extended wait to see a physician for even the most basic medical care.

GEO has not met even the most basic recommendations of the CDC for preventing the spread of the coronavirus. Hygiene products such as antibacterial soap are only available to those with commissary funds, who can only purchase products at the appointed commissary times. Hand sanitizers, due to their alcohol content are not allowed. It is unclear whether GEO has any testing for COVID-19 available, or when, if ever, it will have tests.

*Id.* at 4-5. Mr. Rimmel argued that from his perspective, “his life—not only his liberty—is on the line, creating a powerful incentive to abide by any release conditions the Court may impose.” *Id.* at 6. The parties jointly requested that he be released on a \$10,000 bond secured by his own signature. *Id.* at 7.

The magistrate judge granted the joint motion and ordered Mr. Rimmel released on a \$10,000 personal appearance bond. Ex. E. The court added a condition, however, that Mr. Rimmel reside with a family member or a contract facility approved by Pretrial Services. Two days later, the court (without explanation) amended the order to disallow residence at a contract facility. Ex. D. As a result, Mr. Rimmel’s only option was to reside with a family member. He had no one to stay with, so he remained in custody. Ex. C2.

**D. Mr. Rimmel sought bail review with the district judge, but the court denied his request to live at home in Mexico or at a halfway house approved by Pretrial Services.**

On March 23, Mr. Rimmel sought bail review to the district judge under 18 U.S.C. § 3145(b). Ex. C. His lone request was that the district judge remove the condition that he reside with a family member and permit him to live at home or a halfway house. *Id.* at 2. Mr. Rimmel had confirmed with Pretrial Services that a local halfway house was accepting new residents and that he could move in as soon as he was medically cleared. *Id.*

The government filed no response. But a supervising prosecutor had expressed to defense counsel that she believed Mr. Rimmel would be safer in jail:

AUSA Michelle Petit contacted counsel about the bond and specifically the request that Mr. Rimmel reside in an RRC. AUSA Pettit indicated that she believed that the RRC was not currently accepting anyone, contrary to what PTS had informed counsel. She further indicated that while she understood that Mr. Rimmel's age made him a high-risk individual, that she believed he was currently safer in jail than he would be if released, especially to the RRC. She indicated that because there are no cases in the facilities, given the current controls of individuals allowed into the facilities, the risk of him contracting the virus was lower if he stayed in custody.

*Id.* at 3.

The district judge denied the motion two days later on March 25 without a hearing or soliciting a response from the government. Ex. B. The order stated only:

A personal signature bond permitting the Defendant to reside in Mexico is insufficient to secure his appearance at future proceedings. The risk of contracting Covid-19 at a Residential Re-entry Center (RRC) is equivalent or greater than remaining in custody and the conditions of release as ordered are confirmed.

*Id.* This appeal follows.

#### SUMMARY OF ARGUMENT

This Court should reverse the district court's order and permit Mr. Rimmel to reside at home in Mexico or, in the alternative, to reside at a halfway house while he looks for housing in the United States. Mr. Rimmel's advanced age, health problems, lack of criminal history, and reliance on social security all weigh in favor of allowing him to live in Mexico on his promise to return to court. But the weight of these factors shifts even farther in his favor when compared to the risk of death or serious illness he faces if he remains in custody.

Courts, scientists, and even the U.S. Attorney General have recognized that detention facilities present a grave risk of widespread infection when infiltrated by coronavirus. And the experience of jails around the world and across the United States has already made clear that infection is likely, if not inevitable. Indeed, Bureau of Prison ("BOP") facilities and MDC Brooklyn have already registered positive tests despite officials' best efforts to keep the virus away. The expert consensus is: COVID-19 will infect our national jails and prisons and when it does,

it will spread quickly. Our justice system cannot let a sick, 73-year-old man face that risk simply because he doesn't have close family to live with in the United States. This Court should accordingly use its authority on plenary review to reverse the district court's order and permit Mr. Rimmel to reside in Mexico or at a halfway house.

But even if the Court is not willing to amend the order to guarantee Mr. Rimmel's release and safety, it must still remand for further proceedings. Both the Bail Reform Act and due process require evidentiary support for Mr. Rimmel's continued de facto detention. Here, none exists. The district court denied Mr. Rimmel's uncontested motion without taking evidence or pointing to factual support for its ruling. The district court's conclusion therefore deserves no deference, as it is without support in the record.

