

**STATE OF MICHIGAN**  
**IN THE COURT OF APPEALS**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

**Court of Appeals No.**

**Lower Court No. 73-016366 FX**

-vs-

**KEVIN COTTINGHAM**

Defendant-Appellant

---

**OAKLAND COUNTY PROSECUTOR**

Attorney for Plaintiff-Appellee

---

**JACQUELINE OUVRY (P71214)**

Attorney for Defendant-Appellant

---

**EMERGENCY APPLICATION FOR LEAVE TO APPEAL**

**STATE APPELLATE DEFENDER OFFICE**

**BY: Jacqueline Ouvry(P 71214 )**  
**Claire Alexis Ward (P83174)**  
**Assistant Defenders**  
3300 Penobscot Building  
645 Griswold  
Detroit, Michigan 48226  
(313) 256-9833  
[jouvry@sado.org](mailto:jouvry@sado.org)

**TABLE OF CONTENTS**

Index of Authorities ..... i

Statement of Jurisdiction ..... ii

Statement of Question Presented ..... iii

Statement of Facts ..... 1

    I.        The COVID-19 pandemic created unprecedented health risks for medically vulnerable prisoners and indefinite delay in our courts. While incarcerated, Mr. Cottingham is at grave risk due to his age and medical conditions, yet the appeal, which could result in his immediate discharge, cannot proceed. The trial court violated due process by denying his emergency motion seeking an appeal bond.....7

        a. Prisons create a significantly higher risk of spreading COVID-19 both within the prison and to the surrounding community. The more people incarcerated, the greater the risk.....11

        b. Mr. Cottingham is especially vulnerable to the disease due to his age and poor health. These same factors make him low risk to re-offend.....14

Summary and Relief ..... 23

**Index of Authorities**

**Cases**

*Betterman v Montana*, \_\_ US \_\_; 136 S Ct 1609, 1614; 194 L Ed 2d723 (2016).....18

*Miller v Alabama*, 567 US 460 (2012)..... 18

*Montgomery v Louisiana*, 136 S Ct 718 (2016)..... 18

*People v Giacalone*, 16 Mich App 352 (1969) ..... passim

*People v Levandoski*, 237 Mich App 612 (1999)..... 18

*People v Luckity*, 460 Mich 484 (1999)..... 7

, 496 Mich 133 (2014)..... 19

*People v Smith United States v Stephens*, No. 15-cr-95, \_\_ F Supp 3d \_\_, 2020 WL 1295155 (SDNY, March 19, 2020) ..... 18

**Constitutions, Statutes and Court Rules**

MCL 600.308(2)(c)..... ii

MCL 765.7 ..... 19

MCL 769.25a ..... 1, 7

MCL 769.25a(4)(c)..... 18

MCL 770.9a(2) ..... 16

MCR 7.203(B)(1) ..... ii

MCR 7.205(A)(1) ..... ii

MCR 7.209(F)(2)..... 10

### **Statement of Jurisdiction**

This Court has jurisdiction over any “interlocutory order from the circuit court” under MCL 600.308(2)(c). On March 26, 2020, Judge Denise Langford Morris of the Oakland County Circuit Court denied Kevin Cottingham’s Emergency Motion for Bond Pending a *Miller* Hearing. This Interlocutory Application for Leave to Appeal is being filed pursuant to MCR 7.203(B)(1) and MCR 7.205(A)(1), within 21 days of the trial court’s order. And, Mr. Cottingham requests, by simultaneous motion, immediate consideration of this appeal.

## Statement of Question Presented

- I. **The COVID-19 pandemic created unprecedented health risks for medically vulnerable prisoners and indefinite delay in our courts. While incarcerated, Mr. Cottingham is at grave risk due to his age and medical conditions, yet the appeal, which could result in his immediate discharge, cannot proceed. Did the trial court violate due process by denying his emergency motion seeking an appeal bond?**

Trial Court answers, "No".

Defendant-Appellant answers, "Yes".

## STATEMENT OF FACTS

The COVID-19 pandemic has reached Michigan and its prisons. The impact of this disease creates a crisis for our State, our courts, our prisons, our community, and our State's vulnerable individuals who are at greater risk. As a prisoner, Mr. Cottingham is at greater risk of infection. And as someone over the age of 60, who suffers from hypertension, diabetes, and sleep apnea, he is more vulnerable to the most severe complications from COVID-19. This combination increases his risk of death exponentially. Mr. Cottingham's situation is dire and requires court intervention.

