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11 UNITED STATES DISTRICT COURT  
12 DISTRICT OF NEVADA

13 Rickie Slaughter,

14 Petitioner,

15 v.

16 Renee Baker, et al.,

17 Respondents.

Case No. 3:16-cv-00721-RCJ-WGC

**Emergency motion<sup>1</sup> for release  
pending decision due to risks of  
infection by COVID-19**

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27 <sup>1</sup> A declaration in compliance with L.R. 7-4(a) is attached to this motion as  
Petitioner's Exhibit ("PEX.") 269.

## INTRODUCTION

As the novel coronavirus sweeps the country, Mr. Slaughter's current incarceration has become potentially deadly. Public health experts have expressed substantial concerns about the virus spreading widely throughout American jails and prisons, posing a severe risk to the health of some of the most vulnerable inmates in custody. The situation at Saguaro Correctional Center in Eloy, Arizona, where Mr. Slaughter is currently housed, appears especially dire. Mr. Slaughter therefore faces an imminent danger of contracting COVID-19—and because he has high blood pressure, he falls within a high risk category for negative outcomes if he catches the illness.

Given these risks, Mr. Slaughter respectfully requests the Court order him released from custody pending a decision on the merits of his petition, or pending the administration of an effective vaccine for COVID-19, whichever comes first. The Court has the inherent authority to order habeas petitioners under Section 2254 released from custody pending a decision on the merits. Release is especially appropriate when (1) the petitioner has a strong chance of success on the merits, and (2) the petitioner would face substantial hardship from prolonged incarceration. Mr. Slaughter meets both prongs. His claims—especially his *Brady* claims in Ground Eleven, and his related *Strickland* claims—have a high probability of success. Meanwhile, this once-in-a-century pandemic, which seems poised to overrun Saguaro, qualifies as the sort of extraordinary circumstance that supports release. The Court should therefore order Mr. Slaughter released now.

## ARGUMENT

### **I. The Court can order a petitioner released pending a merits decision in exceptional cases.**

Federal district courts have the inherent authority to order petitioners released pending a decision on the merits of their habeas petitions, and release is

1 appropriate in cases with a high chance of success on the merits and where special  
2 circumstances exist.

3 The Ninth Circuit addressed pre-decision release in *In re Roe*, 257 F.3d 1077  
4 (9th Cir. 2001). There, the Court declined to explicitly hold a federal district court  
5 can order a petitioner released on bail pending a decision. *Id.* at 1080 (“We need not,  
6 and specifically do not, resolve this issue today.”). But the Court suggested release  
7 may be warranted in “an extraordinary case involving special circumstances or a high  
8 probability of success.” *Id.* (cleaned up); *see also Aronson v. May*, 85 S.Ct. 3, 5 (1964)  
9 (Douglas, J., in chambers) (stating, in a Section 2255 case where the district court  
10 denied relief, a petitioner must show “substantial questions presented by the appeal”  
11 along with “some circumstances making this application exceptional and deserving  
12 of special treatment in the interests of justice”); *Land v. Deeds*, 878 F.2d 318, 318 (9th  
13 Cir. 1989) (“Bail pending a decision in a habeas case is reserved for extraordinary  
14 cases involving special circumstances or a high probability of success.”).

15 Every other circuit court of appeals to consider the issue has explicitly held a  
16 federal district court can order release pending decision. *See Hall v. San Francisco*  
17 *Superior Court*, Case No. C 09-5299 PJH, 2010 WL 890044, at \*2 (N.D. Cal. Mar. 8,  
18 2010) (collecting “overwhelming authority”). For example, the Second Circuit has  
19 authorized district courts to order release when “the habeas petition raises substan-  
20 tial claims and [] extraordinary circumstances exist that make the grant of bail nec-  
21 essary to make the habeas remedy effective.” *Mapp v. Reno*, 241 F.3d 221, 226 (2d  
22 Cir. 2001) (cleaned up). Similarly, the Eighth Circuit allows release when the peti-  
23 tioner has “a substantial federal constitutional claim” and can show “some circum-  
24 stance making the request exceptional and deserving of special treatment in the in-  
25 terests of justice.” *Martin v. Solem*, 801 F.2d 324, 329 (8th Cir. 1986) (cleaned up).  
26 *Cf.* Fed. R. App. P. 23(b), (c) (allowing judges to order release of petitioners pending  
27 a post-decision appeal).

1 Like those out-of-circuit decisions, district courts within the Ninth Circuit (in-  
2 cluding within this district) have found the authority to order petitioners released  
3 pending decision. For example, in *Hall*, the court held it could release a petitioner  
4 who showed a high probability of success, along with special circumstances. 2010 WL  
5 890044 at \*3-\*4. Decisions from this Court are similar. *See, e.g., Braunstein v. Cox*,  
6 Case No. 3:11-cv-00587-LRH, 2011 WL 6812548, at \*2 (D. Nev. Dec. 27, 2011).  
7 There's some authority suggesting a petitioner can secure release by making either  
8 showing—i.e., *either* a substantial chance of success on the merits *or* special circum-  
9 stances (*compare Roe*, 257 F.3d at 1080 (using the disjunctive “or”); *and Kerestes v.*  
10 *California*, Case No. 2:15-cv-00545-MCE-ACP, 2017 WL 735736, at \*2 (E.D. Cal. Feb.  
11 24, 2017); *with Hall*, 2010 WL 890044 at \*3-\*4)—but either way a strong showing on  
12 both prongs provides the most compelling case for pre-decision release.

13 A petitioner's poor health can qualify as an exceptional circumstance support-  
14 ing pre-decision release, especially when the prison system is ill-equipped to handle  
15 the issue. *See, e.g., Roe*, 257 F.3d at 1081; *United States v. Mett*, 41 F.3d 1281, 1282  
16 n. 4 (9th Cir. 1994) (stating, in a Section 2255 case, that “[s]pecial circumstances in-  
17 clude a serious deterioration of health while incarcerated”) (cleaned up); *Landano v.*  
18 *Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992) (citing an earlier case involving “an ad-  
19 vanced diabetic who was . . . rapidly progressing toward total blindness”) (cleaned  
20 up); *Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972) (suggesting an “exigency of  
21 circumstances . . . with regard to prisoner's health” can warrant release pending de-  
22 cision) (cleaned up); *Montue v. Stainer*, No. 1:14-CV-01231-AWI, 2014 WL 6892692,  
23 at \*3 (E.D. Cal. Dec. 4, 2014) (stating release may be warranted if a petitioner  
24 “demonstrates a health exigency that cannot be appropriately addressed in prison”);  
25 *Hall*, 2010 WL 890044 at \*13 (suggesting health issues may qualify if “treatment is  
26 unavailable to [the petitioner] through his custodian” or “he has been denied medical  
27

1 care while in custody”); *Puertas v. Overton*, 272 F. Supp. 2d 621, 631 (E.D. Mich. 2003)  
2 (granting release based on a “dire health condition”).

3 If a petitioner has shown a substantial chance of success on the merits and a  
4 special circumstance, a court may also choose to consider whether the petitioner poses  
5 a “risk of flight and danger to the community if he were to be released.” *Montue*, 2014  
6 WL 6892692 at \*3.

7 **II. The Court should release Mr. Slaughter pending a decision on his**  
8 **petition.**

9 The Court should exercise its authority in this case to order Mr. Slaughter re-  
10 leased pending a final decision on the merits of his petition. Mr. Slaughter has strong  
11 claims for relief; the recent outbreak of COVID-19 (and the possibility it’s already  
12 spreading throughout Saguaro) poses an exceptionally serious risk to Mr. Slaughter,  
13 who falls within a high-risk category for negative outcomes from infection; and Mr.  
14 Slaughter poses little risk of flight or danger to the community. The Court should  
15 therefore order Mr. Slaughter released now.

16 **A. Mr. Slaughter has a high probability of success on the merits.**

17 Mr. Slaughter’s third amended petition contains multiple claims and sub-  
18 claims, each of which is a winning claim for relief. For the purposes of this motion,  
19 Mr. Slaughter focuses on two types of claims: claims involving the second photo  
20 lineup, and claims involving his alibi.

