New York County Index No. 451609/20

To be argued by
PATRICIA J. BAILEY
(15 MINUTES REQUESTED)

New York Supreme Court

Appellate Division - First Department

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. COREY STOUGHTON,
on behalf of VENUS WILLIAMS, et al.,

Petitioners-Appellants,

- against -

CYNTHIA BRANN,
Commissioner, New York City Department of Correction, and
ANTHONY ANNUCCI,
Acting Commissioner, New York State Department of Corrections and Supervision,

Respondents-Appellees.

On Appeal from the Supreme Court of the State of New York,
New York County

RESPONDENT'S BRIEF FOR NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE

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THE PEOPLE OF THE STATE OF NEW YORK, ex rel. COREY STOUGHTON, on behalf of VENUS WILLIAMS, et al.,

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BRIEF FOR NEW YORK COUNTY DISTRICT ATTORNEY

INTRODUCTION

Petitioners Gregory Jason, Anibal Quinones, Anthony Brown, Gian Verdelli, Eleuterio Carmona, Joseph Torres, Freddie Johnson, Willie Florence, and Hollis Hosear appeal from an April 13, 2020 order of the Supreme Court, New York County (Statsinger, J.), denying their petition for a writ of habeas corpus after granting their motion for leave to renew an earlier denial of habeas relief. [1] Petitioners assert that the

[1] In addition to the briefs contemporaneously filed by Respondents Commissioner Cynthia Brann and Acting Commissioner Anthony Annucci, a brief is also being filed by New York City Special Narcotics Prosecutor Bridget G. Brennan in response to the appeal of Ricardo Gonzalez. For the convenience of the Court, documents relevant to this appeal

(Continued…)

habeas court erred in finding that they, along with 58 other petitioners, were not entitled to immediate release from custody based on their claim that their federal and State due process rights were violated as a result of their risk of exposure to COVID-19 while incarcerated. Petitioners further dispute the habeas court's determination that the petition had insufficient facts to enable the court to make individualized determinations of whether release was warranted.

On appeal, petitioners append to their brief documents pertaining to each petitioner's health condition and affidavits of others that were not provided to the habeas court. Even if those records provided a basis for petitioners' release, which they do not, they certainly cannot establish that the habeas judge, who was not privy to such evidence, erred in concluding that petitioners failed to establish a due process violation by their continued incarceration. Accordingly, there is no basis to disturb the determination of Justice Statsinger, which is soundly supported by the record in this case.

(…Continued)
are being jointly filed in a single appendix on behalf of Respondents, Mr. Vance, and Ms. Brennan. Citations thereto are preceded by "JA," whereas citations to petitioners' appendix are preceded by "A."

THE RELEVANT PROCEEDINGS

Mass Habeas Corpus Writ

On March 19, 2020, petitioners, along with 107 other pretrial and parole detainees in the custody of the Department of Correction ("DOC") at Rikers Island, filed a petition for a writ of habeas corpus, seeking immediate release on the ground that, by virtue of their ages and/or underlying medical conditions, they were particularly vulnerable to serious illness or death if infected by COVID-19. No individualized information was provided regarding petitioners' underlying charges, their bail status, or their housing within the facility; nor was any documentation of petitioners' medical conditions or the treatment (or lack thereof) by prison medical staff provided to the court. The petition simply listed each petitioner's name, age, and general health condition, such as "heart condition," or "severe medical diagnoses;" in some cases just the petitioner's name and age was listed, such as, with respect to appellants herein, Gregory Jason (60), Anibal Quinones (55), Gian Verdelli (68), Eleuterio Carmona (62), Willie Florence (54), and Hollis Hosear (57), with no other information provided (see A064-A081).

The remainder of the petition and accompanying 191-page appendix discussed the severity and highly contagious nature of COVID-19 which, petitioners contended, could not be contained within a custodial setting (A082-A094, A102-A293). Petitioners maintained that respondents had the authority to release those who, by virtue of their age (over 50) and/or health condition, were vulnerable to serious illness

or death if they contracted the virus and that respondents' failure to exercise that authority constituted deliberate indifference to petitioners' medical needs, in violation of the federal and State constitutions (A094-A0100).

On March 20, 2020, the day following the filing of the petition, an emergency hearing was held before the Hon. Steven M. Statsinger, attended by counsel for petitioners and respondents and an Assistant District Attorney (A005-A009). The court stated that it did not have "sufficient identifying information, such that I could feel confident that the right people are being released. All I have are names alone" without any "NYSID numbers, book and case numbers, docket or indictment numbers at a minimum" (A009-A010). Nor was it clear to the court whether particular petitioners were detained pending trial and/or held on a parole violation warrant (A010-A012). When asked by the court whether petitioners' underlying medical conditions were "based on self reports from the defendants or is it based on medical records from the institution," petitioners' counsel replied that it was a "mix of both of those," although no records were provided to the court (A016). Also in response to inquiry from the court, petitioners' counsel acknowledged that she could not provide any legal authority to support the release of a prisoner who is lawfully in custody, based solely on the conditions of that prisoner's confinement, but argued that this was an unprecedented situation (A017-A020, A044-A045).