### The Appeal

Following the United States Supreme Court decision in *Montgomery v Louisiana*, 136 S Ct 718 (2016), and pursuant to MCL 769.25a, Mr. Cottingham became eligible for resentencing. Mr. Cottingham had been sentenced to mandatory life without the possibility of parole following a conviction of first degree felony murder in 1974 for an offense he committed at age 17. *Judgment of Sentence, Appendix A*. In 2012, that sentence became unconstitutional following *Miller v Alabama*, 567 US 460 (2012).

Under MCL 769.25a, Mr. Cottingham is entitled to a minimum prison term not to exceed 40 years, unless the Prosecutor filed a motion seeking to re-impose life without parole.

On July 21, 2016, the prosecutor filed their motion asserting that he was the principal offender in the murder of Harold Richard McGhee. *Register of Actions*,

*Appendix B.* In January 2020, Mr. Cottingham filed a Motion to Dismiss in which he disputes that the record of the trial supports that assertion and presented new evidence in support of his assertion that he was a juvenile aider and abettor to felony murder, not the principal.<sup>1</sup> Base on court closures, detailed below, Mr. Cottingham’s Motion to Dismiss was adjourned indefinitely.

Today, Mr. Cottingham is 64 years old, and has served 46 years in the Michigan Department of Corrections, which means that should the prosecutor fail on their motion seeking life without parole, he would likely immediately discharge from prison. In the nearly four years that Mr. Cottingham has waited for resentencing this is his first motion seeking bond pending appeal.<sup>2</sup>

#### The State of Emergency

On December 31, 2019, the first case of COVID-19 was reported to a World Health Organization (WHO) Country Office in China.<sup>3</sup> COVID-19 is estimated to be 10 times more lethal than the seasonal flu virus.<sup>4</sup> It spreads from person to person through infectious droplets. The Centers for Disease Control (CDC) has identified

---

<sup>1</sup> *Id.*

<sup>2</sup> *Id.*

<sup>3</sup> World Health Organization, Rolling Updates on Coronavirus Disease 2019 (COVID-19), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> (last updated March 27, 2020).

<sup>4</sup> Noah Higgins-Dunn & Berkeley Lovelace, Jr., “Top US health official says the coronavirus is 10 times ‘more lethal’ than the seasonal flu,” CNBC, <https://www.cnbc.com/2020/03/11/top-federal-health-official-says-coronavirus-outbreak-is-going-to-get-worse-in-the-us.html> (last updated March 11, 2020, 4:31 PM ET).

older adults and those with chronic health conditions such as lung disease, heart disease, and diabetes as high risk groups for COVID-19 related complications, including death.<sup>5</sup> There are no vaccines or anti-viral medications for COVID-19. On March 11, 2020, WHO declared COVID-19 a global pandemic.

On March 10, 2020, the Governor of Michigan announced the State's first two cases of COVID-19 and declared a State of Emergency.<sup>6</sup> On March 13, 2020, President Donald J. Trump declared a national emergency. On March 23, 2020, the Governor of Michigan issued a "stay at home" emergency executive order.<sup>7</sup> As of March 31, 2020, the total number of confirmed COVID-19 cases in Michigan has risen to 6,508 with a death count of 197.<sup>8</sup> Since the first cases were reported less than a month ago, the number of cases in Southeastern Michigan has doubled every three days.<sup>9</sup>

#### The Closing of the Court, Halting the Appeal

On March 15, 2020, the Michigan Supreme Court issued Administrative Order

---

<sup>5</sup> Centers for Disease Control, Coronavirus Disease 2019 (COVID-19), "People who are at higher risk for severe illness," <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (last accessed March 31, 2020).

<sup>6</sup> 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/0,9309,7-387-90499_90705-521576--,00.html).

<sup>7</sup> 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/0,9309,7-387-90499_90705-522626--,00.html).

<sup>8</sup> NY Times, "Coronavirus in the U.S.: Latest Map and Case Count," <https://nyti.ms/39jvJEY> (last updated March 31, 2020, 8:05 A.M. E.T).

<sup>9</sup> Kristen Jordan Shamus & Kristi Tanner, "Southeast Michigan is burning!: Michigan's coronavirus case count doubles every 3 days," Detroit Free Press, <https://www.freep.com/in-depth/news/local/michigan/2020/03/28/michigan-coronavirus-surge-covid-19-case-count/2898574001/> (last updated March 29, 2020, 4:12 PM ET).