21 **1. The State suppressed the outcome of the second photo**  
22 **lineup.**

23 The first set of claims involves the second photo lineup. The State prosecuted  
24 Mr. Slaughter for allegedly participating in a two-man home invasion. Soon after the  
25 crime, the lead detective in the case, Detective Prieto, got a tip from an informant  
26 that Mr. Slaughter was involved (there’s no way to gauge the reliability of the tip,  
27 because Mr. Slaughter has never been able to find out whom the informant was).  
Detective Prieto put together a first photo lineup with Mr. Slaughter’s picture in it.

1 He used what appear to be five jail booking photos as filler photos, but the photo of  
2 Mr. Slaughter was a different photo, which the police probably took when he was out  
3 of custody. For that reason and others, the first photo lineup was impermissibly sug-  
4 gestive; Mr. Slaughter describes the suggestive nature of this photo lineup in Ground  
5 One of the third amended petition. Detective Prieto showed the lineup to seven vic-  
6 tims and witnesses; four purported to identify Mr. Slaughter. Three of the four ulti-  
7 mately identified Mr. Slaughter in court during trial, and the State presented evi-  
8 dence of the fourth witness's out-of-court identification.

9 After the police arrested Mr. Slaughter, Detective Prieto began to suspect an-  
10 other individual, Jaquan Richard, of being the other participant in the home invasion.  
11 Detective Prieto put together a second photo lineup with Mr. Richard's photo, and he  
12 showed the second lineup to at least the six victims who were in the home. None of  
13 them identified Mr. Richard. But unbeknownst to Detective Prieto, the second photo  
14 lineup *also* had a photograph of Mr. Slaughter in it as a filler photo—indeed, it was  
15 his booking photo from his arrest in this case (just a few days after the home inva-  
16 sion). The relevant police report said none of the witnesses identified Mr. Richard  
17 from the second photo lineup, but it didn't say whether any of the witnesses identified  
18 *Mr. Slaughter* (or any of the other filler photos) from the lineup.

19 The prosecution disclosed documents regarding the second photo lineup to the  
20 defense but didn't disclose the outcome of the lineup. At a relevant pre-trial hearing,  
21 the defense suggested none of the witnesses identified Mr. Slaughter from the lineup.  
22 The prosecutor (Marc DiGiacomo) disputed the suggestion, stating it would take a  
23 “giant leap . . . to say Rickie Slaughter wasn't picked out of those photo lineups.” ECF  
24 No. 18-13 (PEX. 126) at 10.

25 After his trial, Mr. Slaughter filed various documents raising issues about the  
26 second photo lineup, including a post-conviction petition alleging his trial attorneys  
27 ineffectively failed to elicit evidence about the outcome of the second photo lineup.

1 The State filed a response, arguing that if the trial attorneys had tried to bring up  
2 the subject, the witnesses might've testified "they did recognize" Mr. Slaughter from  
3 the lineup. ECF No. 26-16 (PEX. 229) at 12.

4 In federal court, Mr. Slaughter sought discovery to figure out whether, in fact,  
5 anyone identified him from the second photo lineup. He deposed Detective Prieto,  
6 who testified none of the witnesses identified him from the second photo lineup. ECF  
7 No. 41-5 (PEX. 253) at 89-90. Mr. Slaughter then deposed Mr. DiGiacomo (the lead  
8 prosecutor). Mr. DiGiacomo's testimony suggested at least one (probably only one)  
9 witness supposedly noticed Mr. Slaughter in the second photo lineup. *See* ECF No.  
10 65-1 (PEX. 262) at 71-90, 197-203. Under that version of events, the witness appar-  
11 ently declined to mention Mr. Slaughter's presence in the second photo lineup to De-  
12 tective Prieto during the lineup viewing, but the witness nonetheless told Mr. DiGia-  
13 como about it later at a pre-trial meeting. The rest of the witnesses apparently didn't  
14 notice Mr. Slaughter in the second photo lineup. Mr. DiGiacomo admitted the non-  
15 identifications were exculpatory and agreed he consciously declined to disclose the  
16 outcome of the lineup to the defense. *Id.* at 121-24.

17 There's some tension between Detective Prieto's testimony (that none of the  
18 witnesses identified Mr. Slaughter from the second photo lineup) and Mr. DiGia-  
19 como's testimony (that one of the witnesses recognized, but apparently declined to  
20 identify, Mr. Slaughter from the second photo lineup). As Mr. Slaughter's third  
21 amended petition argues at length (ECF No. 64 at 66-70), Mr. DiGiacomo's testimony  
22 isn't believable, and it's more likely than not that none of the witnesses recognized  
23 Mr. Slaughter in the second photo lineup. In any event, even viewing both Detective  
24 Prieto and Mr. DiGiacomo's testimony in the light most favorable to the State, it ap-  
25 pears only one of the witnesses (probably Ivan Young) noticed Mr. Slaughter in the  
26 second photo lineup. That means five out of the six failed to identify him in the second  
27

1 photo lineup—which was a non-suggestive lineup—in contrast to the four out of seven  
2 who purported to identify him in the first (suggestive) photo lineup.

3 **2. The State suppressed some evidence, and trial counsel**  
4 **failed to present other evidence, about an alibi.**

5 At trial, Mr. Slaughter pursued an alibi defense: around the time of the crime,  
6 he was halfway across town, picking up his girlfriend (Tiffany Johnson) from work.  
7 The version of the alibi the defense attorneys presented at trial was lackluster, in  
8 part because the State failed to disclose relevant information, and in part because the  
9 attorneys failed to present relevant evidence in their possession.

10 The first step in the alibi was determining when the suspects left the crime  
11 scene. The best evidence of that turned on when Jermaun Means (one of the victims)  
12 called 911, since Mr. Means called the police roughly contemporaneously with the  
13 suspects leaving. The State didn't disclose any records memorializing when that call  
14 took place. Through the federal discovery process, Mr. Slaughter received proof the  
15 call came in to the North Las Vegas Police Department at 7:11 p.m. *See* ECF No. 41-  
16 2 (PEx. 250); ECF No. 41-5 (PEx. 253) at 102; ECF No. 65-1 (PEx. 262) at 141-54.  
17 About two minutes into the call, Mr. Means tells the operator the suspects left about  
18 five minutes ago (i.e., about three minutes before the call started). If Mr. Means's  
19 estimate was accurate, then the suspects would've left at about 7:08 p.m. But the  
20 defense didn't present this evidence at trial and didn't make these arguments. In  
21 fact, when they proposed to tell the jury during closing arguments that the call came  
22 in at 7:11 p.m., Mr. DiGiacomo objected, and the court sustained the objection; the  
23 attorneys were able to say only that the call came in (and the suspects left) at "about  
24 7:00." ECF No. 23-4 (PEx. 179) at 23 (Tr. at 82). That's a difference of between eight  
25 and 11 minutes, and this is an alibi where every minute mattered.

26 The second step in the alibi was determining how long it would've taken for  
27 someone to drive from the crime scene to Ms. Johnson's workplace. The defense



1 attorneys didn't present evidence on that subject. If they had, they could've shown  
2 the drive would've taken at least 20 minutes, if not longer (more like 30 minutes).  
3 *See* ECF No. 26-14 (PEx. 227) at 33-43; ECF No. 41-5 (PEx. 253) at 125-26; ECF No.  
4 65-1 (PEx. 262) at 159-60.

5       The third step in the alibi was determining when Mr. Slaughter arrived to pick  
6 up Ms. Johnson. She testified he showed up between 7:00 and 7:15 p.m., but in no  
7 event was it later than 7:20 p.m. ECF No. 22-8 (PEx. 174) at 9 (Tr. at 21-22). In  
8 contrast, her coworker (Jeffrey Arbuckle) testified he didn't show up until 7:30 p.m.  
9 ECF No. 21-3 (PEx. 165) at 13 (Tr. at 42). Mr. Arbuckle previously told the police  
10 back in 2004 that Mr. Slaughter showed up at about 7:15 p.m., which matched up  
11 with Ms. Johnson's testimony. ECF No. 15-14 (PEx. 14) at 4-5; ECF No. 41-5 (PEx.  
12 253) at 141. But the defense didn't introduce his prior inconsistent statement at trial,  
13 so the jury was unaware he'd told the police Mr. Slaughter arrived at 7:15 p.m., which  
14 would've corroborated Ms. Johnson's account. In addition, the State failed to disclose  
15 impeachment information about Mr. Arbuckle—he'd previously called the cops on Mr.  
16 Slaughter—that would've established a motive for bias, i.e., a motive to his testimony  
17 from 7:15 p.m. (which was consistent with the defense theory) to 7:30 p.m. (which was  
18 more favorable to the State).

