

CHIEF JUDGE RICARDO S. MARTINEZ

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,	)	No. CR19-261-RSM
	)	
Plaintiff,	)	
	)	DEFENDANT’S REPLY TO
v.	)	GOVERNMENT’S RESPONSE TO
	)	DEFENDANT’S MOTION FOR
AUDREY NOLAND-JAMES,	)	REVIEW AND REVOCATION OR
	)	AMENDMENT OF MAGISTRATE
Defendant.	)	JUDGE’S BOND CONDITIONS
	)	

**I. Introduction**

Ms. Noland-James proposes a solution, which is the same solution the government backed less than two weeks ago, to keep the community safe while respecting and protecting her life. This Court need look no further than the government’s own position to conclude that Ms. Noland-James should be released from custody. In its response (Dkt. 30), the government contradicts its earlier conclusion – both in writing (Dkt. 23) and on the record at the March 25 detention hearing (Dkt. 26) – that Ms. Noland-James should be “confined to her daughter’s home in Blaine, Washington” with “electronic monitoring,” refrain “from entering onto the Lummi Indian reservation,” and “follow those additional conditions as recommended by Pretrial Services.” Dkt. 23 at 1. While the government now claims that Ms. Noland-James’s “speculative concerns should not be permitted to overwhelm the careful balance of factors prescribed by Congress in determining whether she is

1 properly subject to pretrial detention,” she simply asks this Court to follow the logical  
2 position that the government championed just 13 days ago. Dkt. 30 at 12.

3 **II. Inpatient treatment is not a safe alternative for Ms. Noland-James at this**  
4 **time.**

5 The government now takes the position that entry into any inpatient treatment  
6 facility represents not just an alternative but an alternative that forecloses home  
7 detention with electronic monitoring, which the government recommended just 13  
8 days ago. The government ignores that admission to an inpatient facility will just  
9 mimic the type of close-quartered conditions as the FDC and create a similar danger to  
10 Ms. Noland-James’s health.

11 Instead, the government attempts to place the evidentiary burden on Ms. Noland-  
12 James when it questions what she has done “to seek placement at another treatment  
13 facility, or why placement is not possible elsewhere.” Dkt. 30 at 6. But the government  
14 carries the burden at all of Ms. Noland-James’s detention hearings and reviews,  
15 including the de novo review by this Court. Leaving aside, for the moment, that  
16 inpatient treatment presents the same type of risk to Ms. Noland-James’s health as  
17 confinement at the FDC, the government’s attempt to shift the burden on Ms. Noland-  
18 James is not genuine and lacks sincerity. The government has known – since at least  
19 February 12 – that Ms. Noland-James has been trying to gain admission to a specific  
20 facility with housing, mental health support, and substance use treatment that was  
21 recommended by a counselor with the Lummi tribe.

22 Returning to the risk to Ms. Noland-James at an inpatient treatment facility, the  
23 government fails to recognize that inpatient treatment recreates the conditions at the  
24 FDC. Just like the FDC, employees will come and go each day, Ms. Noland-James will  
25 remain in tight quarters with other treatment clients, and she will not be able to  
26 physically distance herself from other inpatient clients.

1           Additionally, inpatient treatment would likely last for about 30 days. Under the  
2 government’s proposal for Ms. Noland-James to enter any inpatient treatment facility,  
3 Ms. Noland-James would have to return to the FDC after the inpatient treatment  
4 terminates. It is unclear how the community, Ms. Noland-James, and her fellow FDC  
5 inmates would remain safe if Ms. Noland-James is shuttled to an inpatient treatment  
6 facility – with the same risk to her health as the FDC – and then back to the FDC. The  
7 government’s inpatient treatment proposal creates the exact “irresponsible social habits  
8 [that] will endanger the community” that the government warns against in its response  
9 (Dkt. 30 at 9).

10           Not only is temporary release to an inpatient treatment facility tantamount to a  
11 detention order, but it could cause an increase in the likelihood that Ms. Noland-James  
12 contracts COVID-19. There is an obvious reason why facilities like Bear Creek are not  
13 accepting new clients. It is unclear why the government is placing the burden on  
14 Ms. Noland-James to advocate for release to an inpatient treatment program when it  
15 will create a similar risk of her contracting COVID-19 as the FDC.

