**STATE OF MICHIGAN**

**IN THE OAKLAND COUNTY CIRCUIT COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

 Plaintiff-Appellee,

Circuit Court No. 73-016366 FX

-vs-

 **Hon. Denise Langford Morris**

**KEVIN COTTINGHAM**

 Defendant-Appellant.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_/

**EMERGENCY MOTION FOR BOND PENDING *MILLER* RESENTENCING**

 **NOW COMES** **KEVIN COTTINGHAM,** through his attorneys, the **STATE APPELLATE DEFENDER OFFICE**, by Jacqueline C. Ouvry and Claire Ward, and moves this Honorable Court to grant him an emergency bond pending the completion of his *Miller* resentencing proceeding. See *Miller v Alabama*, 567 US 460 (2012); MCL 769.25a. He states the following in support:

1. Kevin Cottingham is 64 years old and has served more than 46 years in prison. Mr. Cottingham was convicted of first-degree felony murder and sentenced to mandatory life without the possibility of parole for a crime he committed when he was 17 years old. Mr. Cottingham is now entitled to resentencing. *Miller v Alabama*, 567 US 460 (2012); MCL 769.25a.
2. On July 21, 2016, the prosecutor filed a motion requesting the imposition of a sentence of life without the possibility of parole against Mr. Cottingham. MCL 769.25a(4)(b). But for this motion, Mr. Cottingham would have been entitled to a term of years resentencing with a minimum term not exceeding 40 years. MCL 769.25a(4)(c). Mr. Cottingham’s resentencing is pending before this Court.
3. Mr. Cottingham makes this emergency motion for bond pending resolution of his resentencing proceeding because he is currently at high risk due to the novel coronavirus, COVID-19 outbreak and medical conditions which make him more vulnerable to the virus.

**COVID-19 is an unprecedented public health risk.**

1. As the Court knows, Governor Whitmer declared a State of Emergency in response to COVID-19 on March 10, 2020,[[1]](#footnote-1) and on March 23, 2020, the Governor issued a “stay at home” emergency executive order.[[2]](#footnote-2) Individuals incarcerated in the Michigan Department of Corrections are a vulnerable population and are in particular danger as the virus spreads within the prisons. At the time of this writing, one corrections officer in the Thumb Correctional Facility in Lapeer, MI and one prisoner at the Kinross Correctional Facility, in Kincheloe, MI had each tested positive for the virus.[[3]](#footnote-3)
2. On March 15, 2020, the Michigan Supreme Court issued Administrative Order No. 2020-1,[[4]](#footnote-4) urging all state courts to “take any . . . reasonable measures to avoid exposing participants in court proceedings, court employees, and the general public to the COVID-19 crisis.” The order further instructs courts “to take into careful consideration public health factors arising out of the present state of emergency” in considering conditions of release and probation. And, on March 19, 2020, acting under superintending control, the Supreme Court ordered trial courts to limit “access to courtrooms and other spaces to no more than 10 persons, including staff,…and limit court activities to only essential functions.”[[5]](#footnote-5)
3. Bond motions for in-custody defendants are an essential function of the court. The Court of Appeals recognized this in a March 23, 2020 Order vacating the trial court’s refusal to hear an emergency bond motion and remanding “to ensure immediate release on bond.” The Court reasoned that “considering the public health factors arising out of the public health emergency, the circuit court should have granted the defendant a personal bond.” See Exhibit A, Court of Appeals Order, *People v Ferguson,* Docket No. 353226 (March 23, 2020)(emphasis supplied in the attachment).
4. COVID-19 has already infected tens of thousands of people in the United States, including over one thousand in Michigan.[[6]](#footnote-6) It has killed hundreds of people in the United States and thousands of people worldwide, and continues to spread quickly and widely, currently doubling the number of deaths in the United States every few days.[[7]](#footnote-7)
5. Older people and people with underlying health conditions like heart disease, lung disease, or diabetes are at highest risk for serious complications or death from COVID-19. Centers for Disease Control, Coronavirus Disease 2019 (COVID-19), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (last accessed March 22, 2020, 4:50 PM E.T.).