#### ARGUMENT

**A. The standard of review of the district court's order is *de novo*, with review of the district court's factual findings for clear error.**

While any findings underpinning the district court's order are reviewed for clear error, this Court must make an "independent examination" of those facts "to determine whether the pretrial detention order is consistent" with the Constitution and the Bail Reform Act. *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985). Where the only question is whether the underlying facts the district court

relied on warrant the conditions set by the district court, this Court’s review is *de novo*. *United States v. Hir*, 517 F.3d 1081, 1087 (9th Cir. 2008).

**B. This Court should reverse the district court and order that Mr. Rimmel be permitted to reside at home in Mexico while he awaits trial.**

When weighing the risk of flight against a defendant’s liberty interest, the Bail Reform Act prescribes broad consideration of all relevant circumstances, including “the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings[.]” 18 U.S.C. § 3142(g)(3). As the coronavirus pandemic worsens, this analysis must take into account the risk that a detention facility might become infected as well as the risk to a particular defendant if it does. Here, Mr. Rimmel’s history and characteristics—especially in light of the pandemic—weigh in favor of granting him permission to reside in Mexico.

**1. The effects of the coronavirus pandemic shift the analysis under the Bail Reform Act toward more permissive conditions of release.**

This Court has recognized that the coronavirus pandemic presents a “rapidly escalating public health crisis” warranting immediate release of detainees. *See Xochihua-Jaimes v. Barr*, \_\_\_ F. App’x \_\_\_, 2020 WL 1429877, \*1 (9th Cir. 2020) (*sua sponte* ordering release of respondent from immigration custody given health

authorities’ prediction that the virus would especially impact immigration detention centers). Courts across the country agree.<sup>5</sup> Indeed, Attorney General Barr has cautioned that federal officials “want to make sure our institutions don’t become

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<sup>5</sup> See *United States v. Jaffee*, No. 19-cr-88 (D.D.C. Mar. 26, 2020) (releasing defendant with criminal history in a gun and drug case, citing “palpable” risk of spread in jail and “real” risk of “overburdening the jail’s healthcare resources”; “the Court is . . . convinced 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”); *United States v. Garlock*, No. 18-CR-00418-VC-1, 2020 WL 1439980, at \*1 (N.D. Cal. Mar. 25, 2020) (citing “chaos” inside federal prisons in sua sponte extending time to self-surrender: “[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided”); *United States v. Perez*, No. 19 CR. 297 (PAE), 2020 WL 1329225, at \*1 (S.D.N.Y. Mar. 19, 2020) (releasing defendant due to the “heightened risk of dangerous complications should he contract COVID-19”); *United States v. Stephens*, \_\_F. Supp. 3d\_\_, 2020 WL 1295155 (S.D.N.Y. Mar. 19, 2020) (releasing defendant in light of “the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic”); *In re Manrique*, 2020 WL 1307109 (N.D. Cal. Mar. 19, 2020) (“The risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail.”); *In re Request to Commute or Suspend County Jail Sentences*, Docket No. 084230 (N.J. Mar. 22, 2020) (releasing large class of defendants serving time in county jail “in light of the Public Health Emergency” caused by COVID-19); see also *United States v. Matthaei*, No. 1:19-CV-00243-BLW, 2020 WL 1443227, at \*1 (D. Idaho Mar. 16, 2020) (extending self-surrender date by 90 days in light of COVID-19); *United States v. Barkman*, 2020 U.S. Dist. LEXIS 45628 (D. Nev. Mar. 17, 2020) (suspending intermittent confinement because “[t]here is a pandemic that poses a direct risk if Mr. Barkman . . . is admitted to the inmate population of the Wahoe County Detention Facility”); *United States v. Copeland*, No. 2:05-cr-135-DCN (D.S.C. Mar. 24, 2020) (granting compassionate release to defendant in part due to “Congress’s desire for courts to release individuals the age defendant is, with the ailments that defendant has during this current pandemic”).

petri dishes” and would consider ways to send home or protect those most vulnerable.<sup>6</sup>

COVID-19 does not respect security measures at jails. The virus has already infiltrated the federal detention system. On March 19, a BOP staffer in New Hampshire tested positive for the virus.<sup>7</sup> On March 20, a pretrial detainee at MDC Brooklyn tested positive for the virus, only days after a New York AUSA had confidently informed the court that no inmates or any other federal facility had tested positive.<sup>8</sup> These positive tests are not an indictment of the facilities’ efforts; they are an early indication of the reality that prisons and jails—no different than the rest of the world—will suffer from this pandemic. With hundreds of staffers and

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<sup>6</sup> Philip Ewing, *Barr: Federal Prisons Mustn’t Become ‘Petri Dishes’ For Coronavirus*, NPR (March 26, 2020), available at <https://www.npr.org/sections/coronavirus-live-updates/2020/03/26/822016191/barr-federal-prisons-mustnt-become-petri-dishes-for-coronavirus>.