The court, noting that petitioners sought a "blanket release" as opposed to seeking remedies to the conditions at Rikers Island (A33), then inquired of counsel for

respondent DOC regarding conditions at that facility. Counsel responded that with more notice, he would introduce evidence regarding the health, sanitation, and social distancing measures being implemented, but he nevertheless assured the court that, based on the efforts of Patricia Feeney, DOC Deputy Commissioner for Quality Assurance and Integrity, "there is individual soap in every cell. . . . Every captain on every tour is now mandated to inspect all sinks and showers to be sure that they're working for purposes of washing. Disinfectants and mold cleaners, mildew cleaners, general cleaners, floor cleaners, scrubbing cleaners and all of those supplies in every housing area have been greatly supplemented" (A032-A035, A038). Counsel added that daily inspections were being conducted by the Environmental Unit of each housing area, day room, and intake common spaces to ensure that they were properly supplied with soap dispensers and other supplies and that sinks were functional (A035). "I have spoken to the captains, and they are now mandated to cut tours and to report to their deputy or wardens and report on their operational or non-operational plumbing, and any work orders are immediately expedited" (A036).

DOC counsel also stated that the medical staff of Correctional Health Services was working overtime, "meeting with inmates, discussing hygiene with inmates, the importance of social distancing," and that "if an inmate exhibits symptoms which require [a] hospital setting . . . that inmate is taken to Bellevue" (A037). Counsel argued that petitioners' reliance on tweets from the Chief Medical Officer at Rikers

Island regarding the need to reduce the population there was not the equivalent of sworn testimony that should guide the court's decision making (A021, A038).

After hearing from all parties, the court denied the petition, stating:

> Deliberate indifference, in general, requires a dangerous condition; knowledge, either actual or constructive, on the part of the incarcerating agency, and the failure to take any steps to remedy. In this case although the first two are satisfied, there is a dangerous condition of a sort that is truly unprecedented, and the Department of Corrections, clearly, knows about it. I'm simply not prepared to find either that Corrections has done nothing to remedy the situation, or that release is the only way to mitigate the harm.

(A059) (see A004) (Order dismissing petition).

Motion for Leave to Reargue or Renew Habeas Petition

Almost two weeks later, on April 1, 2020, counsel for petitioners filed a Verified Petition in Support of a Motion for Leave to Reargue or Renew Writ of Habeas Corpus on behalf of 79 of the original 116 petitioners, claiming that since the court issued its decision, "when there was only *one* diagnosed case of COVID-19 in New York's jails, the virus has exploded," infecting 180 incarcerated individuals and more than 141 DOC staff members, thereby "transforming Rikers Island into the global epicenter of the pandemic and eviscerating Respondents' claim that its efforts are a sufficient response to the threat to Petitioners' lives" (A327-A328) (emphasis in original). Petitioners claimed that updated information definitively established that no conditions of confinement could adequately manage the risk of infection for medically vulnerable individuals such as petitioners, and that continuing to subject them to

pretrial incarceration constituted deliberate indifference to the risk of serious medical harm, in violation of their federal and State due process rights (A328, A353-A357).

Petitioners further alleged, without citation, that the "attack rate" or rate of infection in New York City jails was "eight times higher" than any other epicenter of the disease, including Wuhan, China and Lombardy, Italy (A348), and that although in "other litigation," DOC personnel had provided affidavits describing the measures taken to separate medically vulnerable inmates from the general population and to implement enhanced sanitizing procedures, those measures were simply insufficient and the only remedy consistent with constitutional requirements was immediate release of the named petitioners (A348-A351).

Although almost two weeks had passed since the hearing before Justice Statsinger, the motion for leave to reargue, in addition to alleging the ages and medical diagnoses of the petitioners as the original petition had, also listed most of the petitioners' NYSID numbers and the amount of bail that had been set as to each. However, like the original petition, the accompanying 109-page appendix was replete with media articles about COVID-19 in general, but contained no supporting affidavits of petitioners or attorneys and no documentation of petitioners' medical conditions, the current state of their health, where they were housed in the jail, or whether they were receiving treatment for their conditions. Nor was any information provided regarding the nature of the charges pending against them, their likelihood of complying with conditions of release, or any information regarding the medical care

and treatment available to them upon release. As to some petitioners, the motion mentioned the existence of documentation in the form of medical records and letters by prison doctors, but none was attached to the motion or provided to the court (A329-A345).[2]

In a written response, the New York County District Attorney argued that the court should deny petitioners' motion because they had not met the standard for such reconsideration by simply re-hashing their earlier arguments which had not been overlooked by the court (JA010-JA016). Addressing the substance of petitioners' claims, the District Attorney noted that since the filing of the initial petition, respondents had submitted, in other habeas proceedings, affidavits from prison officials with first-hand knowledge of the conditions at Rikers Island and that such submissions, now appended to the District Attorney's response, directly contradicted