**Prisoners are at significantly higher risk from COVID-19.**

1. During pandemics, prison facilities become “ticking time bombs” as “[m]any people crowded together, often suffering from diseases that weaken their immune systems, form a potential breeding ground and reservoir for diseases.” As Dr. Jaimie Meyer, an expert in public health in jails and prisons, recently explained, “the risk posed by COVID-19 in jails and prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.” See Exhibit B, Declaration of Dr. Jaimie Meyer (“Meyer Decl.”) ¶ 7 (Mar. 15, 2020).
2. The increased risk in prison facilities is due to a number of factors: the close proximity of individuals in those facilities; their reduced ability to protect themselves through social distancing; the lack of necessary medical and hygiene supplies ranging from hand sanitizer to protective equipment; ventilation systems that encourage the spread of airborne diseases; difficulties quarantining individuals who become ill; the increased susceptibility of the population in jails and prisons; the fact that jails and prisons normally have to rely heavily on outside hospitals that will become unavailable during a pandemic; and loss of both medical and correctional staff to illness. *Id.* ¶¶ 7-19.

**Mr. Cottingham is especially vulnerable due to his age and poor health.**

1. Mr. Cottingham is 64 years old and suffers from diabetes, hypertension, and sleep apnea. Mr. Cottingham is at high risk for serious respiratory complications or even death if he is infected with COVID-19. See Exhibit C, Selected MDOC medical records of Kevin Cottingham.
2. Mr. Cottingham takes nine daily medications for his conditions and regularly sees MDOC health care providers for chronic care visits. Exhibit C, Chronic Care Visit, 5/13/2019. Mr. Cottingham’s sleep apnea causes him to awaken throughout the night with symptoms of choking, gasping, and shortness of breath. Exhibit C, Sleep Study, 10/17/2012. Since 2012, he has slept with a full-face CPAP mask every night to manage the condition and is designated as at risk for heat-related illness since 2007. Exhibit C, Special Accommodation, 4/16/2019. His cardiovascular function is impaired due to high blood pressure. Exhibit C, Nurse Protocol 4/26/2019. These conditions are managed but place him at high risk of complications and death, if proper social-distancing is not exercised.
3. Even one of these conditions places Mr. Cottingham at high risk. Each additional chronic condition increases his risk of susceptibility exponentially. Older adults are more likely to become infected, more likely to require hospitalization, more likely to need intensive care and more likely to die from COVID-19 complications (8 of every 10 deaths in the United States is an older adult). See: <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications/older-adults.html> (accessed March 25, 2020).
4. Mr. Cottingham is currently housed at Macomb Correctional Facility. It is not possible for prisoners to maintain the necessary social distancing to prevent the spread of the virus and prisoner are not allowed to have hand sanitizer. Prisoners at Macomb congregate in large groups of approximately 100 people when in the chow hall and the yard, and in smaller groups in the TV rooms. At present, prisoners with symptoms of a cold are “quarantined” to their unit for five days but are free to move around the unit and are still housed with a roommate, who is not restricted.
5. On March 24, 2020, the federal Eastern District of Michigan, recognized that a prisoner’s asthma condition and detention in the Livingston County Jail created “danger to the Defendant [that is] dire.” Exhibit D, US v Knight, Eastern District of Michigan, Southern Division, March 24, 2020. The court granted release on motion of the defendant, without permitting a response from the United States, because “of the particular danger that the COVID-19 pandemic presents to detainees as determined by the CDC, and because of Defendant’s respiratory condition that makes him particularly vulnerable to this disease…amidst this growing public health emergency.” Exhibit D. Mr. Cottingham’s multiple conditions make him even more vulnerable in this crisis.