<sup>7</sup> Cassidy McDonald, *Workers at federal prisons sound the alarm as system confirms two coronavirus cases*, CBS News (Mar. 19, 2020), available at <https://www.cbsnews.com/news/coronavirus-prison-federal-employees-say-conflicting-orders-putting-lives-at-risk-2020-03-18/>.

<sup>8</sup> Compare Kevin Johnson, *Trump weighs release of some federal prisoners after inmate tests positive for coronavirus*, USA Today (March 22, 2020), available at <https://www.usatoday.com/story/news/politics/2020/03/22/first-federal-inmate-tests-positive-coronavirus-new-york/2893959001/> with Andrew Denny, *No coronavirus cases at federal prisons, Brooklyn prosecutor says*, New York Post (March 17, 2020), available at <https://nypost.com/2020/03/17/no-coronavirus-cases-at-federal-prisons-brooklyn-prosecutor-says/>.

service providers entering and exiting the facilities each day, jails are not and cannot be sealed off from the coronavirus.

The inevitable spread of the virus into our local jails will add to the public health crisis already gripping our community. “With no known effective treatment, and vaccines months (or more) away, public health officials have been left to urge the public to practice ‘social distancing,’ frequent (and thorough) hand washing, and avoidance of close contact with others (in increasingly more restrictive terms)—all of which are extremely difficult to implement in a detention facility.” *United States v. Martin*, 2020 WL 1274857, \*2 (D. Md., March 17, 2020). That means that when the virus gets in, it will spread quickly.

As contagious as COVID-19 is in daily life in the community, the coronavirus is significantly *more* likely to spread in detention facilities than outside of them. In the community, scientists estimate that one person with COVID-19 will infect about two and a half people without social distancing, and about one person with strong social distancing and quarantining.<sup>9</sup> By contrast, scientists estimate that, in

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<sup>9</sup> Adam J. Kucharski *et al.*, *Early dynamics of transmission and control of COVID-19: a mathematical modelling study*, *The Lancet Infectious Diseases* (2020), available at [https://doi.org/10.1016/S1473-3099\(20\)30144-4](https://doi.org/10.1016/S1473-3099(20)30144-4).

confined settings like prisons and cruise ships, one person with COVID-19 will infect about 11 people, who in turn will infect up to 11 other people each.<sup>10</sup>

That is because conditions of pretrial confinement create the ideal environment for the transmission of contagious disease.<sup>11</sup> Prisons and jails “have become breeding grounds for infectious epidemics, with severe consequences for both prisoners and the public alike.”<sup>12</sup> Outbreaks of the flu regularly occur in American jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.<sup>13</sup> According to public health experts, incarcerated individuals “are at special risk of infection, given their living situations,” and “may

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<sup>10</sup> Kenji Mizumoto & Gerardo Chowell, *Transmission potential of the novel coronavirus (COVID-19) onboard the diamond Princess Cruises Ship, 2020*, 5 *Infectious Disease Modelling* 264 (2020) (evaluating the transmission rate on a cruise ship, and comparing that infection rate to similarly confined spaces like hospitals, prisons, and churches), available at <https://www.sciencedirect.com/science/article/pii/S2468042720300063>.

<sup>11</sup> Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047, 1047–55 (2007), available at <https://doi.org/10.1086/521910>.

<sup>12</sup> John E. Dannenberg, *Prisons as Incubators and Spreaders of Disease and Illness*, *Prison Legal News*, August 15, 2007, available at <https://www.prisonlegalnews.org/news/2007/aug/15/prisons-as-incubators-and-spreaders-of-disease-and-illness/>.

<sup>13</sup> *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, *The Verge*, Mar. 7, 2020, available at <https://bit.ly/2TNcNZY>.

also be less able to participate in proactive measures to keep themselves safe;”  
“infection control is challenging in these settings.”<sup>14</sup>

Across the world, detention facilities have had major coronavirus outbreaks, almost all traced back to jail staff who inadvertently brought the disease in before being diagnosed with the disease. For example, a single prison guard in China showed COVID-19 symptoms in early February; less than three weeks later, 200 prisoners and seven other guards had contracted the disease.<sup>15</sup>

Similarly, on March 18, a single officer in the New York City jail on Rikers Island showed symptoms and tested positive for COVID-19; three days later, on March 21, 21 inmates and 17 employees had also tested positive.<sup>16</sup> Another 58 inmates were under monitoring in quarantine units, but had “likely passed through ‘hundreds of housing areas and common areas over recent weeks and ha[d] been in

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<sup>14</sup> “Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States,” Mar. 2, 2020, available at <https://bit.ly/2W9V6oS>.