No. 2020-1, 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 specifically to “take into careful consideration public health factors arising out of the present state of emergency . . . in making pretrial release decisions, including in determining any conditions of release.”<sup>10</sup>

On March 16, 2020, the Oakland County Circuit Court adjourned all criminal calls, and closed for criminal matters, except for emergency bond motions, arraignments, jury trials currently scheduled and sentencing via video for in-custody defendants.<sup>11</sup> On March 23, 2020, the emergency order was continued indefinitely. Neither Mr. Cottingham’s motion nor his *Miller* hearing can proceed until the emergency orders are lifted.

Courts around the country have recognized the importance, both for community health and for the health of incarcerated populations, of releasing pre-trial detainees during this crisis.<sup>12</sup>

---

<sup>10</sup> See Administrative Order No. 2020-01 (March 15, 2020), available at: [https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08\\_2020-03-15\\_FormattedOrder\\_AO2020-1.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-03-15_FormattedOrder_AO2020-1.pdf).

<sup>11</sup> Press Release, “Oakland Circuit Court’s Response to the COVID-19 Outbreak” (March 16, 2020), available at: <https://www.oakgov.com/courts/circuit/Documents/press-releases/2020/pr-2020-03-occc-emergency-order.pdf>

<sup>12</sup> See, e.g., Ryan Autullo, *Travis County judges releasing inmates to limit coronavirus spread*, The Statesman (March 16, 2020), available at: <https://www.statesman.com/news/20200316/travis-county-judges-releasing-inmates-to-limit-coronavirus-spread?fbclid=IwAR3VKawwn3bwSLSO9jXBxXNRuaWd1DRLsCBFc-ZkPN1INWW8xnzLPvZYNO4>.

### Prisons: Places of Greater Risk

Mr. Cottingham is currently housed at Macomb Correctional Facility in Lenox Township, Michigan. As of this writing, at least 80 MDOC prisoners, including 27 at Macomb Correctional Facility, have tested positive for COVID-19.<sup>13</sup>

Public health experts have warned that the COVID-19 pandemic presents a particularly severe risk to incarcerated persons and to the attorneys and court and jail staff who interact with them.<sup>14</sup> While required for personal and public safety, social distancing precautions are virtually impossible in the carceral setting.<sup>15</sup>

### Mr. Cottingham's medical conditions

Mr. Cottingham is 64 years old and has several chronic medical conditions, including hypertension, diabetes, and sleep apnea. Mr. Cottingham receives chronic care, takes multiple medications, and sleeps with a full-face CPAP mask to manage these conditions. *Select MDOC Medical Records of Kevin Cottingham, Appendix C.* These specific conditions, in addition to his age, place him at high risk for severe

---

<sup>13</sup> See Michigan Department of Corrections, MDOC response to coronavirus (COVID-19) and preventative measures, <https://medium.com/@MichiganDOC/mdoc-takes-steps-to-prevent-spread-of-coronavirus-covid-19-250f43144337> (last accessed March 31, 2020 9AM ET).

<sup>14</sup> See Rich et al., *We Must Release Prisoners to Lessen the Spread of Coronavirus*, Washington Post (March 17, 2020), <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/>.

<sup>15</sup> See, e.g., Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047, 1047 (October 2007).

illness or death if he contracts COVID-19.<sup>16</sup>

Emergency Motion for Bond Pending *Miller* Resentencing

On March 25, 2020, Mr. Cottingham filed an Emergency Motion for Bond Pending *Miller* Resentencing setting forth the emergency pandemic in the state, the dangers to medically vulnerable persons in prison, and Mr. Cottingham's specific medical conditions, behavior, and comprehensive plan for release (including housing, transportation, and medications).<sup>17</sup> *Emergency Motion, Appendix D.*<sup>18</sup> On March 26, 2020, the Court denied this emergency motion without providing any reasoning. *Order, Appendix E.*

Mr. Cottingham asks this Honorable Court to grant his simultaneously filed motion for immediate consideration, grant consideration of this appeal, and remand for procedures to effectuate his release pending his *Miller* resentencing.

---

<sup>16</sup> Centers for Disease Control, Coronavirus Disease 2019 (COVID-19), "People who are at higher risk for severe illness," <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (last accessed March 31, 2020).