[2] For example, as to appellants Freddie Johnson, Anthony Brown, Joseph Torres, and Willie Florence, the motion stated that "Dr. Rachel Bedard of Correctional Health Services" had either "written a letter" or confirmed in some fashion that as a result of his age and health condition, the petitioner was "at high risk for severe illness or death if he contracts COVID-19" (A329 ¶9, A334 ¶29, A335 ¶35, A335 ¶35, A341 ¶62). As to appellants Gregory Jason, Hollis Hosear, and Anibal Quinones, the motion merely alluded to the existence of medical records that showed that the petitioner suffered from a particular health condition, as a result of which he is at a "high risk for severe illness or death if he contracts COVID-19" (A331 ¶14, A338 ¶50, A343 ¶75). As to Gian Verdelli and Eleuterio Carmona, the motion stated that by virtue of their ages (68, 62), these petitioners were at a "high risk for severe illness or death" if infected with the virus, but without reference to any documentation (A336 ¶38, A339 ¶53).

petitioners' unsupported allegations regarding conditions within DOC facilities (JA001-JA002, JA022-JA023, JA032-JA039).[3]

For example, an April 2, 2020 affidavit of Richard D. Bush, Senior Correctional Institution Administrator for Health Affairs at DOC, who has worked in the corrections health care field for 20 years and serves as the liaison between DOC and Correctional Health Services ("CHS"), describes in detail the efforts to minimize the risks to those in DOC custody, including identifying "medically vulnerable person[s] based on their medical background," and separating those individuals from the general population or placing them in a unit that provides access to increased clinical attention (JA033 ¶3).[4] Further, Bush advised, inmates who have tested positive for COVID-19 are separated from those who have not been so diagnosed, clinicians are available to communicate with patients and reinforce guidance on preventing the spread of COVID-19 by frequent hand washing and social distancing, and DOC

[3] Petitioner's appendix to their brief includes selected exhibits to the District Attorney's response to their motion for leave to renew (incorrectly described as "Respondents' Exhibits to Motion in Opposition to Petitioner's Writ for Habeas Corpus") (see A294-A326), but their appendix does not include the response itself, consisting of the affirmation of Assistant District Attorney Patricia Bailey with an accompanying memorandum of law. Her response is in the Joint Appendix at JA001-JA069).

[4] CHS is a division of the New York City Health + Hospitals Corporation and has been responsible for the health care of inmates housed in DOC facilities since 2016. It provides a range of services including, but not limited to, medical care, mental health care, substance abuse treatment, social work services, dental, and pharmacy. As a division of Health + Hospitals, CHS is able to leverage the resources of the nation's largest public health care system. See NYC Health + Hospitals/Correctional Health Services: About Us. Available at https://www.nychealthandhospitals.org/correctionalhealthservices/

monitors at-risk inmates and refers any individuals exhibiting symptoms for evaluation (id., ¶¶3, 4).

Bush's affidavit further states that a total of 1,278 individuals, roughly 20 percent of the population, had been discharged from DOC custody between March 17 and April 1, 2020, that DOC reopened the Eric M. Taylor Center for newly admitted individuals exhibiting symptoms "to expand capacity for housing and separation of people who have tested positive for COVID-19," and that additional units were opened for the same purpose within the Rose M. Singer Center for female detainees (id., ¶¶6, 7).

Also attached to the District Attorney's response was an April 2, 2020 affidavit of Patricia Feeney, DOC Deputy Commissioner of Quality Assurance and Integrity, who oversees the Environmental Health Unit and the Compliance and Safety Center (JA035-JA039). According to Feeney, DOC has "implemented the containment and control of transmission guidelines recommended by the Centers for Disease Control ("CDC") and the Department of Health and Mental Hygiene ("DOHMH"), and has communicated these guidelines to staff and persons in custody" (id., ¶6).

Feeney, who has a substantial background in both health and sanitation, explains in her affidavit that she has "been instrumental in ramping up DOC sanitation protocols and comprehensive cleaning measures to combat [COVID-19's] spread throughout our facilities. This includes implementing enhanced cleaning and sanitizing procedures in areas with a lot of traffic, which include hallways and

bathrooms" (id., ¶5). Feeney states that DOC's efforts also include training all staff to encourage inmates to observe social distancing, to wash their hands, to avoid sitting on other inmates' beds, to cover their mouths when sneezing or coughing, and to adhere to sanitary practices (id., ¶¶6-7). Feeney, along with the Bureau Chief of Facilities Operations, monitors compliance with mandated inspections of housing areas by DOC staff to ensure that faucets are working and that there are always adequate cleaning and sanitation supplies (id., ¶10).[5]

In addition to these affidavits, the District Attorney also provided the court with the following information and documentation:

(1) an April 1, 2020 letter from the Mayor's Office of Criminal Justice to all of the New York City District Attorneys, describing the efforts taken by DOC to minimize the spread of COVID-19 in the City's jails and the actions of various officials, including the District Attorneys, who had consented to the release of certain offenders, thereby reducing the jail population, making the jails "better able to provide space for social distancing of the well and care for the sick" (JA040-JA044);

(2) an April 1, 2020 joint statement of the Interim and Incoming Chairs of the Board of Correction, the independent oversight agency for the City's jails, explaining

[5] According to Feeney's affidavit, "[s]oap is placed in the bathrooms of the housing areas, and hand soap is allowed in each person's individual cell" (id., ¶9). In addition, daily inspections are conducted so that "housing areas, dayrooms, intakes and common spaces have operable soap dispensers, functional sinks and adequate cleaning supplies" (id.).