16           The government cites to one case, *United States v. McConaghy*, CR18-05076-  
17 RJB, to conclude that what was appropriate for Mr. McConaghy is also appropriate for  
18 Ms. Noland-James. The government ignores several key differences between  
19 Ms. Noland-James and Mr. McConaghy. Ms. Noland-James is 68 years old.  
20 Mr. McConaghy is just 22 or 23 years old.<sup>1</sup> Ms. Noland-James has a safe and secure  
21 place to live with her daughter, who will serve as a third-party custodian. It is unclear  
22 if Mr. McConaghy had anywhere else to go other than inpatient treatment.  
23 Ms. Noland-James has a permanent place to stay during the COVID-19 pandemic.  
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25 <sup>1</sup> According to the defendant’s sentencing memorandum, Mr. McConaghy was 21 years old  
26 when the memorandum was filed on July 13, 2018.

1 Ms. Noland-James is on the wait list for the Baker Creek facility, which will  
2 likely house her between 6 to 12 months if she is accepted. But, at the moment, Baker  
3 Creek is not accepting new patients because of the COVID-19 pandemic. Additionally,  
4 even if accepted, Baker Creek is a 16-bed facility. Ms. Noland-James may not be able  
5 to appropriately distance herself at Baker Creek, especially compared to the living  
6 situation at her daughter's home. On the other hand, Mr. McConaghy is going to  
7 inpatient treatment for just 30 days and neither the appearance bond nor the filings in  
8 the case indicate that he has a place to reside, other than the FDC, at the end of the 30  
9 days (3:18-cr-05076, Dkt. 105 at 2).

10 **III. Several BOP facilities are overrun by COVID-19 and the BOP is not**  
11 **equipped to keep inmates safe.**

12 It is not uncommon for the government to argue, at detention and sentencing  
13 hearings, that past performance is the best indication of future performance. Yet, when  
14 it comes to the BOP's ability to keep inmates and staff safe from COVID-19, the  
15 government seemingly ignores the BOP's recent and past performance. According to  
16 the government, the "BOP has been planning for potential coronavirus transmissions  
17 since January" and has an "Action Plan." Dkt. 30 at 10. Yet, several BOP facilities are  
18 overrun with COVID-19.

19 According to the BOP, on April 6 there were 195 "Open COVID-19 Tested  
20 Positive Cases" of inmates in BOP facilities, 63 open BOP staff cases, and 8 federal  
21 inmate deaths in the 30 BOP facilities and 6 residential reentry centers that have been  
22 affected.<sup>2</sup> When the government filed its response, just four days ago, there were 91  
23 known cases. Dkt. 30 at 10. At FCI Elkton, there are at least three deaths caused by

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26 <sup>2</sup> <https://www.bop.gov/coronavirus/>.

1 COVID-19 and 20 positive cases.<sup>3</sup> The situation at Elkton is dire.<sup>4</sup> The governor of  
2 Ohio had to call in the National Guard to FCI Elkton to “assist on a medical mission.”<sup>5</sup>

3 Notably, the government is unable to say with any level of certainty that there is  
4 no COVID-19 case within the FDC. Even the government’s response does not inspire  
5 confidence that COVID-19 is not already within the FDC. *See* Dkt. 30 at 10  
6 (“Currently, to the best of the undersigned’s knowledge, there are no known cases in  
7 the FDC . . .”).

8 The BOP’s planning clearly did not work in other institutions. Ms. Noland-  
9 James fears the BOP’s planning will not work at the FDC either. The government  
10 belittles Ms. Noland-James’s fear of “the possibility that she will become infected by  
11 someone else at the [FDC].” Dkt. 30 at 10. Yet, the government knows the BOP’s  
12 planning and action plans have not been able to keep its inmates safe in other  
13 institutions. The government further belittles Ms. Noland-James’s fear when it  
14 seemingly values the safety of a probation officer over that of Ms. Noland-James, who  
15 has little or no criminal history, has not been convicted of the instant offense, and  
16 allegedly committed a crime due to untreated mental health issues.

17 Even Ms. Noland-James’s own experience at the FDC demonstrates that its  
18 staff was not equipped to sufficiently provide her with care and medication that was  
19 already in place at another institution. Ms. Noland-James was arrested on August 1,  
20 2019 and held in the Whatcom County jail. According to jail records, Ms. Noland-  
21 James received prescription medication for depression while incarcerated at the  
22 Whatcom County jail. Additionally, she received numerous visits from medical staff at  
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24 <sup>3</sup> <https://businessjournaldaily.com/third-inmate-death-reported-at-elkton-prison/>.

25 <sup>4</sup> The graphic and shocking situation at FCI Elkton is allegedly captured on 20-minute video at  
the following link: [https://www.vice.com/en\\_us/article/z3b9qj/prisoner-uses-smuggled-  
cellphone-to-beg-for-help-with-coronavirus-on-facebook-live](https://www.vice.com/en_us/article/z3b9qj/prisoner-uses-smuggled-cellphone-to-beg-for-help-with-coronavirus-on-facebook-live).