<sup>17</sup> *Appendix B.*

<sup>18</sup> As indicated in the body of the Emergency Motion, the following were attached as Exhibits and are also attached as Appendices in this appeal: Court of Appeals Order No. 353226; Declaration of Dr. Jamie Meyer; Select MDOC Medical Records for Kevin Cottingham; US v Knight, Eastern District of Michigan, Case No. 18-cr-20180-001; Letter from Alicia Jones; and Comprehensive Reentry Plan.

- I. **The COVID-19 pandemic created unprecedented health risks for medically vulnerable prisoners and indefinite delay in our courts. While incarcerated, Mr. Cottingham is at grave risk due to his age and medical conditions, yet the appeal, which could result in his immediate discharge, cannot proceed. The trial court violated due process by denying his emergency motion seeking an appeal bond.**

### **Standard of review**

“[I]n passing upon an application for bail on appeal filed with our Court, we do not review the trial judge's earlier exercise of his discretion in denying bail; rather we exercise our own independent discretion.”<sup>19</sup> Questions of law, including constitutional questions, are reviewed de novo.<sup>20</sup>

### **Issue Preservation**

Mr. Cottingham preserved this issue with an emergency motion for bond pending *Miller* resentencing. The motion was denied the following morning without reasoning.<sup>21</sup>

### **Argument**

Kevin Cottingham seeks leave to appeal the circuit court denial of his emergency motion for bond pending appeal. Mr. Cottingham is a juvenile lifer who has been eligible for resentencing pursuant to MCL 769.25a since 2016. By the same

---

<sup>19</sup> *People v Giacalone*, 16 Mich App 352, 355 (1969).

<sup>20</sup> See *People v Luckity*, 460 Mich 484, 488 (1999).

<sup>21</sup> See *Appendix B, E*.

statute, Mr. Cottingham is entitled to a term of years sentence, not to exceed a 40 year minimum term, unless the prosecutor files a motion seeking life without parole. The prosecutor filed their motion in 2016. Now, due to the COVID-19 pandemic, the courts are closed and proceedings related to Mr. Cottingham's resentencing are postponed indefinitely and Mr. Cottingham's health is at great risk.

Michigan, and our entire nation, are in the midst of a viral pandemic on a scale unknown in living memory. As the Court knows, Governor Whitmer declared a State of Emergency in response to COVID-19 on March 10, 2020<sup>22</sup> and on March 23, 2020<sup>23</sup> issued a "stay at home" emergency executive order. President Donald J. Trump declared a national emergency on March 13, 2020, and he has subsequently urged Americans not to gather in groups of more than 10 people until at least May.

The pandemic has reached the prisons. 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, at least 80 prisoners across the state have tested positive for COVID-19, including 27 at the Macomb Correctional facility where Mr. Cottingham is housed.<sup>24</sup>

Mr. Cottingham's age and health conditions place him at greater risk of

---

<sup>22</sup> 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/0,9309,7-387-90499_90705-521576--,00.html).

<sup>23</sup> 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/0,9309,7-387-90499_90705-522626--,00.html)

<sup>24</sup> See Michigan Department of Corrections, MDOC response to coronavirus (COVID-19) and preventative measures, <https://medium.com/@MichiganDOC/mdoc-takes-steps-to-prevent-spread-of-coronavirus-covid-19-250f43144337> (last accessed March 31, 2020 9AM ET).

contracting the virus during this pandemic and greater risk of severe complications and death. He is 64 years old and has served more than 46 years in prison for a crime committed when he was 17 years old. He currently suffers from diabetes, hypertension, and sleep apnea. The combination of his age and these conditions increase his risks exponentially. Based on these conditions and other evidence available to the trial court, Mr. Cottingham is neither at risk to commit violence nor is he a flight risk.

The pandemic has closed the courts for all but emergency business. Mr. Cottingham sought to dismiss the prosecutor's motion based on new evidence and support in the record that he was an aider and abettor, not the principal, to the murder. His motion to dismiss is adjourned indefinitely due to the pandemic and his emergency motion seeking bond pending *Miller* resentencing was denied without any reasoning.

Under these circumstances, the denial of an appeal bond violates due process. As this Court decided in *People v Giacalone*, 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. There is no record evidence these factors were given consideration here, as the

judge gave no reasons for denying bond pending appeal.<sup>25</sup> Yet, as this Court recognized in the *Giacalone* decision, questions regarding the substantiality of grounds for appeal should be resolved in favor of the defendant,<sup>26</sup> and appellate courts “should not deny bond unless we are convinced” that consideration of those factors requires denial of bond.<sup>27</sup> Given the direction of the *Giacalone* court, consideration of the four factors requires Mr. Cottingham’s release.