the efforts undertaken by various agencies to address COVID-19 in City jails and commending the City and its District Attorneys for taking action to release hundreds of inmates, where "appropriate," in order to reduce the jail population and "allow for improved separation" of the inmates who remain in custody (JA003, ¶5);[6]

(3) an April 3, 2020 order of Commissioner Brann to the commanding officers of all DOC facilities and divisions, requiring all staff to wear face masks at all times and have latex gloves in their possession when on duty, and further requiring that all persons in custody while "in a congregant setting shall be required to wear a mask" (JA045-JA047);

(4) contemporaneous decisions of other Supreme Court justices denying the majority of writs of habeas corpus, finding no deliberate indifference to DOC inmates' medical needs during the COVID-19 pandemic (JA003-JA004, ¶6); and

(5) brief case summaries, criminal histories (including warrant and parole history), and bail status of 43 petitioners, excluding those detained solely on a violation of parole warrant (JA048-JA069).[7] The summaries contained information that the prosecutor assigned to the particular underlying criminal case had provided to the bail court when it determined the securing order (id.).

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[6] NYC Board of Corrections and COVID-19: April 1, 2020 Joint Statement of BOC Chairs, available at https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/JJA_JS%20public%20report%20statement_mme.pdf (last visited May 17, 2020).

[7] All appellants except for Anthony Brown and Joseph Torres, who have parole holds and $1 bail set in their pending criminal cases, were among these 43 petitioners.

In an accompanying memorandum of law, the District Attorney argued that the appended brief case summaries and criminal histories of petitioners and their continued detention following extensive, coordinated efforts by the Mayor's Office and the District Attorney's Office to reduce the inmate population without compromising the administration of justice and public safety showed that "these individuals are among the highest flight risks in the system" (JA009).

The District Attorney further argued that petitioners' statistical analysis regarding the rate of infection in city jails was flawed because it compared dissimilar populations, namely inmates who were subject to on-site medical care and more frequent testing than the general New York City population, as to whom testing was not generally available outside of a hospital setting (JA017-JA019). Specifically, New York City Health + Hospitals was not testing members of the public for COVID-19 who did not require hospitalization and it issued guidelines, urging those with symptoms of the virus to stay at home, isolate themselves, and not go to a hospital unless "severely ill" (JA017-JA018).[8]

The District Attorney stated that a comparison of those actually testing positive for COVID-19 showed that in many areas of New York City, the infection rate was

[8] NYC Health + Hospitals: New Coronavirus Testing Guidelines. Available at https://www.nychealthandhospitals.org/coronavirus-testing-guidelines/ (last visited May 17, 2020).

higher than at Rikers Island. Accordingly, petitioners' data, taken out of context and viewed in a vacuum, was simply an unreliable indicator of the relative risk of exposure to COVID-19 by these two populations (JA018-JA019). Moreover, data from the Board of Correction which, on April 1, 2020, began to publicly report data concerning the virus and the DOC population, showed that the daily confirmed COVID-19 cases at DOC was actually on a downward trend from April 1 to April 7, 2020, in contrast to the rising rate of infection among DOC staff who were out of the facility and with the general public when not on duty (JA019-JA021). The District Attorney further noted that the approximately 20% reduced population in DOC jails, as attested to in the Bush affidavit, had to be viewed in the context of the already reduced jail population due to bail reform legislation that took effect in on January 1, 2020 and resulted in the release of nearly all non-violent offenders as well as some violent offenders who had no history of failing to appear in court (JA021).

Petitioners did not file a reply to the District Attorney's response, but they filed an addendum to their motion on April 8, 2020, advising the court that six of the petitioners (none of the appellants herein) had tested positive for COVID-19, and that the petition was moot as to 11 additional petitioners who had been released and one who, after pleading guilty, withdrew from the petition, thus reducing the total number of petitioners to 67. The addendum provided additional information, but no

documentation, regarding several of petitioners' medical conditions.[9] Two organizations, Physicians for Human Rights, and another group consisting of "public health officials and human rights experts," filed amicus briefs in support of petitioners' motion for leave to reargue and renew (JA081). The District Attorney filed responses to the amicus briefs, one of which is appended to this brief (JA070-JA077). Physicians for Human Rights has filed an amicus brief in this appeal.

The Court's Decision

On April 13, 2020, the court issued a written decision and order, granting petitioners' motion for leave to renew their petition for a writ of habeas corpus, "[i]n light of the rapidly evolving facts surrounding the COVID-19 pandemic, as well as the changing legal environment," the latter being a reference to judicial decisions rendered after the court's denial of the petition (JA078). "However," the court held, "after a review of the extensive materials submitted in connection with the motion to renew, the Court adheres to its prior decision and dismisses the petition for a writ of habeas corpus" (id.).