26 <sup>5</sup> [https://www.wlwt.com/article/dewine-3-inmates-die-from-covid-19-at-federal-prison-in-ohio-  
national-guard-called-in-to-assist/32055585#](https://www.wlwt.com/article/dewine-3-inmates-die-from-covid-19-at-federal-prison-in-ohio-national-guard-called-in-to-assist/32055585#).

1 the Whatcom County jail. Previously, when she was out of custody, Ms. Noland-James  
2 was not taking prescription medication.

3 Perhaps, the inability of detention facilities to deal with the COVID-19 crisis  
4 caused 81 faculty members of the Harvard School of Public Health and Harvard  
5 Medical School to call for the authorities to “consider release for anyone [age 50 and  
6 over], regardless of crime of conviction.”<sup>6</sup>

7 After arriving at the FDC, Ms. Noland-James did not receive prescription  
8 medication for depression. When Ms. Noland-James indicated that her attempts to  
9 receive the medication were fruitless, her defense team sent at least three e-mails to  
10 BOP staff in January. The defense team detailed that Ms. Noland-James had been  
11 receiving medication for depression, chest pain, stomach and esophagus pain, and high  
12 cholesterol. Additionally, the defense team sent Ms. Noland-James’s Whatcom County  
13 jail medical records to the BOP representatives. Each e-mail included a request for a  
14 psychiatrist to see Ms. Noland-James in order to provide her with appropriate  
15 treatment and medication.

16 Counsel believes that it took weeks, if not months, for Ms. Noland-James to  
17 receive medication for depression after she left the Whatcom County jail and entered  
18 the FDC. The delayed response by the FDC to provide medication that was already  
19 provided by another jail does not inspire confidence that the FDC will be able to  
20 appropriately respond if Ms. Noland-James is exposed to COVID-19.

21 **IV. At the time of the alleged offense, Ms. Noland-James lacked medication for**  
22 **mental health issues and lived in a tent, but now she is receiving medication**  
23 **and her daughter will provide safe housing and oversight.**

24 The government claims that Ms. Noland-James does not “point to any change in  
25 her individual circumstances that would warrant reconsideration” of the initial

26 <sup>6</sup> <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2464/2020/04/HCSPPH-HMS-Faculty-Letter-on-COVID-19-in-jails-4-2-20.pdf>.

1 detention order from December 6, 2019. Dkt. 30 at 2. But that is clearly incorrect. As  
2 the government knows, through the discovery it provided on January 22, 2020,  
3 Ms. Noland-James's daughter previously would not allow Ms. Noland-James to live in  
4 her home. But now that Ms. Noland-James has been receiving medication for her  
5 mental health issues and is at risk of dying in a federal prison if she contracts COVID-  
6 19, her daughter wants Ms. Noland-James to live in her home under home detention  
7 with electronic monitoring. The government, which bears the burden at a detention  
8 hearing, has not questioned the proposed third-party custodian's ability to supervise  
9 Ms. Noland-James and to report violations immediately.

10 Ms. Noland-James is now taking medication for mental health issues and she is  
11 stable. At the time of her arrest, she was not taking medication for her mental health  
12 issues and depression. Also, at the time of the arrest, Ms. Noland-James was homeless  
13 and lived in a tent.

14 Considering her lack of criminal history – especially a lack of violence – it is  
15 fair to assume that Ms. Noland-James's untreated mental health issues were a key  
16 ingredient that led to the instant allegations. Ms. Noland-James advised counsel that  
17 she will comply with every condition the Court places on her, including a condition to  
18 refrain from contacting certain witnesses or the alleged victim. Additionally,  
19 Ms. Noland-James informed counsel that she will comply with home detention and  
20 will not remove electronic monitoring devices, as was implied by the government.  
21 Dkt. 30 at 9. Again, less than two weeks ago, the government had no issue with  
22 placing Ms. Noland-James on home detention at her daughter's house with electronic  
23 monitoring.

## 24 **V. Conclusion**

25 Ms. Noland-James hopes that the government is correct when it claims the FDC  
26 will be able to protect her from contracting COVID-19. But risking her life is too great

1 of a chance to take, especially considering she has already served over 8 months in  
2 custody, the low end of her guideline range is likely to be 18 months, and defendants in  
3 the Western District of Washington regularly receive below-guideline sentences.  
4 Ms. Noland-James has a viable plan to physically distance herself while reasonably  
5 assuring the safety of the community. This Court should follow the government's  
6 advice from just 13 days ago and release Ms. Noland-James to her daughter's home.

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8 DATED this 7th day of April, 2020.

9 Respectfully submitted,

10 *s/ Gregory Geist*

11 Assistant Federal Public Defender  
12 Attorney for Audrey Noland-James