**1) COVID-19 is an unprecedented global health risk.**

COVID-19 has already infected hundreds of thousands of people in the United States, including over 6,500 in Michigan.<sup>28</sup> It has killed more than 3,000 people in the United States in a matter of weeks and thousands of people worldwide, and continues

---

<sup>25</sup> Further, MCR 7.209(F)(2) sets forth six (6) requirements for a criminal defendant for whom bond pending appeal is allowed after conviction. S/he shall promise in writing: (a) to prosecute the appeal to decision; (b) if the sentence is one of incarceration, to surrender himself or herself to the sheriff of the county ... if the sentence is affirmed on appeal or if the appeal is dismissed; (c) if the judgment or order appealed is other than a sentence of incarceration to perform and comply with the order of the trial court if it is affirmed on appeal or if the appeal is dismissed; (d) to appear in the trial court if the case is remanded for retrial or further proceedings or if a conviction is reversed and retrial allowed; (e) to notify the trial court clerk of a change of address. Were bond to be granted, under-signed counsel asserts that she has discussed these matters with Mr. Cottingham and he would attest to the same in writing.

<sup>26</sup> *Giacalone*, *supra* at 356, 357 n.13.

<sup>27</sup> *Id.* at 360-361.

<sup>28</sup> As of this writing. “[t]he coronavirus pandemic has sickened more than 796,000 people” worldwide and “at least 38,556 people have died.” NY Times. “Coronavirus Map: Tracking the Global Outbreak.” <https://nvti.ms/2t6WE75> (last updated March 31, 2020, 8:05 A.M. E.T). The United States has reported nearly 163,575 cases to date and 3,073 deaths. NY Times. “Coronavirus in the U.S.: Latest Map and Case Count.” <https://nvti.ms/39ivJEY> (last updated March 31, 2020, 8:05 A.M. E.T). Michigan has recorded 6,508 cases and 197 deaths, the fourth-highest number of cases of any state. *Id.*

to spread quickly and widely, currently doubling the number of deaths in the United States every few days. 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.<sup>29</sup>

The best available public health advice involves preventing the spread of COVID-19 by regularly washing hands, social distancing, and self-quarantining when necessary.<sup>30</sup> Social distancing requires “remaining out of congregate settings, avoiding mass gatherings, and maintaining distance (approximately 6 feet or 2 meters) from others when possible.”<sup>31</sup>

Public health experts have warned that the COVID-19 pandemic presents a particularly severe risk to incarcerated persons and to the attorneys and court and jail staff who interact with them.<sup>32</sup>

- a. **Prisons create a significantly higher risk of spreading COVID-19 both within the prison and to the surrounding community. The more people incarcerated, the greater the risk.**

---

<sup>29</sup> Centers for Disease Control, Coronavirus Disease 2019 (COVID-19), “People who are at higher risk for severe illness,” <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (last accessed March 31, 2020).

<sup>30</sup> See Michigan Department of Health and Human Services, Community Mitigation Strategies, [https://www.michigan.gov/coronavirus/0,9753,7-406-98178\\_98155-521467--,00.html](https://www.michigan.gov/coronavirus/0,9753,7-406-98178_98155-521467--,00.html).

<sup>31</sup> Centers for Disease Control, Interim U.S. Guidance for Risk Assessment and Public Health Management of Persons with Potential Coronavirus Disease 2019 (COVID-19) Exposures (March 7, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html>.

<sup>32</sup> See Rich et al., *We Must Release Prisoners to Lessen the Spread of Coronavirus*, Washington Post (March 17, 2020), <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/>



Social distancing precautions are virtually impossible in the carceral setting.<sup>33</sup> In jail or prison, “[t]he probability of transmission of potentially pathogenic organisms is increased by crowding, delays in medical evaluation and treatment, rationed access to soap, water, and clean laundry, [and] insufficient infection-control expertise”.<sup>34</sup>

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.” *Declaration of Dr. Jaimie Meyer (“Meyer Decl.”) (Mar. 15, 2020), Appendix F.* 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.”<sup>35</sup>

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

---

<sup>33</sup> See, e.g., Bick, *Infection Control in Jails and Prisons*, 45 *Clinical Infectious Diseases* 1047, 1047 (October 2007).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