The court first adhered to its original conclusion that the conditions at Rikers Island did not amount to "deliberate indifference" to the inmates' medical needs, finding that "[t]he extensive record of remedial efforts being undertaken at Rikers Island, well documented both in connection with this motion and elsewhere, shows

[9] Petitioners' addendum is not in their appendix, but the court referred to it in its opinion (JA081).

that neither the City nor the State is 'disregarding' the very real risk to these inmates' health or safety," and that "the record in this case establishes that Rikers Island's efforts to limit the spread of the novel coronavirus are, at a very minimum, 'reasonable' or 'adequate' and in fact are probably far greater than that" (JA083-JA085). The court further found that "even accepting the premise that it is impossible to reduce the risk of serious illness faced by Rikers Island inmates to that faced by the population as a whole does not alter the constitutional calculus." The court's rationale was as follows:

> The Due Process Clause and the Eighth Amendment do not require that the medical treatment received by inmates be as good as that available to the population as a whole, or that the medical outcomes be equivalent. They require only that prisons not be 'deliberately indifferent' to their inmates' medical needs. Indeed, substandard, even negligent, medical care of a prisoner does not amount to a constitutional violation. *E.g., Sereika v. Patel*, 411 F. Supp.2d 397, 407 (S.D.N.Y. 2006); *Atkins v. County of Orange*, 372 F. Supp.2d 377 (S.D.N.Y. 2005).

(JA085).

The court further rejected petitioners' claims under the Due Process Clause of Art. I, § 6 of the New York Constitution, finding that the interest in having the petitioners return to confinement once the pandemic subsides and be present for trial was "a compelling governmental interest that would be affected to an extreme degree by the relief requested" (JA087). On the other side of the equation was petitioners' right to be free from "deliberately indifferent" medical care which, the court determined, would not be violated by their continued detention based on the court's

previous finding that DOC's efforts to limit the spread of the virus were, at the very least "reasonable" and "adequate" (JA086-JA087).

The court discussed the two amicus briefs, which both focused on the inadequacy of DOC's remedial efforts and the importance of reducing the inmate population in order to contain the spread of the virus (JA088-JA089). Acknowledging that at least some petitioners might experience "better health outcomes if released," the court concluded that "the likelihood of a better health outcome outside of a carceral setting does not create a viable constitutional argument for [petitioners'] release" (id.). The court also rejected the arguments in the amicus briefs that the petition should be granted as a "general public health measure" to reduce the prison population (id.). Although the court stated that "[*a*]*mici* make an excellent point," it noted that its authority was limited to ordering immediate release of petitioners only if they were "illegally detained," and not to achieve any other purpose, "however worthwhile" (id.).

Although Justice Statsinger reached the merits of petitioners' due process arguments, and found them lacking, he alternatively denied relief on procedural grounds, finding it impossible to adjudicate petitioners' claims based upon the paucity of information they had provided him (JA089-JA092). He noted that the petition lumped all remaining 67 petitioners together and urged the court "to treat identically persons who would appear to have very different levels of susceptibility to serious illness or death from COVID-19" (JA091). Beyond that problem was the fact that

"the petition does not contain information that would differentiate those who present risk of flight from those who do not. There is no information about any individual's criminal history, ties to the community or history of nonappearance, if any. Nor is there any meaningful information about the nature of any pending criminal charges or the nature of any alleged parole violation" (JA090-JA091). The court concluded:

> These examples highlight the need for an individual review of each inmate's particular circumstances, so that a court can properly assess the level of risk to her health, weigh that against the risk of non-appearance, and decide whether release is warranted in that particular case. But the instant petition does not permit that.

(JA092). Accordingly, the court, after granting petitioners' motion for leave to renew, dismissed their petition for a writ of habeas corpus (id.).

POINT

THE HABEAS CORPUS PETITION WAS PROPERLY DENIED.

The court below correctly denied the petition on the merits because petitioners failed to establish that their continued incarceration violated either their federal or State due process rights. The court was further correct in finding the petition procedurally deficient for failing to provide the court with the requisite information to adjudicate petitioners' claims for release based upon their age and/or medical conditions. The court also properly determined that release from custody was not the appropriate remedy for petitioners' claims even if they had merit and sufficient

evidentiary support. On any, or all, of these grounds, the order dismissing the petition should be affirmed.

A. The Habeas Court Correctly Determined that it Could Not Adjudicate Petitioners' Due Process Claims Based Upon the Allegations Before It and this Court Should Therefore Affirm the Dismissal of the Petition on that Ground Alone

Based on petitioners' submissions to the habeas court, consisting of the initial habeas corpus petition and the subsequent motion for leave to reargue and renew the petition, that court was eminently correct in concluding that it could not properly address the merits of petitioners' claims. This state of affairs stemmed in large part from petitioners' choice to file a "mass writ" on behalf of 116 inmates (reduced to 67 at the time of the habeas court's decision), that provided no information other than their names and ages and, in some instances, a general, vague description of a medical condition without any accompanying documentation (see supra n.2). As the habeas court aptly noted, "the petition asks the Court to treat identically persons who would appear to have very different levels of susceptibility to serious illness or death from COVID-19," noting that numerous petitioners claimed to be at high risk solely because they were 50 years of age or older (JA091); see A066, A071, A073, A074, A076, A079). The court further found that the petition "does not contain information that would differentiate those who present risk of flight from those who do not," noting the lack of information in the petition or renewal motion about petitioners'

criminal histories, ties to the community, histories of nonappearances, or the nature of pending criminal charges and/or parole violations (JA090-JA091).