**This Court should grant Mr. Cottingham an emergency bond.**

1. This Court has the power to protect Mr. Cottingham from unnecessary health risks and to effectuate the recommendations of the Governor and the State Supreme Court to protect the public health. An emergency bond is warranted because Mr. Cottingham is currently serving an unconstitutional sentence in violation of his 8th Amendment right to be free from cruel and unusual punishment. He is entitled to resentencing and has been waiting to complete that resentencing for approximately four years. If he is resentenced to even the maximum term of years of 40-60 years, he is likely to be immediately discharged from prison.
2. Under *People v Giacolone*, 16 Mich App 352 (1969), consideration of bond pending appeal is focused on four relevant factors: a) the substantiality of the grounds for appeal; b) the risk to the administration of justice if bond is granted; c) the likelihood that Defendant will appear when required in response to the order of the Court; d) the potential harm to the community if Defendant is released on bond while the appeal is pending.
3. Similarly, MCL 770.9a(2) provides that a defendant convicted of an assaultive crime and sentenced to imprisonment may be released on bail if the court finds clear and convincing evidence that he is not likely to pose a danger to others and there is a substantial ground for appeal.
4. Mr. Cottingham’s appeal has obvious merit, as his current sentence is unconstitutional under *Miller* and *Montgomery*. He is entitled to resentencing both by Constitutional mandate and under MCL 769.25a.
5. Granting Mr. Cottingham bond pending the outcome of his resentencing hearing would not be a risk to the administration of justice. This case does not raise the prospect of witness tampering, which was the explicit concern addressed in *Giaccolone, supra*, where the defendant was an alleged mobster. Here, the witnesses have already testified at trial, more than 46 years ago. Mr. Cottingham has not had a violent infraction in the MDOC in more than 20 years, and has been misconduct-free for the last 5 years.
6. The likelihood that Mr. Cottingham will appear when required is high. He has already served 46 years in prison. He has strong support from family and friends and roots in Oakland County and he plans to live in Pontiac if released. Mr. Cottingham’s sister, Alicia R. Jones, lives in Rochester Hills, and remained in contact with Mr. Cottingham for many years. As a minister, she has witnessed character growth and deepening faith in her brother over years. She will support him if released with transportation for doctor’s appointments and an occasional dinner. Exhibit E, Letter of Alicia Jones. Mr. Cottingham has a Comprehensive Reentry Plan which will provide for his housing, employment, medical, and other needs in the community. See Exhibit F, Comprehensive Reentry Plan. Notably, Project Reentry staff have confirmed that Mr. Cottingham could leave prison with his CPAP machine, a supply of prescription medication, and connection to medical care in the community. The State Appellate Defender’s Office has committed to assisting him with his transition back to the community and meeting his needs if he is released.
7. There is clear and convincing evidence that Mr. Cottingham will not pose a threat to the community. He is 64 years old and has a number of chronic medical conditions which significantly increase his risk of serious complications or death due to COVID-19. He has served more than 46 years in prison and is currently serving an unconstitutional sentence and must be resentenced. He has had no history of violence in the MDOC in 20 years and no other misconduct violations in 5 years. He has a strong network of family and friends in Oakland County and plans to live in Pontiac if he is released.
8. This Court should order Mr. Cottingham’s release on his own personal recognizance given the clear and convincing evidence that he will not be a threat to the community and the unprecedented public health crisis recognized by the Michigan Supreme Court and the recent Order of Court of Appeals. See Exhibit A. Further, this Court may note that Mr. Cottingham is awaiting his *Miller* hearing because of the prosecutor’s motion seeking to re-impose life without parole. Under MCL 765.7, when a prosecutor appeals, a defendant “shall be permitted to post bail on his or her own recognizance” unless the trial court “determines and certifies” that “the character of the offense, the respondent, and the questions involved in the appeal” are such that bail is necessary. There is an analogy here because absent the prosecutor’s motion, Mr. Cottingham would have received a term of years sentence of not more than 40 years and would now be six years past his earliest release date.
9. Counsel has sought agreement for release of Mr. Cottingham from the prosecution through a request for withdrawal of their motion seeking a life without parole sentence on Thursday, March 19, 2020, via email, detailing the pandemic concerns, health conditions, and reentry plans outlined in this motion.[[8]](#footnote-8) In that same email, undersigned counsel indicated she would file this motion if agreement could not be reached. Counsel has served a copy of this motion on the prosecution via email on the same date it was delivered to this court.
10. Mr. Cottingham requests that this Court act immediately on this emergency motion and issue an Order without oral argument from the parties. In the alternative, if this Court wishes to conduct argument, counsel asks that guidelines of the MSC Order be implemented to permit arguments on this motion via telephone or video conferencing technology (Zoom). See Order 2020-08, *supra*. Undersigned counsel can best be reached at jouvry@sado.org to arrange a time for argument.