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.<sup>36</sup>

The Michigan Supreme Court has acknowledged the carceral crisis and instructed trial courts specifically to “take into careful consideration public health factors arising out of the present state of emergency . . . in making pretrial release decisions, *including in determining any conditions of release.*”<sup>37</sup>

This Court recognized the emergency in a March 23, 2020 Order vacating the trial court’s refusal to hear an emergency pre-trial 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 Order, *People v Ferguson*, Court of Appeals Docket No. 353226 (March 23, 2020), attached as *Appendix G*. Additionally, this Court granted an appeal bond on March 31, 2020, finding the trial court abused its discretion in denying defendant’s bond during this crisis where courts are mandated to consider public health factors arising out of the COVID-19, and the Court ordered immediate release subject to the conditions in MCR 7.209(F)(2). Order, *People v Calloway*, Court of Appeals Docket No. 349870 (March 31, 2020), also attached in *Appendix G*.

---

<sup>36</sup> *Id.*

<sup>37</sup> See Administrative Order No. 2020-01 (March 15, 2020) [https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08\\_2020-03-15\\_FormattedOrder\\_AO2020-1.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-03-15_FormattedOrder_AO2020-1.pdf). (emphasis supplied).

Courts around the state and country are recognizing the importance, both for community health and for the health of incarcerated populations, of releasing pre-trial detainees during this crisis.<sup>38</sup> As one court recently explained in ordering a pre-trial detainee released, “[t]he more people we crowd into [a] facility, the more we’re increasing the risk to the community.”<sup>39</sup>

**b. Mr. Cottingham is especially vulnerable to the disease due to his age and poor health. These same factors make him low risk to re-offend.**

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.<sup>40</sup>

Mr. Cottingham takes nine daily medications for his conditions and regularly sees MDOC health care providers for chronic care visits.<sup>41</sup> Mr. Cottingham’s sleep apnea causes him to awaken throughout the night with symptoms of choking, gasping, and shortness of breath.<sup>42</sup> 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

---

<sup>38</sup> See, e.g., Autullo, *Travis County Judges Releasing Inmates to Limit Coronavirus Spread*, *The Statesman* (March 16, 2020), <https://www.statesman.com/news/20200316/travis-county-judges-releasing-inmates-to-limit-coronavirus-spread?fbclid=IwAR3VKawwn3bwSLSO9jXBxXNRuaWd1DRLsCBFc-ZkPN1INWW8xnzLPvZYNO4>; Anderson, *Wayne County Officials Weigh Releasing Jail Inmates Vulnerable to Coronavirus*, *Detroit Free Press* (March 18, 2020), <https://www.freep.com/story/news/2020/03/18/wayne-county-jail-inmate-release-coronavirus/2864302001/>.

<sup>39</sup> *United States v Stephens*, No. 15-cr-95, \_\_\_ F Supp 3d \_\_\_, 2020 WL 1295155, \*2 (SDNY, March 19, 2020), quoting *United States v Reihan*, No. 20-cr-68 (EDNY, March 12, 2020).

<sup>40</sup> See Selected MDOC medical records of Kevin Cottingham, *Appendix C*.

<sup>41</sup> *Appendix C*, Chronic Care Visit, 5/13/2019.

<sup>42</sup> *Appendix C*, Sleep Study, 10/17/2012.

2007.<sup>43</sup> His cardiovascular function is impaired due to high blood pressure.<sup>44</sup> These conditions are managed but place him at high risk of complications or death if he contracts COVID-19.

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.<sup>45</sup> Eight of every 10 deaths from COVID-19 in the United States is an older adult. *Id.*<sup>46</sup>

Mr. Cottingham is housed at Macomb Correctional Facility, which now has 27 confirmed cases of COVID-19.<sup>47</sup> It is not possible for prisoners to maintain the necessary social distancing to prevent the spread of the virus and prisoners 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 the time this motion was filed in the circuit court, prisoners with symptoms of a cold were “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.

On March 24, 2020, the federal District Court for the Eastern District of Michigan recognized that a prisoner’s asthma and detention in the Livingston County

---

<sup>43</sup> *Appendix C*, Special Accommodation, 4/16/2019.

<sup>44</sup> *Appendix C*, Nurse Protocol 4/26/2019.

<sup>45</sup> See Centers for Disease Control, Coronavirus Disease 2019 (COVID-19), “Older Adults,” <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications/older-adults.html> (last accessed March 31, 2020).