The proper way to proceed would have been to do as many other habeas petitioners have done since the outbreak of the COVID-19 pandemic, which is to first seek release from the bail-setting court on an expedited basis, based on the facts and circumstances relevant to that individual petitioner and, if unsuccessful, to file a habeas petition, alleging an abuse of discretion by the bail court. See People ex rel. Rosenthal v. Wolfson, 48 N.Y.2d 230, 233 (1979) (holding that, while "[c]hanges in relevant facts, of course, may require reconsideration of a bail determination[,] . . . principles of orderly process dictate that a renewal of the application for the setting or reduction of bail be made on return to the trial court"). Petitioners have given no reason for not following that proper procedure other than to represent to Justice Statsinger that although various agencies (DOC, the Mayor's office, NYC District Attorneys) were reviewing cases for possible release in light of the COVID-19 pandemic, that process "was not going fast enough" (A012). Justice Statsinger specifically addressed that claim and rejected it:

> [I]t appears that a fair number of the original petitioners have indeed been released since March 20; the original petition was filed on behalf of 116 inmates and the motion for leave to renew, filed on April 1, was filed on behalf of 79 members of that original class. Moreover, on April 8, counsel for petitioners advised the Court that eleven more inmates had been released and withdrew the petition as to an additional inmate, leaving 67. Thus, about 40 percent of the original petitioners have been released over a period of 19 days, *after an individual review of their*

> *circumstances*. In the Court's view, this is not evidence of a release mechanism that is "not going fast enough."

(JA090) (emphasis added).

Moreover, although almost two weeks elapsed from the date of the habeas court's initial denial of the petition (March 20), until petitioners filed their motion for leave to reargue and renew the petition (April 1), they provided no further information, other than petitioners' NYSID numbers, the amount of bail that had been set as to each, and a reference to the existence of medical records and letters by prison doctors, none of which was attached to the motion or provided to the court (A329-A345; see supra note 2). Thereafter, almost one more month elapsed from the date of Judge Statsinger's grant of the motion to renew and his denial of the habeas petition (April 13) until petitioners perfected this emergency appeal (May 8), where they, for the first time, appended medical information that had never been presented to Justice Statsinger, without providing any reason for doing so, let alone asking for this Court's permission (see App. Br., pp. 14-17) (citing to A484-A499, A501-A506, A527-A530). Indeed, the appended letters, written by CHS physician, Dr. Rachel Bedard, were dated between March 19 and March 30, either prior to the filing of the initial petition or prior to the motion for leave to renew the petition (id.)

The record thus reflects the lack of any grounding, in fact or law, for the manner in which petitioners have proceeded, first by failing to provide the habeas court with a basis for adjudicating, let alone granting, their claims for relief, and then

presenting this Court with submissions that, in the time allotted, could have and should have been presented to the lower court. Such submissions should not be considered by this Court. See, e.g., People ex rel. Aidala v. Warden, Rikers Is. Corr. Facility, 100 A.D.3d 667, 667 (2d Dept. 2012) (finding that report from forensic accountant, submitted by habeas petitioner on appeal of finding by bail court that petitioner failed to meet burden of showing that bail originated from legitimate source, "was not properly before this Court" because it had not been timely submitted to bail court); People ex rel. Dieckmann v. Warden, 182 A.D.3d 555 (2d Dept. April 9, 2020) (upholding dismissal of the writ, noting that petitioner appeared to be raising a "deliberate indifference" claim for the first time on appeal and concluding that "this claim raises questions of fact that are more appropriately considered in the first instance by the Supreme Court, which can hold evidentiary hearings and whose findings of fact and conclusions of law may be reviewed on an appropriate appellate record").

These cases support the reasoning of the habeas court that it had insufficient information to decide the weighty constitutional claims raised in the petition. Petitioners' claim on appeal, that they provided all that was necessary to obtain immediate release from custody (App. Br., p. 49-50), is based on a misunderstanding of the components of a "deliberate indifference" due process claim, as shown below (see infra Point C), and is belied by their submission to this Court of additional documentation not presented to the habeas court. Petitioners had the burden of

presenting sufficient facts in support of their claim for immediate release and they failed to meet that burden. See, e.g., People ex rel. Boyd v. LeFevre, 92 A.D.2d 1042, 1042 (3d Dept. 1983) (affirming denial of habeas writ without a hearing where petition contained "only bare, conclusory assertions that petitioner's rights have been violated without any facts alleged to support petitioner's claims"). On this ground alone, this Court should affirm the habeas court's decision and order the writ dismissed.

B. Petitioners' Due Process Claim Is Not Properly Raised In A Habeas Corpus Petition

Even if petitioners' due process claim was properly presented and had merit, a habeas corpus proceeding was not the proper vehicle for resolving it, as Justice Statsinger opined in denying the petition in the first instance. At the March 20, 2020 hearing at which all parties were present, Justice Statsinger stated that he was familiar with "the deliberate indifference cases relating to an inmate's medical needs, but it doesn't really seem that those cases generally conclude that the remedy is for the inmate to be released. It may be a change of prison policy or condition. Perhaps, an inmate is moved so he's not sharing a cell with a sick inmate, or compelling the [institution] to provide necessary care or treatment" (A017). When the court inquired of petitioners' counsel whether any case supported release under these circumstances, she could not provide one, but stated that "these are not normal times," that the only possible means of preventing serious risk of illness and death for inmates at Rikers

Island was to provide adequate hygiene and social distancing, but that "such remedies are not possible in this context" (A018-A020, A044).