<sup>15</sup> Scott Neuman, *Coronavirus Found in China Prisons, As Cases Spike in South Korea*, NPR (Feb. 21, 2020), available at <https://www.npr.org/2020/02/21/808002924/coronavirus-found-in-china-prisons-as-cases-spike-in-south-korea>.

<sup>16</sup> NBC New York, *21 Inmates, 17 Employees Test Positive for COVID-19 on Rikers Island: Officials* (Mar. 21, 2020), available at <https://www.nbcnewyork.com/news/coronavirus/21-inmates-17-employees-test-positive-for-covid-19-on-rikers-island-officials/2338242/>.

close contact with many other people in custody and staff.’”<sup>17</sup> By March 25, 52 inmates had tested positive, with 96 more under observation awaiting results.<sup>18</sup> In light of similar threats, at-risk prisoners (and not-at-risk prisoners) have been released in Iran, Bahrain, and Italy, among other countries, as well as in some American cities.<sup>19</sup>

When detainees in San Diego become ill, the limited medical resources available to the jails will be under-equipped to treat them. Sick detainees will end up adding to the growing number of people competing for scarce hospital beds, ICU rooms, and respirators. In short, keeping hundreds of people in jail together will end up placing a large and disproportionate number of people into an already overstressed medical system.<sup>20</sup>

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<sup>17</sup> *Id.*, quoting the New York City Board of Correction’s Interim Chair.

<sup>18</sup> Julia Craven, *Rikers Island Has 52 Confirmed COVID-19 Cases*, Slate (March 25, 2020), available at <https://slate.com/news-and-politics/2020/03/coronavirus-is-spreading-on-rikers-island.html>.

<sup>19</sup> Human Rights Watch, *Human Rights Dimensions of COVID-19 Response* (Mar. 19, 2020), at “Protect people in custody and in institutions,” available at <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response>; Bradford Betz, *Coronavirus leads some overseas prisons to release inmates; Rikers, other U.S. prisons consider the same*, Fox News (Mar. 18, 2020), available at <https://www.foxnews.com/world/coronavirus-prisoners-release-inmates-rikers>.

<sup>20</sup> See Walter Pavlo, *The COVID-19 Prison Crisis Is About To Become A Community Crisis*, Forbes (March 22, 2020), available at <https://www.forbes.com/sites/walterpavlo/2020/03/22/the-covid-19-prison-crisis-is-about-to-become-a-community-crisis/>.

But quick action to reduce the population of people in prisons and jails can mitigate the risk and the harm to the community. The Bail Reform Act asks courts to weigh the risk to public safety in making bail and detention determinations, and courts must “take[] this health risk extremely seriously,” *see Martin*, 2020 WL 1274857 at \*2, when deciding whether release is appropriate. While detention facilities “may successfully have dealt with past viruses and outbreaks of communicable diseases, the pale in scope with the magnitude and speed of transmission of COVID-19.” *Id.* This novel coronavirus requires a novel response from the courts.

**2. In light of the coronavirus pandemic and all other relevant considerations under the Bail Reform Act, this Court should allow Mr. Rimmel to reside at home in Mexico.**

Mr. Rimmel could make a good argument for living in Mexico even under normal circumstances. Mr. Rimmel has *no prior criminal history*. Ex. F2; *see* 18 U.S.C. § 3142(g)(3)(a)-(b). He has thus never missed a court date. *Id.* He’s a United States citizen who depends on social security checks to stay afloat. *Id.* He’s 73 years old and of limited means. *Id.* In short, he would not and could not cut ties with this country and flee prosecution.