19       In sum, the jury heard a weak version of Mr. Slaughter's alibi: the suspects  
20 left at about 7:00 p.m.; it wasn't clear how long it would've taken a suspect to drive to  
21 Ms. Johnson's workplace; and Mr. Slaughter arrived to pick up Ms. Johnson either  
22 by 7:20 p.m. (according to Ms. Johnson) or 7:30 p.m. (according to Mr. Arbuckle).  
23 That's not a convincing alibi. But if the prosecution had provided a full disclosure,  
24 and if the defense attorneys had tried the case competently, the jury would've known  
25 the suspects actually left at about 7:08 p.m.; it would've taken about 20 minutes at a  
26 minimum to drive to Ms. Johnson's workplace; and Mr. Slaughter arrived to pick up  
27 Ms. Johnson at about 7:15 p.m.—in which case there's no way he could've been one of

1 the culprits. That's a much stronger alibi than the version the attorneys presented  
2 at trial.

3 **3. Mr. Slaughter has a high likelihood of proving**  
4 **constitutional violations based on these facts.**

5 Given the new information about the second photo lineup and the alibi, Mr.  
6 Slaughter will likely be able to prove the merits of his related claims.

7 To start, Mr. Slaughter has alleged related claims under *Brady v. Maryland*,  
8 373 U.S. 83 (1963) (as well as under *Napue v. Illinois*, 360 U.S. 264, 266 (1959)). *See*  
9 Ground Eleven. To prove a *Brady* claim, a petitioner needs to show the State with-  
10 held favorable exculpatory or impeachment evidence. *See Brady*, 373 U.S. at 87. A  
11 petitioner also needs to establish the evidence was material, i.e., "there is a reason-  
12 able probability that, had the evidence been disclosed to the defense, the result of the  
13 proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

14 Mr. Slaughter can make both showings when it comes to the second photo  
15 lineup. While the State disclosed the *existence* of the second photo lineup to the de-  
16 fense, it withheld the *outcome*, i.e., that none of the witnesses (or, at most, only one  
17 of the witnesses) recognized Mr. Slaughter in the second photo lineup. *See, e.g.*, ECF  
18 No. 65-1 (PEx. 262) at 119, 122-24; ECF No. 65-2 (PEx. 263) ¶¶ 4-5; ECF No. 65-3  
19 (PEx. 264) ¶ 16. This withheld information was material. The four eyewitness iden-  
20 tifications from the first photo lineup (and the three in-court identifications) were by  
21 far the State's most convincing evidence against Mr. Slaughter. The outcome of the  
22 second photo lineup undermines the reliability of these identifications: while the wit-  
23 nesses purported to identify Mr. Slaughter as a suspect from a suggestive first lineup,  
24 most if not all of them were unable to do so when they saw Mr. Slaughter in a non-  
25 suggestive second photo lineup, which provides reasonable doubt about whether the  
26 initial identifications (and any ensuing in-court identifications) were accurate.  
27

1 As Mr. Slaughter's third amended petition explains (ECF No. 64 at 29-30), the  
2 remainder of the State's case was circumstantial and weak. In brief, the State pre-  
3 sented (1) equivocal ballistics evidence (*see* Ground Three(D)); (2) a 7-Eleven video  
4 with minimal probative value (*cf.* Ground Eight); and (3) evidence Mr. Slaughter had  
5 access to a car that was consistent with the color and general model that some of the  
6 witnesses mentioned when describing the getaway car (but inconsistent with some of  
7 the witnesses' other descriptions of the car). Those categories of evidence alone don't  
8 create a convincing case. By contrast, the eyewitness identifications were direct evi-  
9 dence of guilt. Thus, if the State had disclosed the outcome of the second photo lineup,  
10 and if the defense had been able to use that evidence to undercut the eyewitness  
11 identifications, there's a reasonable probability the jury would've returned a more  
12 favorable verdict.

13 A similar analysis applies to the alibi. The State withheld information about  
14 when Mr. Means called 911. *See* ECF No. 50-12 (PEx. 260); ECF No. 50-13 (PEx.  
15 261); ECF No. 65-1 (PEx. 262) at 140; ECF No. 65-2 (PEx. 263) ¶ 7; ECF No. 65-3  
16 (PEx. 264) ¶ 16. It also withheld impeachment information about Mr. Arbuckle. *See*  
17 ECF No. 50-12 (PEx. 260); ECF No. 50-13 (PEx. 261); ECF No. 65-1 (PEx. 262) at 177;  
18 ECF No. 65-2 (PEx. 263) ¶¶ 6-9; ECF No. 65-3 (PEx. 264) ¶ 16. Both pieces of evi-  
19 dence are material. The 911 call time is material because it leads to the conclusion  
20 the suspects left the crime scene at about 7:08 p.m., not as early as 7:00 p.m. Mean-  
21 while, the information about Mr. Arbuckle's trespassing complaint is material be-  
22 cause it would help give the jury a reason to disbelieve Mr. Arbuckle's version of  
23 events (that Mr. Slaughter arrived as late as 7:30 p.m.) and believe Ms. Johnson's  
24 (that Mr. Slaughter arrived no later than 7:20 p.m.). Because both pieces of evidence  
25 strengthen Mr. Slaughter's alibi, there's a reasonable probability the withheld evi-  
26 dence could've impacted the jury's verdict.

1 In the alternative, Mr. Slaughter has alleged related claims under *Strickland*  
2 *v. Washington*, 466 U.S. 668 (1984). See Grounds Two(A) through (D), Three(A), and  
3 Four(A). To prove a *Strickland* claim, a petitioner needs to satisfy two elements.  
4 “First, the defendant must show that counsel’s performance was deficient” (*id.* at  
5 687), i.e., that the lawyer’s performance “fell below an objective standard of reasona-  
6 bleness” (*id.* at 688). “Second, the defendant must show that the deficient perfor-  
7 mance prejudiced the defense” (*id.* at 687), such that there’s “a reasonable probability  
8 that, but for counsel’s unprofessional errors, the result of the proceeding would have  
9 been different” (*id.* at 694).

10 Mr. Slaughter’s attorneys provided deficient performance by failing to intro-  
11 duce evidence about the second photo lineup and by failing to establish Mr. Slaugh-  
12 ter’s alibi. The defense knew (or should’ve known) it was possible the witnesses didn’t  
13 identify Mr. Slaughter from the second photo lineup, since the issue was the subject  
14 of pre-trial litigation (albeit by prior counsel). The defense therefore had a profes-  
15 sional obligation to investigate the issue and, upon learning the outcome of the second  
16 photo lineup was favorable, present that information to the jury. But the defense  
17 didn’t perform a reasonable investigation and therefore didn’t realize the witnesses  
18 had been unable to identify Mr. Slaughter from that lineup. See ECF No. 65-2 (PEx.  
19 263) ¶¶ 4-5. Had they known that fact, they would’ve used it at trial. *Id.* ¶ 5. While  
20 the State is ultimately at fault for declining to turn over this information, in the al-  
21 ternative the attorneys’ failure to investigate this topic and present the evidence  
22 amounts to deficient performance. See, e.g., *Strickland*, 466 U.S. at 691 (“[C]ounsel  
23 has a duty to make reasonable investigations or to make a reasonable decision that  
24 makes particular investigations unnecessary.”).

25 The failure to present complete information about Mr. Slaughter’s alibi was  
26 also deficient performance. After having made the strategic decision to run an alibi  
27 defense—and after promising the jury it would hear an airtight alibi in opening

1 statements (*see* Ground Five)—the attorneys had a professional obligation to deliver  
2 on the promise and present a competent version of the alibi defense. The failure to  
3 investigate and/or introduce foundational evidence in support of the alibi—for exam-  
4 ple, the 911 call time, the drive time between the crime scene and Ms. Johnson’s  
5 workplace, and Mr. Arbuckle’s prior inconsistent statement—therefore amounted to  
6 deficient performance, especially given the way the attorneys set up the alibi during  
7 opening statements. *See, e.g., English v. Romanowski*, 602 F.3d 714, 728 (6th Cir.  
8 2010) (“[I]t was objectively unreasonable for English's trial attorney to decide before  
9 trial to call . . . a [specific] witness, make that promise to the jury, and then later  
10 abandon that strategy, all without having fully investigated [the witness] and her  
11 story prior to opening statements”).