In denying the initial habeas corpus writ, the court stated: "I'm simply not prepared to find either that Corrections has done nothing to remedy the situation, or that release is the only way to mitigate the harm" (A059). The court's determination that release was not the proper remedy was correct and its judgment may be affirmed on that ground alone.

Rule 7002 of the CPLR provides that "[a] person illegally imprisoned or otherwise restrained" may petition for a writ of habeas corpus to "inquire into the cause of such detention and for deliverance." If the habeas court concludes that a petitioner, who is seeking release, "is illegally detained," it shall issue a judgment "discharging [the petitioner] forthwith." CPLR 7010(a). "Traditionally the purpose of a writ of habeas corpus is to determine the legal cause of detention." People ex rel. Sacconanno v. Shaw, 4 A.D.2d 817, 817 (3d Dept. 1957); see People ex rel. Haderxhanji v. New York State Board of Parole, 97 A.D.2d 368, 369 (1st Dept. 1983) ("[T]he judgment of conviction would remain unaffected since petitioner is incarcerated by virtue of a valid commitment. Where the legality of the detention is not subject to challenge, the detainee is not entitled to immediate release and, hence, habeas corpus is not available to him.").

A habeas petition is also an appropriate means for challenging a petitioner's place of confinement, where the facility in which the petitioner is being held subjects

him to a "further restraint *in excess* of that permitted by the judgment or constitutional guarantees." People ex rel. Brown v. Johnston, 9 N.Y.2d 482, 484-85 (1961) (challenging a transfer from a state prison to a hospital for the criminally insane) (emphasis added). In such circumstances, a change in the place of confinement, and not release, is the appropriate remedy. See McGraw v. Wack, 220 A.D.2d 291, 292 (1st Dept. 1995) (observing that a writ of habeas corpus may be used to secure a transfer from one facility to another where a person has been subject "to a deprivation of personal liberty greater than necessary to achieve the purpose for which that individual is confined").

Here, petitioners do not claim that the cause of their detention is illegal, or that they are being held subject to restraint in excess of that permitted by the cause of their detention. Rather, they claim that the current pandemic has created a health and safety risk entitling them, as a group, to immediate release from custody. Petitioners have not cited to any binding case law authorizing release from custody by means of a writ of habeas corpus based upon a claim that the medical care available or the conditions of confinement were inadequate to meet the person's needs. Rather, as Justice Statsinger correctly observed, courts have considered such claims to be properly reviewable by other procedural means, such as a CPLR Article 78 petition or a 42 U.S.C. § 1983 action, which permit a court to address an inmate's medical or health-related needs with measures short of immediate release—for example, by ordering

that medication or other health-related services be provided (A033).[10] See People ex rel. Sandson v. Duncan, 306 A.D.2d 716, 717 (3d Dept. 2003) (CPLR Article 78 proceeding, rather than habeas corpus petition, was proper procedural vehicle for reviewing claim that prisoner had been denied necessary medication to treat his hepatitis C because his claim "might entitle petitioner to the medication he seeks," but not to release); Matter of Wooley v. New York State Dept. of Correctional Services, 15 N.Y.3d 275, 279-80 (2010) (reviewing claim by petitioner in DOC's custody that he was unconstitutionally denied requested medical treatment by means of CPLR Article 78 petition); Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 351-52 (3d Cir. 1987) (on appeal of 42 U.S.C. § 1983 class action, affirming judgment that required county correctional facility to provide abortion services to inmates if requested).

Habeas corpus review does not allow for such alternative remedial measures, and thus is not a proper means by which to adjudicate claims related to medical and

[10] In Brown v. Plata, 563 U.S. 493 (2011), although a court issued an order effectively releasing prisoners to relieve prison overcrowding, it did so pursuant to a federal statute that required the court to have first ordered alternative measures that had failed. In that case the Supreme Court upheld a federal court order that limited California's prison population, recognizing that the order was likely to necessitate the release of large numbers of prisoners. The order was issued pursuant to the Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626, which authorizes a specially-convened three-judge court to "enter an order limiting a prison population" as a remedy for a constitutional violation if the court had previously ordered less intrusive relief that had not remedied the violation. Id. at 512. As the Supreme Court noted in affirming the three-judge-panel's order in Brown, earlier orders for less intrusive relief had been issued and California had been given an opportunity to remedy the violations pursuant to those orders, but had failed to do so. Id. at 516.

health-related needs.[11] See, e.g., People ex rel. Barnes v. Allard, 25 A.D.3d 893, 894 (3d Dept. 2006) (petitioner's claim that prison officials were deliberately indifferent to his medical needs would not, even if meritorious, entitle him to immediate relief, rendering habeas corpus an improper vehicle for raising such a claim); Sandson, 306 A.D.2d at 716-17 ("Habeas corpus will be granted only in cases where success would entitle the petitioner to immediate release," whereas petitioner's claim "might entitle petitioner to the medication he seeks"; accordingly, "[t]he appropriate procedural" vehicle for raising a claim for certain medication would be a "CPLR article 78 proceeding").