But the coronavirus crisis eliminates any question that Mr. Rimmel ought to be able to live at home. No one below—not the government, not the magistrate

judge, not the district judge—questioned that Mr. Rimmel is particularly at risk of death or serious illness if he contracts COVID-19. Nor did anyone contradict his proffer that GEO is incapable of providing the sort of precautions and care necessary to keep him safe. Why, then, should he sit in jail because he lives in Mexico instead of the United States? The suggestion that Mr. Rimmel “should wait until there is a confirmed outbreak of COVID-19 . . . is impractical.” *In re Manrique*, 2020 WL 1307109, at \*1. “By then it may be too late.” *Id.*

Indeed, even under the stricter standard governing release pending appeal, this Court has identified similar factors as “exceptional circumstances” warranting release under 18 U.S.C. § 3145(c). In *United States v. Garcia*, this Court explained that exceptional circumstances justifying release might include “that the defendant’s criminal conduct was aberrational” and “circumstances that would render the hardships of prison unusually harsh for a particular defendant.” 340 F.3d 1013, 1019-20 (9th Cir. 2003). Mr. Rimmel has lived 73 years without a criminal conviction and the threat of COVID-19 unquestionably presents “unusually harsh” conditions for him in custody. If those factors warrant his release after conviction, surely they permit him to live in Mexico while he is still presumed innocent.

The district court nonetheless denied Mr. Rimmel permission to reside in Mexico. This Court should not afford that ruling any deference. The district court

offered no factual support for its decision to require that Mr. Rimmel live with a family member in the United States. Further, after joining in Mr. Rimmel's motion for pretrial release, the government never filed another pleading and never offered any reason why residence in Mexico was inappropriate. Certainly, there is no provision in § 3142 prohibiting travel to or residence in another country. This Court's "independent examination" of the facts should therefore disregard the district court's unreasoned decision. *See Motamedi*, 767 F.2d at 1405.

**C. If the Court is not inclined to permit Mr. Rimmel to live in Mexico, it should permit him to reside at a halfway house while he looks for safe housing in the United States.**

Even if this Court disagrees that Mr. Rimmel should be permitted to live in Mexico, leaving him de facto detained merely because he has no family to live with makes no sense. Defense counsel confirmed below that a local halfway house had available beds and could provide Mr. Rimmel a place to stay while he locates a safe residence in the United States. Ex. C2-3.

While at the halfway house, Mr. Rimmel can find an apartment, fill out applications, and collect his social security check. He can't do any of that from jail. The idea is not that Mr. Rimmel permanently move from jail to a halfway house; the idea is that the court utilize the halfway house to allow him to move from jail to a

more permanent home. He could then adhere to social distancing guidelines and keep himself safe. Again, he can't do any of that from jail.

The district court's decision to prohibit this second-best option is unsupportable. The district court had no evidentiary support for its conclusion that jail is just as safe from coronavirus as a halfway house. None. As a result, the district court's finding is archetypal clear error. That is, the finding is "without any support in the record." See *United States v. Gardenhire*, 784 F.3d 1277, 1280 (9th Cir. 2015) (quoting *United States v. Fitch*, 659 F.3d 788, 797 (9th Cir. 2011)).

What's more, the court never made a finding—as it did for residence in Mexico—that the halfway house would be insufficient to assure Mr. Rimmel's return to court. In the district court's view, the problem with the halfway house was that it was as dangerous or more dangerous as jail, not that it wouldn't assure Mr. Rimmel's appearance. That is flatly inconsistent with § 3142, which nowhere permits a court to detain a person for his own safety.

**D. At the very least, this Court should remand for an evidentiary hearing.**

While Mr. Rimmel urges this Court to reverse and permit him to reside in Mexico or a halfway house, the Court cannot affirm the district court's order on the current record. The government did not contest Mr. Rimmel's bail review motion, and the district court never conducted a hearing or took evidence. In addition, the

district court's conclusory statement of reasons provides no evidentiary support for its ruling, even by reasonable inference.

If it does not reverse the district court's order, this Court must at least vacate remand to the district court for further proceedings to develop the record. Mr. Rimmel appreciates that the current circumstances require courts' quick action, but a district judge's uninformed gut feeling does not satisfy the requirements of due process or the prescriptions of the Bail Reform Act.

#### CONCLUSION

This Court should reverse the district court's order of denying Mr. Rimmel's bail review motion and permit him to live in Mexico or, in the alternative, at a halfway house approved by Pretrial Services. At the very least, this Court should remand to the district court to develop an evidentiary record.

Respectfully submitted,

Dated: March 27, 2020

*Michael Marks*

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CERTIFICATE OF COMPLIANCE

Neither the Federal Rules of Appellate Procedure nor the Ninth Circuit Rules specify a page limit or word limit for FRAP 9(a) memoranda. This memorandum, however, contains **5086** words, which complies with the 5200 word limit under Rule 27(d)(2)(A).

Respectfully submitted,

Dated: March 27, 2020

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CERTIFICATE OF RELATED CASES

Counsel is unaware of any related cases.