12 Both failures prejudiced the defense. If the attorneys had presented evidence  
13 that all (or all but one) of the eyewitnesses who purported to identify Mr. Slaughter  
14 from the first (suggestive) lineup had failed to identify him soon after in a second  
15 (non-suggestive) lineup, the jury would’ve had reasonable doubt about whether the  
16 initial identifications were reliable. And in that event, there was precious little left  
17 in the State’s case to support a conviction. Meanwhile, if the attorneys had presented  
18 a fulsome version (as opposed to a watered-down version) of Mr. Slaughter’s alibi, the  
19 jury would’ve had reasonable doubt about whether it would’ve been physically possi-  
20 ble for Mr. Slaughter to have participated in the home invasion and then made it to  
21 Ms. Johnson’s workplace when he did. There’s therefore a reasonable probability that  
22 if the attorneys hadn’t made these errors (or had made one but not both errors), the  
23 jury would’ve returned a more favorable verdict. Mr. Slaughter is therefore likely to  
24 win relief on his *Strickland* claims, as with his *Brady* claims.

25  
26  
27

1                   **4.     It's likely the Court will be able to consider these claims**  
2                   **on the merits and under de novo review.**

3           It's unlikely the State will have any legitimate procedural defenses to these  
4           claims, and it's unlikely the Nevada appellate courts' decisions will be entitled to def-  
5           erence. Thus, it's likely the Court will be able to review Mr. Slaughter's claims de  
6           novo, which strengthens his probability of success.

7           The State won't be able to credibly claim a limitations defense. Mr. Slaughter  
8           filed a comprehensive pro se federal petition in this case well within the federal lim-  
9           itations period. ECF No. 6. In that petition, Mr. Slaughter raised detailed *Strickland*  
10          claims involving his attorneys' failure to present evidence about the second photo  
11          lineup and about his alibi. *Id.* at 22-24, 27-28, 30-32, 35-36. The corresponding  
12          *Strickland* claims in Mr. Slaughter's third amended petition share a common core of  
13          operative facts with the versions of the claims Mr. Slaughter pled in his original pro  
14          se petition, so the *Strickland* claims in the third amended petition will relate back to  
15          the filing date of the timely pro se petition. *See Mayle v. Felix*, 545 U.S. 644, 650, 664  
16          (2005). While Mr. Slaughter's pro se petition didn't include *Brady* claims, the *Brady*  
17          claims in the third amended petition also share a common core of operative facts with  
18          the *Strickland* claims Mr. Slaughter pled in his original petition, so those *Brady*  
19          claims will relate back as well. *See Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1297  
20          (9th Cir. 2013) (noting a claim raising a different legal theory can relate back to an  
21          earlier claim with a common factual basis), *abrogated on other grounds by Davila v.*  
22          *Davis*, 137 S.Ct. 2058 (2017). The *Brady* claims may also be timely under a delayed  
23          accrual provision. *See* 28 U.S.C. § 2244(d)(1)(D).

24          The State won't be able to credibly claim an exhaustion or procedural default  
25          defense, either. Mr. Slaughter litigated his *Strickland* claims in his first state post-  
26          conviction petition, and the Nevada Supreme Court resolved those claims on the mer-  
27          its. Those claims are therefore exhausted and not defaulted. Mr. Slaughter is

1 currently litigating his *Brady* claims in state court, and the state district court has  
2 imposed procedural bars on one of his pending petitions, which is currently on appeal.  
3 Mr. Slaughter is therefore in the process of exhausting his *Brady* claims. If the state  
4 appellate court imposes a procedural bar, then Mr. Slaughter will be able to avoid the  
5 procedural default in federal court given the merits of his *Brady* claim, as well as  
6 because he is innocent. *See, e.g., Banks v. Dretke*, 540 U.S. 668, 691-98 (2004) (“[A]  
7 petitioner shows ‘cause’ when the reason for his failure to develop facts in state-court  
8 proceedings was the State’s suppression of the relevant evidence.”); *Schlup v. Delo*,  
9 513 U.S. 298 (1995).

10 The Nevada appellate courts’ decisions in this case aren’t (or won’t) be entitled  
11 to deference. The Nevada Supreme Court rejected Mr. Slaughter’s *Strickland* claims  
12 under the prejudice prong because it thought the evidence presented at trial was  
13 “overwhelming.” ECF No. 27-13 (PEX. 244) at 3. But the state court reached that  
14 conclusion without allowing Mr. Slaughter a hearing to prove the evidentiary basis  
15 for his claims, many of which were an attempt to undercut the supposed “overwhelm-  
16 ing” nature of the evidence the State presented at trial. For example, the first piece  
17 of supposedly inculpatory evidence the court referenced was the “[m]ultiple eyewitness  
18 ness [who] identified Slaughter at trial and in a photographic lineup.” *Id.* But one of  
19 the *Strickland* claims at issue here—the claim involving the second photo lineup—  
20 would, if proven, have undermined the identifications’ probative value. Because the  
21 court rejected these claims without allowing Mr. Slaughter an evidentiary hearing,  
22 the court’s decision isn’t entitled to deference under Section 2254(d)(2), and this Court  
23 may review the *Strickland* claims de novo. *See, e.g., Earp v. Ornoski*, 431 F.3d 1158,  
24 1167 (9th Cir. 2005).

25 In the alternative, the new evidence Mr. Slaughter has developed through the  
26 federal discovery process may have strengthened the evidentiary basis for the *Strick-*  
27 *land* claims to the degree that they should be considered “new” claims. *See, e.g., Sivak*



1 *v. Hardison*, 658 F.3d 898, 908 (9th Cir. 2011). Mr. Slaughter is currently in the  
2 process of litigating (and exhausting) the potentially “new” versions of these claims  
3 in state court. If the state court imposes a procedural bar against these claims, then  
4 Mr. Slaughter will be able to overcome the procedural default in federal court under  
5 *Martinez v. Ryan*, 566 U.S. 1 (2012), because he didn’t have an attorney during his  
6 initial state post-conviction proceedings. *See Rodney v. Filson*, 916 F.3d 1254, 1259  
7 (9th Cir. 2019). If the state court reviews the “new” versions of these claims on the  
8 merits and rejects them, it’s unlikely (given the strength of the claims) its decision  
9 will be entitled to deference.

10 The Section 2254(d) analysis for the *Brady* claims is similar. It’s unclear right  
11 now whether the Nevada appellate courts will resolve the claims on the merits. If  
12 the state court declines to consider the merits of the *Brady* claims and instead im-  
13 poses a procedural bar, then as Mr. Slaughter just explained, he will be able to over-  
14 come the procedural default in this Court (because the claims are meritorious *Brady*  
15 claims) and will therefore be entitled to de novo review. If the Nevada appellate  
16 courts resolve the claims on the merits adversely, it’s unlikely (given the strength of  
17 the claims) its decision will be entitled to deference.

18 **5. The Court should therefore find a high probability of**  
19 **success on the merits.**

20 As this discussion shows, Mr. Slaughter has a high probability of winning relief  
21 on the merits at the conclusion of the litigation in this Court. While the discussion  
22 in this motion isn’t exhaustive, and while Mr. Slaughter recognizes the Court will  
23 ultimately resolve the procedural issues and the merits after receiving fulsome brief-  
24 ing from the parties, this discussion nonetheless illustrates a sufficiently high prob-  
25 ability of success. Indeed, the Court need not decide right now that Mr. Slaughter  
26 will be entitled to a writ; rather, it need conclude only that Mr. Slaughter’s claims are  
27 sufficiently strong, and the State’s procedural defenses (if any) are sufficiently weak,



1 that release would be appropriate while the litigation is pending. *Cf. Lair v. Bullock*,  
 2 697 F.3d 1200, 1204 (9th Cir. 2012) (stating the typical civil preliminary injunction  
 3 standard “does not require the petitioners to show that it is more likely than not that  
 4 they will win on the merits”) (cleaned up).