 **WHEREFORE**, Mr. Cottinghamasks that this Honorable Court act immediately on this emergency motion and grant him personal bond pending his upcoming *Miller* resentencing hearing.

 Respectfully submitted,

 **STATE APPELLATE DEFENDER OFFICE**

 

 BY:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 **JACQUELINE OUVRY (P58774)**

 **CLAIRE ALEXIS WARD (P83174)**

 3300 Penobscot Building

 645 Griswold

 Detroit, Michigan 48226

 (313) 256-9833

Dated: March 25, 2020

#  APPENDIX A Court of Appeals Order

# APPENDIX B Declaration of Dr. Jamie Meyer

# APPENDIX C Select Medical Records

# APPENDIX D Eastern District Order

# APPENDIX E Letter from Alicia R. Jones

# APPENDIX FComprehensive Reentry Plan

1. Executive Order 2020-04, Declaration of State of Emergency, available at [https://www.michigan.gov/whitmer/0,9309,7-387-90499\_90705-521576--,00.html](https://www.michigan.gov/whitmer/0%2C9309%2C7-387-90499_90705-521576--%2C00.html) . [↑](#footnote-ref-1)
2. Executive Order, 2020-21, available at: [https://www.michigan.gov/whitmer/0,9309,7-387-90499\_90705-522626--,00.html](https://www.michigan.gov/whitmer/0%2C9309%2C7-387-90499_90705-522626--%2C00.html) [↑](#footnote-ref-2)
3. Angie Jackson, “First Michigan Prisoner Tests Positive for Coronavirus,” Detroit Free Press, <https://www.freep.com/story/news/local/michigan/2020/03/23/first-prisoner-tests-positive-coronavirus/2896984001/?fbclid=IwAR1dRshgnjqlLlFjiIyll6krgc0BYfKrP7Etpk_OPj913UXD-HPCKIVSzzI> (last updated March 23, 2020, 1:31 PM ET); Paul Egan & Gina Kaufman, “Employee of Thumb Correctional Facility tests positive for coronavirus,” Detroit Free Press, <https://www.freep.com/story/news/local/michigan/2020/03/22/prison-employee-thumb-correctional-facility-coronavirus/2893942001/> (last updated March 22, 2020, 10:56 AM ET). [↑](#footnote-ref-3)
4. Available at <https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-03-15_FormattedOrder_AO2020-1.pdf>. [↑](#footnote-ref-4)
5. Supreme Court Order, available at: <https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-03-18_FormattedOrder_AO2020-2.pdf> [↑](#footnote-ref-5)
6. As of this writing, “[t]he coronavirus pandemic has sickened more than 382,000 people” worldwide and “at least 16,890 people have died.” NY Times, “Coronavirus Map: Tracking the Global Outbreak,” <https://nyti.ms/2t6WE75> (last updated March 24, 2020, 7:50 A.M. E.T). The United States has reported approximately 44,000 cases to date. *Id.* Michigan has recorded 1324 cases and 16 deaths, the fifth-highest number of cases of any state. NY Times, “Coronavirus in the U.S.: Latest Map and Case Count,” <https://nyti.ms/39jvJEY>, (last updated March 24, 2020, 7:50 A.M. E.T). [↑](#footnote-ref-6)
7. As of this writing, “[t]he number of known coronavirus cases in the United States continues to grow quickly. As of Tuesday morning, there have been at least 43,499 cases of coronavirus confirmed by lab tests and 537 deaths, according to a New York Times database.” NY Times, Coronavirus Map, *supra*. [↑](#footnote-ref-7)
8. In a prior communication with counsel, the prosecution agreed to accept service of documents and pleadings via email during the COVID-19 outbreak and expressed a preference for email communication. [↑](#footnote-ref-8)