Respectfully submitted,

Dated: March 27, 2020

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# Addendum

United States Code Annotated  
Title 18. Crimes and Criminal Procedure (Refs & Annos)  
Part II. Criminal Procedure  
Chapter 207. Release and Detention Pending Judicial Proceedings (Refs & Annos)

18 U.S.C.A. § 3142

§ 3142. Release or detention of a defendant pending trial

Effective: December 23, 2008

Currentness

**(a) In general.**--Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be--

(1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;

(2) released on a condition or combination of conditions under subsection (c) of this section;

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

(4) detained under subsection (e) of this section.

**(b) Release on personal recognizance or unsecured appearance bond.**--The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a), unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

**(c) Release on conditions.**--(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person--

(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a); and

**(B)** subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person--

**(i)** remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

**(ii)** maintain employment, or, if unemployed, actively seek employment;

**(iii)** maintain or commence an educational program;

**(iv)** abide by specified restrictions on personal associations, place of abode, or travel;

**(v)** avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

**(vi)** report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

**(vii)** comply with a specified curfew;

**(viii)** refrain from possessing a firearm, destructive device, or other dangerous weapon;

**(ix)** refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

**(x)** undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

**(xi)** execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

**(xii)** execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title, or a failure to register offense under section 2250 of this title, any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

**(d) Temporary detention to permit revocation of conditional release, deportation, or exclusion.**--If the judicial officer determines that--

(1) such person--

(A) is, and was at the time the offense was committed, on--

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

(2) such person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, such person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

**(e) Detention.--(1)** If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

**(2)** In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that--

**(A)** the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

**(B)** the offense described in subparagraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and

**(C)** a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in subparagraph (A), whichever is later.

**(3)** Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed--

**(A)** an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

**(B)** an offense under section 924(c), 956(a), or 2332b of this title;

**(C)** an offense listed in section 2332b(g)(5)(B) of title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed;

**(D)** an offense under chapter 77 of this title for which a maximum term of imprisonment of 20 years or more is prescribed; or

**(E)** an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title.

**(f) Detention hearing.--**The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community--

**(1)** upon motion of the attorney for the Government, in a case that involves--

(A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code; or

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves--

(A) a serious risk that such person will flee; or

(B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

**(g) Factors to be considered.**--The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning--

**(1)** the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

**(2)** the weight of the evidence against the person;

**(3)** the history and characteristics of the person, including--

**(A)** the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

**(B)** whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

**(4)** the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

**(h) Contents of release order.**--In a release order issued under subsection (b) or (c) of this section, the judicial officer shall--

**(1)** include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

**(2)** advise the person of--

**(A)** the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

**(B)** the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

(i) **Contents of detention order.**--In a detention order issued under subsection (e) of this section, the judicial officer shall--

- (1) include written findings of fact and a written statement of the reasons for the detention;
- (2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;
- (3) direct that the person be afforded reasonable opportunity for private consultation with counsel; and
- (4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) **Presumption of innocence.**--Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

#### CREDIT(S)

(Added Pub.L. 98-473, Title II, § 203(a), Oct. 12, 1984, 98 Stat. 1976; amended Pub.L. 99-646, §§ 55(a), (c), 72, Nov. 10, 1986, 100 Stat. 3607, 3617; Pub.L. 100-690, Title VII, § 7073, Nov. 18, 1988, 102 Stat. 4405; Pub.L. 101-647, Title X, § 1001(b), Title XXXVI, §§ 3622 to 3624, Nov. 29, 1990, 104 Stat. 4827, 4965; Pub.L. 104-132, Title VII, §§ 702(d), 729, Apr. 24, 1996, 110 Stat. 1294, 1302; Pub.L. 108-21, Title II, § 203, Apr. 30, 2003, 117 Stat. 660; Pub.L. 108-458, Title VI, § 6952, Dec. 17, 2004, 118 Stat. 3775; Pub.L. 109-162, Title X, § 1004(b), Jan. 5, 2006, 119 Stat. 3085; Pub.L. 109-248, Title II, § 216, July 27, 2006, 120 Stat. 617; Pub.L. 109-304, § 17(d)(7), Oct. 6, 2006, 120 Stat. 1707; Pub.L. 110-457, Title II, §§ 222(a), 224(a), Dec. 23, 2008, 122 Stat. 5067, 5072.)

18 U.S.C.A. § 3142, 18 USCA § 3142

Current through P.L. 116-56.