5 **B. COVID-19 poses a high risk to Mr. Slaughter’s health.**

6 The world is currently grappling with a dangerous pandemic without prece-  
 7 dent over the past century. The novel coronavirus represents a serious health risk  
 8 for everyone, but it’s especially likely to infect the vulnerable prison population, and  
 9 it’s especially likely to cause substantial harm or death to people with the same risk  
 10 factors Mr. Slaughter has. Meanwhile, it appears Mr. Slaughter’s prison (Saguaro  
 11 Correctional Center) may be suffering from an outbreak. The virus therefore poses  
 12 an overwhelming threat to Mr. Slaughter that supports pre-decision release.

13 **1. The novel coronavirus is causing havoc throughout the**  
 14 **world.**

15 The novel coronavirus (named SARS-CoV-2) first caught attention in late De-  
 16 cember 2019 and has quickly grown into one of the most serious crises to affect the  
 17 safety and security of the entire world since perhaps World War II. The first outbreak  
 18 occurred in Wuhan, China; the Chinese government confirmed dozens of cases on  
 19 December 31. *See* Derrick Bryson Taylor, “A Timeline of the Coronavirus Pandemic,”  
 20 The New York Times (Apr. 7, 2020), *available at* <https://nyti.ms/2wNznJ7> (last visited  
 21 May 11, 2020) (hereinafter “Timeline”). China reported its first known death from  
 22 the virus (the illness it causes is called “COVID-19”) on January 11. *Id.* Within the  
 23 next couple weeks, the virus spread to other parts of East and Southeast Asia, and  
 24 then on from there, including to Washington State. *Id.* The Chinese government  
 25 locked down Wuhan on January 23; the World Health Organization declared a global  
 26 health emergency soon after; and the Trump administration responded by barring  
 27 certain travel from China. *Id.*

1 Concerns continued to mount from there. Within a month after China reported  
2 its first death, the number of confirmed cases had skyrocketed to 44,653. *See* Time-  
3 line, *supra*. Substantial outbreaks developed in mid-February in France, South Ko-  
4 rea, and Iran. *Id.* The Lombardy region in Italy became a major cluster, and the  
5 local government closed schools and events in late February. *Id.* By the end of Feb-  
6 ruary, the United States recorded its first domestic death from COVID-19. *Id.* The  
7 Trump administration banned travel from Europe and declared a national emer-  
8 gency; the European Union and its associated countries imposed similar steps over  
9 the coming weeks; and the world is now scrambling to contain the impact. *Id.*

10 The novel coronavirus causes initial symptoms somewhat like seasonal influ-  
11 enza's, but with a higher risk of negative outcomes. Like the flu, people who contract  
12 COVID-19 often suffer fever, cough, and/or shortness of breath. *See* "Symptoms,"  
13 U.S. Centers for Disease Control and Prevention, *available at* <https://bit.ly/33U4pey>  
14 (last visited May 11, 2020). But unlike the flu, serious illness can develop in about  
15 16 percent of all cases. *See* "Situation Summary," U.S. Centers for Disease Control  
16 and Prevention, *available at* <https://bit.ly/2X60slJ> (last visited May 11, 2020). In se-  
17 vere cases, the disease can cause pneumonia, which is a dangerous lung infection.  
18 *See* James Gallagher, "Coronavirus: What it does to the body," BBC News (Mar. 14,  
19 2020), *available at* <https://bbc.in/2UL8wFG> (last visited May 11, 2020). As the pneu-  
20 monia worsens, the condition can develop into acute respiratory distress syndrome  
21 ("ARDS"), which is life-threatening and requires ventilators to manage. *Id.* The virus  
22 can also cause septic shock and serious damage to other organs. *Id.*

23 The disease is a public health crisis on an unparalleled scale for many reasons,  
24 including because it's so much more deadly and virulent than seasonal flu. Seasonal  
25 flu has an average death rate of 0.1 percent; estimates for the novel coronavirus's  
26 death rate range much higher, from between 1 percent and 3.4 percent. *See* Denise  
27 Grady, "How Does the Coronavirus Compare With the Flu?," The New York Times

(Mar. 27, 2020), *available at* <https://nyti.ms/2WRsRvz> (last visited May 11, 2020). Meanwhile, someone who contracts seasonal flu is likely to infect only another 1.3 people; someone who contracts coronavirus is likely to infect a much more significant total of 2.2 people. *Id.* Thus, the novel coronavirus is more serious than the typical flu because it's more likely to cause death and more likely to spread to more people.

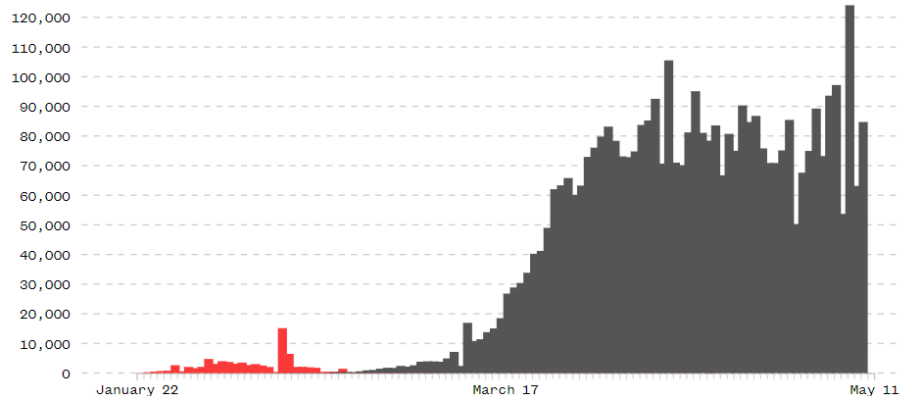
Notably, the incubation period for the virus can be up to two weeks—that is, someone can be infected for up to two weeks without noticing any symptoms—and some people can be asymptomatic for the entire duration of the infection. *See*, Graham Lawton, “You could be spreading the coronavirus without realizing you’ve got it,” *New Scientist* (Mar. 24, 2020), *available at* <https://bit.ly/2QVeToy> (last visited May 11, 2020). People who haven’t yet suffered symptoms or who won’t end up suffering any symptoms might still be contagious and can still spread the virus without realizing it. *Id.*

So far, the exponential growth of the virus around the world and the ensuing death rates have confirmed both the high rates of transmission, the high death rates, and the serious health risks the virus poses. Here’s one illustrative graph, showing the total number of new coronavirus cases each day in mainland China and in the rest of the world:

#### New coronavirus cases per day

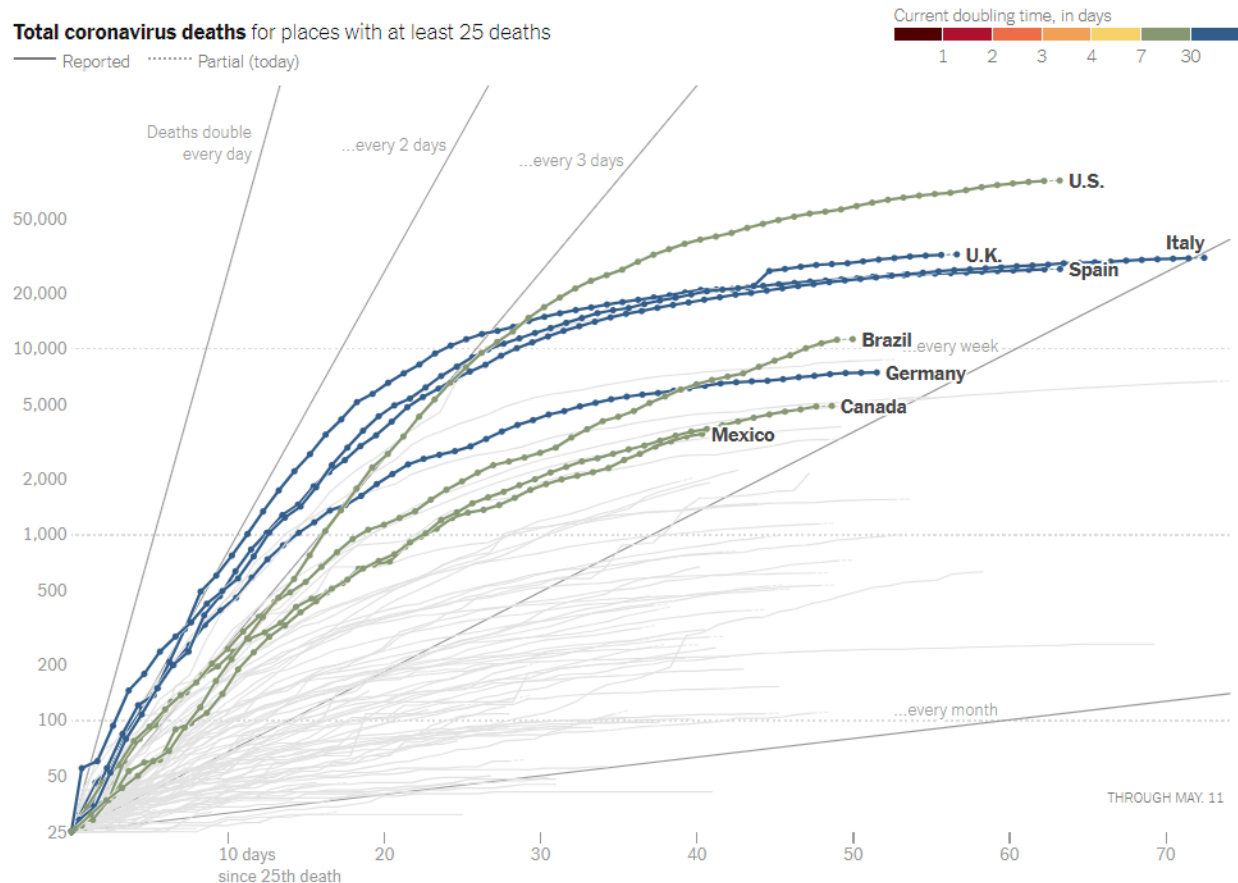
Global cases have outpaced those in mainland China since late February.

■ Mainland China ■ Rest of world



See Joe Murphy et al., “Graphic: See the day-by-day size of the coronavirus outbreak,” NBC News (May 11, 2020, version), *available at* <https://nbcnews.to/2JnbMSj>.

Here’s another illustrative graph showing death rates by country; the U.S. has the highest number of deaths, with a total of over 80,000 as of May 11, 2020:



See Josh Katz and Margot Sanger-Katz, “Coronavirus Deaths by U.S. State and Country Over Time: Daily Tracker,” The New York Times (May 11, 2020, version), *available at* <https://nyti.ms/2UwsnJQ>.

One of the many challenges posed by the pandemic isn’t just the death rates from the disease itself, but the very real possibility the virus will overwhelm our health care systems. If too many people contract the disease at once, then the number of patients requiring intensive care will be astronomical—much greater than the number of hospital beds we have available. For example, in Italy, doctors grappled with running out of ventilators and making triage decisions about which patients got

1 ventilators and which ones didn't. *See* Ariana Eunjung Cha, "Spiking U.S. corona-  
 2 virus cases could force rationing decisions similar to those made in Italy, China," *The*  
 3 *Washington Post* (Mar. 15, 2020), *available at* <https://wapo.st/3asYtf2> (last visited  
 4 May 11, 2020) (hereinafter "Spiking U.S. coronavirus cases"). Parts of the United  
 5 States (like New York City) have faced (or are still facing) similar problems. *See*  
 6 Andrew Jacobs, "Fears of Ventilator Shortage Unleash a Wave of Innovations," *The*  
 7 *New York Times* (Apr. 17, 2020), *available at* <https://nyti.ms/2XQdWST> (last visited  
 8 May 11, 2020). Estimates suggest between 40 and 60 percent of the population might  
 9 get infected. *See* Spiking U.S. coronavirus cases, *supra*. Between about five and  
 10 twelve percent of patients require admission to the intensive care unit ("ICU"). *See*  
 11 Table, "Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-  
 12 19)," Centers for Disease Control and Prevention (Mar. 26, 2020), *available at*  
 13 <https://bit.ly/2UsiU6c> (last visited May 11, 2020). If 40 percent of the U.S. population  
 14 gets infected at about the same time, and even if only five percent of those patients  
 15 require ICU admission, that's a total of about 6.5 million people—compared with  
 16 about 45,000 ICU beds nationwide. *See* Dan Vergano, "The Coronavirus Outbreak  
 17 Could Spread to Millions in the US. We Don't Have Nearly Enough Hospital Beds if  
 18 it Does," *BuzzFeed News* (Mar. 12, 2020), *available at* <https://bit.ly/3aqMEpw> (last  
 19 visited May 11, 2020).

20 According to the *New York Times*, a federal government agency has released  
 21 scenarios under which "[a]s many as 200,000 to 1.7 million could die." Sheri Fink,  
 22 Worst-Case Estimates for U.S. Coronavirus Deaths, *The New York Times* (Mar. 13,  
 23 2020), *available at* <https://nyti.ms/2Jo9fHq> (last visited May 11, 2020) (hereinafter  
 24 "Worst-Case Estimates"). Even with appropriate social distancing measures, the pro-  
 25 jections anticipated a total domestic death toll of "between 100,000 and 240,000  
 26 Americans." "White House Projects Grim Toll from Coronavirus," *The New York*  
 27 *Times* (Mar. 31, 2020), *available at* <https://nyti.ms/2xIdNWG> (last visited May 11,

2020). Moreover, between “2.4 million to 21 million people in the United States could require hospitalization, potentially crushing the nation’s medical system, which has only about 925,000 staffed hospital beds.” *See* “Worst-Case Estimates.” Beds aren’t the only issue—American hospitals have been running out of personal protective equipment (“PPE”) like masks for their doctors and nurses. *See* Mariel Padilla, “It Feels Like a War Zone’: Doctors and Nurses Plead for Masks on Social Media,” *The New York Times* (Mar. 19, 2020), *available at* <https://nyti.ms/3dFO0Pk> (last visited May 11, 2020). For these reasons and others, our health care system is vulnerable to extreme strain from the pandemic, which poses major concerns for patient wellbeing.

Given these threats, governments across the world are taking unprecedented steps to combat the virus. Here in Nevada, Governor Sisolak has ordered the closure of non-essential businesses (including casinos) to avoid the possibility of community spread. *See* Megan Messerly et al., “Sisolak orders statewide closure,” *Nevada Independent* (Mar. 17, 2020), *available at* <https://bit.ly/3dgeTJt> (last visited May 11, 2020). While Governor Sisolak slightly loosened restrictions on some businesses as of May 9, those changes are marginal, and the State is still treating the virus as a substantial threat to community safety. *See* Michelle Rindels & Riley Snyder, “Sisolak says businesses can start reopening Saturday, subject to capacity limits and other restrictions,” *The Nevada Independent* (May 7, 2020), *available at* <https://bit.ly/3dCguJ1> (last visited May 11, 2020). Many state governments are maintaining similar lockdowns. *See* Sarah Mervosh et al, “See Which States Are Reopening and Which Are Still Shut Down,” *The New York Times* (updated May 11, 2020), *available at* <https://nyti.ms/2Wq2SuF>.

Courts realize the seriousness of the situation, too. For example, this Court has closed the clerk’s office to the public and is “striving to eliminate in-person court appearances.” *See* Temporary General Orders (D. Nev.), *available at* <https://bit.ly/2zqwHCg> (last visited May 11, 2020). The U.S. Court of Appeals for the

1 Ninth Circuit is cancelling oral arguments on a case-by-case basis through May. *See*  
2 COVID-19 Notice (9th Cir.), *available at* <https://bit.ly/2woI5NJ> (last visited May 11,  
3 2020). The U.S. Supreme Court has switched over to telephonic arguments for the  
4 time being. Press Release (U.S. Sup. Ct.) (Apr. 13, 2020), *available at*  
5 <https://bit.ly/3czY237> (last visited May 11, 2020). The state courts in Nevada have  
6 taken similar steps. *See, e.g.,* Docket, *In the Matter of Supreme Court Administrative*  
7 *Orders Related to the Coronavirus Emergency* (Nev. Sup. Ct.), *available at*  
8 <https://bit.ly/2LgVN9e> (last visited May 11, 2020); Administrative Orders 2020-01  
9 through 2020-14 (Nev. 8th Jud. Dist. Ct.), *available at* <https://bit.ly/397CPeT> (last  
10 visited May 11, 2020).