<sup>46</sup> *Id.*

<sup>47</sup> Michigan Department of Corrections, MDOC response to coronavirus (COVID-19) and preventative measures, <https://medium.com/@MichiganDOC/mdoc-takes-steps-to-prevent-spread-of-coronavirus-covid-19-250f43144337> (last accessed March 31, 2020 9AM ET).

Jail created “danger to the Defendant [that is] dire.” Order, *United States v Knight*, Eastern District of Michigan, March 24, 2020, attached as *Appendix H*. The court granted release on motion of the defendant, without permitting a response from the prosecution, 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.”<sup>48</sup>

It is important to note that the *Knight* Court found that asthma alone created a dire danger to a prisoner. Mr. Cottingham’s age and multiple health conditions create risk that is extreme in this crisis. By forcing Mr. Cottingham to remain incarcerated, where he cannot follow medical advice to prevent the spread of the virus, the circuit court not only jeopardized his health, and his very life, but also ignored the fact that every unnecessary body in the prison poses an increased risk to the health of other inmates and MDOC staff.<sup>49</sup>

**2) Mr. Cottingham is neither at risk of violent behavior nor a flight risk.**

In addition to the *Giacolone* factors, 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. Mr. Cottingham is neither at risk for violent behavior nor a flight risk.

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

---

<sup>48</sup> *Id.*

<sup>49</sup> See *Stephens, supra*, 2020 WL 1295155, \*2.

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 five years. Mr. Cottingham's age, poor health, and lengthy record of good behavior establish that he is unlikely to engage in violence.

The likelihood that Mr. Cottingham will appear when required is high. 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. *Letter of Alicia Jones, attached as Appendix I.* Mr. Cottingham has a Comprehensive Reentry Plan which will provide for his housing, employment, medical, and other needs in the community. *Comprehensive Reentry Plan, attached as Appendix J.* 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.

If released, Mr. Cottingham will appear for further proceedings as ordered. He has transportation assistance. He has great interest in the outcome of these proceedings, not only in the possibility of obtaining actual discharge from his sentence, but because he is litigating the issue of his culpability (whether he was the principal in the murder as alleged by the prosecution or a juvenile aider and abettor, as the existing record and new evidence suggest).

**3) Under principles of due process, both the substantial grounds for appeal and the administration of justice require Mr. Cottingham's release.**

While there are no speedy trial rights that apply after conviction, a defendant does retain a due process right to liberty, though it is diminished.<sup>50</sup> In *People v Smith*, 496 Mich 133 (2014), the Michigan Supreme Court recognized that a delay in sentencing could prejudice the defendant. Further, this Court has recognized the government delay in executing sentence implicates due process and may lead to the government forfeiting its right to implement the defendant's sentence.<sup>51</sup> Each of these cases demonstrate that some due process liberty interest continues following conviction.

In 1974, Mr. Cottingham was convicted and sentenced to mandatory life in prison without possibility of parole for an offense he committed when he was 17 years old. That sentence became unconstitutional in 2016 via *Miller v Alabama*, 567 US 460 (2012) and *Montgomery v Louisiana*, 136 S Ct 718 (2016), as a violation of his 8th Amendment right to be free from cruel and unusual punishment. Under MCL 769.25a(4)(c), he is entitled to resentencing and entitled to a sentence not to exceed a 40-year minimum term if a term of years sentence is imposed. There is no question that substantial appellate questions are involved as the United States Supreme Court and the Michigan Legislature recognized the original sentence is unconstitutional.

Mr. Cottingham has served 46 years in prison, and since the prosecution filed a motion on July 21, 2016 seeking to re-impose life without parole, he has waited nearly

---

<sup>50</sup> *Betterman v Montana*, \_\_\_ US \_\_; 136 S Ct 1609, 1614; 194 L Ed 2d723 (2016).

<sup>51</sup> *People v Levandoski*, 237 Mich App 612 (1999).

four years for his resentencing. If he is resentenced to even the maximum term of years of 40-60 years, he is likely to be immediately discharged from prison.

Following the prosecutor's motion, Mr. Cottingham is entitled to a *Miller* resentencing hearing to ensure that the court considers his youth, its hallmark features, and any another relevant information when imposing sentence. No appellate court has addressed whether this action constitutes a prosecutor appeal. But, 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.