11 In sum, the pandemic is an unprecedented crisis that requires unprecedented  
12 responses from all our branches of government.

13 **2. The prison population is especially likely to get infected.**

14 While the entire country is at risk, inmates in jails and prisons are particularly  
15 vulnerable to contracting the disease. Among other things, people in the community  
16 can combat spread by staying isolated at home whenever possible; practicing social  
17 distancing (i.e., staying six feet apart from others) and wearing gloves or masks in  
18 public; sanitizing their surroundings; and washing their hands or using hand sani-  
19 tizer frequently. Most inmates don't have the same luxuries; they can't stay in their  
20 own homes, they can't avoid interacting with officers or other inmates at their pleas-  
21 ure, they can't sanitize their living spaces, they can't wash their hands at will—they  
22 can't even use Purell (which is often considered contraband). *See, e.g.,* Timothy Wil-  
23 liams et al., "Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind  
24 Bars," *The New York Times* (Mar. 30, 2020), *available at* <https://nyti.ms/2UrZ8b0>  
25 (last visited May 11, 2020). Thus, as the *New York Times* has reported, "Defense  
26 lawyers, elected officials, health experts and even some prosecutors have warned that  
27



1 efforts to release inmates and to contain the spread of the disease are moving too  
2 slowly in the face of [the] contagion.” *Id.*

3       Public health experts have voiced substantial concerns about the prison popu-  
4 lation’s susceptibility to infection. For example, in a letter to President Trump re-  
5 garding federal inmates, dozens of health experts explain prisons “contain high con-  
6 centrations of people in close proximity and are breeding grounds for the uncontrolled  
7 transmission of SARS-CoV-2.” Letter from Sandro Galea, MD, DrPH, et al., to Pres-  
8 ident Trump (Mar. 27, 2020), *available at* <https://bit.ly/39uc7x5> (last visited May 11,  
9 2020). Thus, prisons “present significant health risks to the people housed in them,”  
10 as well as prison staff. *Id.* Prisoners are often “housed cheek-by-jowl, in tightly-  
11 packed and poorly-ventilated dormitories; they share toilets, showers, and sinks; they  
12 wash their bedsheets and clothes infrequently; and often lack access to basic personal  
13 hygiene items.” *Id.* The institutions “lack the ability to separate sick people from  
14 well people and to quarantine those who have been exposed.” *Id.* Thus, the experts  
15 urge the President to help combat the pandemic by reducing the total federal prison  
16 population. *See also, e.g.*, “Preparedness, Prevention and Control of COVID-19 in  
17 Prisons and Other Places of Detention: Interim Guidance,” World Health Organiza-  
18 tion (Mar. 20, 2020), *available at* <https://bit.ly/3bAqIsf> (last visited May 11, 2020).

19       Given these concerns, litigation has ensued across the country about the pos-  
20 sible effects of the pandemic on the prison population; in connection with that litiga-  
21 tion, doctors have repeatedly stressed the likelihood that the disease will spread rap-  
22 idly throughout prison facilities. *See, e.g., Valentine et al v. Collier et al.*, Case No.  
23 4:20-cv-01115 (S.D. Tex.), ECF Nos. 12 through 14; *United States v. Toro*, Case No.  
24 1:19-cr-00256-NONE-SKO-8 (E.D. Cal.), ECF No. 145 at 29-65 (collecting various dec-  
25 larations). Similarly, the American Civil Liberties Union of Nevada has written a  
26 letter to state government officials discussing the problem; as they explain, “People  
27 in prisons and jails are highly susceptible to outbreaks of contagious illness” because



1 “[t]hey are housed in close quarters and are often in poor health.” Letter from ACLU  
2 of Nevada to Steve Sisolak et al. (Mar. 26, 2020), *available at* <https://bit.ly/2WWW886>  
3 (last visited May 11, 2020). Some of that litigation has already been successful, in-  
4 cluding here in Nevada. *See, e.g.*, Ricardo Torres-Cortez, “Henderson immigration  
5 detainee, at high risk of coronavirus, is released,” Las Vegas Sun (Apr. 2, 2020), *avail-*  
6 *able at* <https://bit.ly/3dT6yvy> (last visited May 11, 2020); *Rose v. Baker et al.*, Case  
7 No. 17-15009 (9th Cir.), ECF No. 62 (order granting release pending the State’s peti-  
8 tion for a writ of certiorari to the U.S. Supreme Court).

9       The novel coronavirus is already starting to infiltrate the prison population,  
10 and outbreaks are likely to get much worse over time. For example, hundreds of  
11 inmates and jail staff members in New York City have contracted the disease. *See*  
12 David Brand, “At least 167 NYC inmates, 114 jail staffers now have COVID-19,”  
13 Queens Daily Eagle (Mar. 30, 2020), *available at* <https://bit.ly/39PeVoE> (last visited  
14 May 11, 2020). Some prison systems—federal and state—have already been releas-  
15 ing inmates early to mitigate the threat. *See, e.g.*, Paige St. John, “California to re-  
16 lease 3,500 inmates early as coronavirus spreads inside prisons,” Los Angeles Times  
17 (Mar. 31, 2020), *available at* <https://lat.ms/2R6qpNX> (last visited May 11, 2020). Con-  
18 cerns abound in other jurisdictions. *See, e.g.*, Douglas Berman, “Reviewing more  
19 headlines from more states about coronavirus cases among prisoners and prison  
20 staff,” Sentencing Law and Policy (Apr. 6, 2020), *available at* <https://bit.ly/34eCciJ>  
21 (last visited May 11, 2020). So far, about 304 inmates across the country have died  
22 from the disease. *See* “A State-by-State Look at Coronavirus in Prisons,” The Mar-  
23 shall Project (May 8, 2020), *available at* <https://bit.ly/2zsRpBu> (last visited May 11,  
24 2020).

25       The experience of jails and prisons outside Nevada confirms how quickly the  
26 virus can take over an institution. For example, in a Chicago jail, two inmates tested  
27 positive on March 23; two weeks later, at least 350 people were infected. *See* Timothy

Williams and Danielle Ivory, “Chicago’s Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars,” *The New York Times* (Apr. 8, 2020), *available at* <https://nyti.ms/2XP8eRa> (last visited May 11, 2020). At Rikers Island in New York City, the jail went from having one case to nearly 200 cases in just 12 days. *See* Miranda Bryant, “Coronavirus spread at Rikers is a ‘public health disaster,’ says jail’s top doctor,” *The Guardian (US)* (Apr. 1, 2020), *available at* <https://bit.ly/2yxYvEo> (last visited May 11, 2020). In Ohio, the prison system has tested 2,300 inmates; 2,028 tests came back positive, and about 95 percent of those individuals reported no symptoms. *See* Linda So, Grant Smith, “In four U.S. state prisons, nearly 3,300 inmates test positive for coronavirus—96% without symptoms,” *Reuters* (Apr. 25, 2020), *available at* <https://reut.rs/3bkl25f> (last visited May 11, 2020).

As this explanation shows, the coronavirus pandemic—while an extraordinary circumstance for everyone—is an even more extraordinary risk for inmates.

### **3. The virus is a threat to Mr. Slaughter, who has health issues and is at a prison suffering a possible outbreak.**

While the novel coronavirus poses health risks for everyone, people with specific health issues or vulnerabilities have a more substantial likelihood of negative outcomes. Mr. Slaughter has one of these high-risk health conditions. Thus, if he contracts the illness—which is an imminent risk, given the conditions he’s described at Saguaro—there’s a high probability he’ll suffer serious adverse consequences.

Mr. Slaughter suffers from hypertension (i.e., high blood pressure), which is considered a high risk medical condition for developing severe complications from a coronavirus infection. *See, e.g.,* Ryan Prior, “Those with high blood pressure are at a greater risk for Covid-19. Here’s what you need to know to protect yourself,” *CNN* (Apr. 17, 2020), *available at* <https://cnn.it/2WDQYfu> (last visited May 11, 2020). He’s currently taking two medications to manage the condition. PEx. 268 ¶ 15.