Due to the COVID-19 pandemic Mr. Cottingham cannot proceed in seeking resentencing. Prior to the pandemic he filed a motion seeking to dismiss the prosecutor's motion seeking life without parole.<sup>52</sup> Mr. Cottingham asserted that the record and new evidence establish that he is an aider and abettor to felony murder, not the principal, and not possessing the intent to kill. As a matter of law, Mr. Cottingham is less culpable and not the worst of the worst. Neither this motion nor any *Miller* hearing can be heard during the pandemic. The courts are closed for all but emergency motions in pending criminal cases.

---

<sup>52</sup> *Appendix B*.



On March 15, 2020, the Michigan Supreme Court issued Administrative Order No. 2020-1, noted *supra*, which urged 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.”<sup>53</sup> Similarly, Oakland County has suspended all motions precisely because the COVID-19 pandemic has been declared an emergency and renders large congregations of people dangerous to everyone present and to the community at large.<sup>54</sup>

Mr. Cottingham is prejudiced by the delay caused by this pandemic. And, 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 *Giacalone*, *supra*, where the defendant was an alleged mobster. Here, the witnesses have already testified at trial, more than 46 years ago.

Release would serve the administration of justice, given the due process concerns involved: 1) Mr. Cottingham is serving an unconstitutional sentence; 2) his

---

<sup>53</sup> Supreme Court Order, available at: [https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-adminmatters/Administrative%20Orders/2020-08\\_2020-03-18\\_FormattedOrder\\_AO2020-2.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-adminmatters/Administrative%20Orders/2020-08_2020-03-18_FormattedOrder_AO2020-2.pdf).

<sup>54</sup> Press Release, “Oakland Circuit Court’s Response to the COVID-19 Outbreak” (March 16, 2020), available at: <https://www.oakgov.com/courts/circuit/Documents/press-releases/2020/pr-2020-03-occc-emergency-order.pdf>.

appellate issues are substantial and were he to succeed, he would be eligible for immediate discharge; and 3) his case cannot proceed while the circuit courts are closed. Continued incarceration poses grave personal risk to Mr. Cottingham and each additional incarcerated body poses an increased risk to the community at large.

The *Giacalone* court recognized that “bail is basic to our system of law” and questions regarding whether an appeal raises substantial issues may be a matter of opinion, but “[d]oubts whether [bail] should be granted or denied should always be resolved in favor of the defendant.”<sup>55</sup>

**4) The trial court violated due process by denying bond in these circumstances.**

In sum, by failing to take seriously the exigencies and health implications of the COVID-19 pandemic to Mr. Cottingham and to the community in denying Mr. Cottingham’s emergency motion for bond pending appeal, the circuit court violated the principles of due process, particularly because the court did so without providing reasons.

Under *Giacalone*: 1) “[t]he fact that the defendant has been convicted is not always a legally relevant reason for denying bail on appeal;”<sup>56</sup> and 2) if there is a substantial appeal “we should not deny bond unless we are convinced that bail should be denied because of the danger of flight, potential of harm to the community or risk

---

<sup>55</sup> *Giacalone, supra*, 356, 357 n. 13

<sup>56</sup> *Giacalone, supra* at 359.

to the proper administration of justice.”<sup>57</sup> The *Giacalone* court remanded for release.

The record here establishes that Mr. Cottingham has a substantial appeal, that in this unprecedented pandemic the public health and safety of the community would be protected by release, and in light of indefinite delays the proper administration of justice requires release.

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. Mr. Cottingham should be released on his own personal recognizance forthwith to await his resentencing proceedings in the circuit court.

---

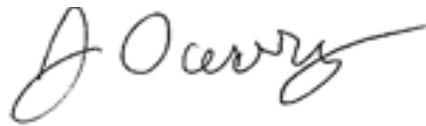
<sup>57</sup> *Id.* at 360-361.

**Summary and Relief**

**WHEREFORE**, for the foregoing reasons, Mr. Cottingham asks that this Honorable Court grant his simultaneously filed motion for immediate consideration, grant consideration of this appeal, and remand to the Circuit Court for proceedings to effectuate Mr. Cottingham's immediate release on personal bond pending his upcoming *Miller* resentencing hearing.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**



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

**JACQUELINE OUVRY (P71214)**  
**CLAIRE ALEXIS WARD (P83174)**  
3300 Penobscot Building  
645 Griswold  
Detroit, Michigan 48226  
(313) 256-9833  
[jouvry@sado.org](mailto:jouvry@sado.org)

Dated: April 1, 2020