1 In addition to falling within a high risk category, Mr. Slaughter is also at a  
2 prison—Saguaro Correctional Center (a private institution in Eloy, Arizona, owned  
3 and operated by CoreCivic)—that appears to be facing an outbreak. According to Mr.  
4 Slaughter, six of the other inmates on his tier, including the inmate in his neighboring  
5 cell, have symptoms consistent with COVID-19, and one of the officers working on his  
6 tier recently had close contact with COVID-19 patients. PEx. 268 ¶¶ 8, 16. Indeed,  
7 a correctional officer told Mr. Slaughter he believed at least 70 percent of the inmates  
8 prison-wide appeared to be sick. *Id.* ¶ 9. The medical staff apparently isn't taking  
9 the problem as seriously as it should be—according to Mr. Slaughter, some inmates  
10 have been told they're probably just suffering from allergies. *Id.* ¶ 8. Mr. Slaughter  
11 reports some of the corrections officers and staff have received confirmed positive  
12 tests on their own, but the prison as a general matter isn't arranging for tests for  
13 either staff or inmates. *Id.* ¶ 13.

14 The fact Saguaro is a CoreCivic institution is particularly concerning. Another  
15 Arizona prison facility owned and operated by CoreCivic is facing an outbreak of its  
16 own. *See* Craig Harris, "About 400 inmates quarantined at CoreCivic prison in Flor-  
17 ence, after 13 test positive for COVID-19," Arizona Republic (May 8, 2020), *available*  
18 *at* <https://bit.ly/35OgO4u> (last visited May 11, 2020). Other CoreCivic facilities across  
19 the country are struggling to combat the virus and keep inmates and staff safe. *See,*  
20 *e.g.*, Ben Hall, "Family members shocked by latest COVID-19 numbers inside state  
21 prisons; CoreCivic prison has most," WTVF (Nashville, Tenn.) (May 1, 2020), *availa-*  
22 *ble at* <https://bit.ly/2xXs9mu> (last visited May 11, 2020); Morgan Cook, Kate Morris-  
23 sey, "Guards sue CoreCivic over allegedly dangerous workplace amid COVID-19,"  
24 The San Diego Union-Tribune (Apr. 30, 2020), *available at* <https://bit.ly/2LinMoS>  
25 (last visited May 11, 2020).

26 Mr. Slaughter's description of the conditions at Saguaro are concerning to say  
27 the least, especially given news reports regarding other CoreCivic facilities. PEx. 268

¶¶ 3-14, 16. At the very least, the Court should consider setting a hearing and authorizing Mr. Slaughter to conduct discovery regarding whether Saguaro Correctional Center is in the middle of a coronavirus outbreak.

**4. The virus is the sort of special circumstance that warrants pre-decision release.**

In all, a court should be particularly inclined to grant pre-decision release when special health circumstances exist that endanger a petitioner in prison. That situation exists here: the novel coronavirus is a special health circumstance that jeopardizes all inmates, but especially people (like Mr. Slaughter) with specific risk factors (like hypertension) in institutions that appear to be fighting an outbreak (like Saguaro). Release is therefore appropriate.

Courts have often mentioned health issues as possibly justifying pre-decision release. For example, if a petitioner suffers (or might suffer) “a serious deterioration of health while incarcerated,” release might be appropriate. *Mett*, 41 F.3d at 1282 n. 4 (cleaned up). If the health condition can’t be “appropriately addressed in prison,” that might also warrant release. *Montue*, 2014 WL 6892692 at \*3. Other “health emergenc[ies]” might qualify. *Woodcock*, 470 F.2d at 94.

The risk the coronavirus poses to Mr. Slaughter fits within these standards. It appears Saguaro is suffering an outbreak and is ill-equipped to stop the spread. Mr. Slaughter therefore faces an exceptionally high risk of catching the disease and suffering serious complications as a result, especially since the prison doesn’t appear to be engaging in the type of testing and treatment necessary to battle the disease. In other words, the coronavirus pandemic is a “health emergency” (*Woodcock*, 470 F.2d at 94) that can’t be “appropriately addressed in prison” (*Montue*, 2014 WL 6892692 at \*3), and so it justifies release

By analogy, many courts faced with similar release or confinement decisions (for example, regarding pre-trial detention or probation conditions) have found

1 incarceration to be dangerous based on the pandemic. *See, e.g., United States v. Bark-*  
2 *man*, Case No. 3:19-cr-00052-RCJ-WGC, 2020 U.S. Dist. LEXIS 45628, at \*2 (D. Nev.  
3 Mar. 17, 2020) (“With confirmed cases that indicate community spread, the time is  
4 now to take action to protect vulnerable populations and the community at large.”).  
5 While the standard for pre-decision release in a habeas case differs, the special cir-  
6 cumstances are the same, and release is appropriate in all settings.

7 In sum, the best way to make sure Mr. Slaughter doesn’t contract COVID-19  
8 and doesn’t suffer catastrophic health consequences from the disease is by ordering  
9 him released and allowing him to remain in a safe environment while the pandemic  
10 is ongoing. These special circumstances justify pre-decision release.

11 **C. Mr. Slaughter isn’t a flight risk, and he doesn’t pose a danger to**  
12 **the community.**

13 Mr. Slaughter isn’t a flight risk and poses little danger to the community.  
14 These considerations support pre-decision release.

15 While the crimes of conviction are serious, Mr. Slaughter is innocent of the  
16 charges. Mr. Slaughter anticipates making a full-fledged innocence argument if the  
17 State files a motion to dismiss in this case. In brief, the eyewitness identifications  
18 are unreliable given the previously undisclosed fact the witnesses didn’t identify him  
19 from the second photo lineup. Even in the light most favorable to the State, the pros-  
20 ecution’s other evidence was weakly probative at best. And Mr. Slaughter can now  
21 establish a convincing alibi. The Court should take this innocence argument into  
22 consideration when weighing whether Mr. Slaughter is a flight risk or a danger to  
23 the community. Meanwhile, in the interest of full disclosure, the State of Arizona has  
24 recently filed a criminal charge against Mr. Slaughter for contraband. This unproven  
25 charge, which is related to the conditions in prison, shouldn’t reflect adversely on how  
26 Mr. Slaughter would conduct himself in the community. (If the Court were to order  
27 Mr. Slaughter released, he anticipates promptly posting bail on the Arizona charge.)

1 To the extent the Court would have concerns about flight risk in other circum-  
2 stances, those concerns should be minimal under current circumstances. Because the  
3 pandemic has disrupted life and travel across the country, it's hard to believe Mr.  
4 Slaughter could flee. *See Matter of Extradition of Toledo Manrique*, Case No. 19-mj-  
5 71055-MAG-1 (TSH), 2020 WL 1307109, at \*1 (N.D. Cal. Mar. 19, 2020) ("This [flight  
6 risk] problem has to a certain extent been mitigated by the existing pandemic.").

7 Finally, Mr. Slaughter has support from family and friends in Las Vegas and  
8 would have access to a safe and stable household if he were released. The parents of  
9 Mr. Slaughter's friend Nick Shook have offered to allow Mr. Slaughter to live with  
10 them in Las Vegas if he were to be released, assuming he tests negative for COVID-  
11 19. PEx. 266 ¶ 2; PEx. 267 ¶ 1. Mr. Shook is willing to drive Mr. Slaughter from  
12 Arizona to Las Vegas, hire Mr. Slaughter upon release, and help him find educational  
13 opportunities. PEx. 266 ¶ 2. Mr. Slaughter also has family in Las Vegas who could  
14 provide a support network. PEx. 268 ¶ 17. Mr. Slaughter would be willing and able  
15 to comply with any requirements the Court believes would be appropriate to impose  
16 as a condition of pre-decision release.

#### 17 CONCLUSION

18 The Court should order Mr. Slaughter released pending a final merits decision  
19 on his petition or the administration of an effective vaccine.

20 Dated May 11, 2020.

21 Respectfully submitted,

22  
23 Rene L. Valladares  
24 Federal Public Defender

25 /s/ Jeremy C. Baron

26 Jeremy C. Baron  
27 Assistant Federal Public Defender