In fact, several lower courts that have considered claims seeking immediate release from custody based on the risks posed by the COVID-19 pandemic have correctly concluded that a writ of habeas corpus is not the appropriate vehicle for such claims. See, e.g., People ex rel. Moulter (Crockett) v. Brann, 67 Misc.3d 1206(A), Slip Op. 50436(U) *2, *5 (Sup. Ct., Bronx Co. Apr. 16, 2020) (Fabrizio, J.) (holding that even if petitioner could establish deliberate indifference to his medical needs, "release via habeas corpus [ ] is not legally cognizable" for claim based on "prison conditions" and "would be unprecedented"); People ex rel. Shoshany (Banegas) v. Brann, Index No. 260222/2020 *7 (Sup. Ct., Bronx Co. Apr. 11, 2020) (Lieb, J.)

[11] To the extent appellate courts have contemplated that a claim for release based upon allegedly inadequate medical care or other conditions could be raised by a habeas corpus petition, they did so in dicta. See People ex rel. Hall v. LeFevre, 60 N.Y.2d 579, 580 (1983); People ex rel. Kalikow v. Scully, 198 A.D.2d 250, 251 (2d Dept. 1993).

(JA103, JA109) (concluding that petitioner's claim that his medical care for symptoms of COVID-19 had been inadequate was not properly brought in writ of habeas corpus); People ex rel. Stoughton (Aponte et al.) v. Brann, (Sup. Ct., Queens Co. March 15, 2020) (Holder, J.) (JA113-JA114) ("Although petitioners contend that . . . their continued custody at Rikers Island during the COVID-19 pandemic violates their due process rights because the conditions of their confinement render it impossible to prevent the transmission of the virus, they have not established that their confinement is illegal such that the only remedy would be their immediate release.") (citation omitted).

And, even more recently, the Second Department affirmed the dismissal of a habeas corpus petition of a Rikers Island prisoner who had contracted the COVID-19 virus, finding both that he had not demonstrated that prison officials were deliberately indifferent to his medicals needs or that he "is entitled to immediate release from custody as a remedy for any failure to address his medical needs." People ex rel. Ferro (Pasha) v. Brann, 2020 WL 2462237 (2d Dept. May 12, 2020) (citing, *inter alia*, People ex rel. Sandson, 306 A.D.2d at 717).

Accordingly, the Court may additionally affirm the habeas court's dismissal of the writ on the ground that a habeas corpus petition is not an appropriate vehicle for adjudicating petitioners' claims.

C. Petitioners Have Not Established A Violation Of Their Due Process Rights Under The Federal Or State Constitutions

Petitioners claim that their federal due process rights have been violated because corrections officials have shown deliberate indifference to the serious health risk posed by the COVID-19 pandemic. They further contend that their State due process rights were violated because the potential harm posed by the COVID-19 virus is not outweighed by the State's interest in their continued detention. Even if petitioners provided a sufficient factual basis in support of their claims, and even if a habeas petition were a proper vehicle for asserting such claims, the contentions should be rejected.

Filed in support of petitioners' request for immediate release is an amicus curiae brief by a non-profit group, Physicians for Human Rights. Amici provide an overview of the path and effects of COVID-19, much of which was briefed below. They advocate for petitioners' release by opining on what they believe to be the conditions inside Rikers Island. However, critical information that Amici, as physicians, do not provide is concrete documentation or analysis of petitioners' individualized, alleged medical conditions. Nor do they discuss, and perhaps may not even know, the specific conditions of petitioners' housing units at Rikers Island.

As shown by the District Attorney's response to petitioners' motion to renew their habeas petition, and credited by Justice Statsinger, far from showing deliberate indifference, the DOC has devised policies and implemented numerous precautions

to minimize the risk of harm posed by COVID-19 to inmates in its facilities. By the same token, as Justice Statsinger correctly held, petitioners failed to show that the State's interest in their continued detention was outweighed by the risk of harm to their health if they remained in custody.

First, as documented in petitioners' original petition, in early March 2020, DOC instituted a COVID-19 Preparation and Action Plan with various measures to reduce the risk of exposure to COVID-19 for inmates and staff (A258-A263).[12] Among these measures are the following:

> a. DOC staff has been instructed to refer any persons in custody who exhibit symptoms of COVID-19 to Correctional Health Services ("CHS") for evaluation.
>
> b. CHS medically screens all individuals prior to arraignment in criminal court and again upon admission to DOC's custody to identify health issues, including signs and symptoms of COVID-19, and isolates and monitors, as appropriate, detainees who may be at a high risk of infection.
>
> c. If clinically indicated, detainees are placed in special housing units for monitoring and isolation for a variety of reasons, including the possibility of COVID-19 infection. As appropriate, patients may also receive care at acute care facilities within the NYC Health + Hospitals system.

[12] DOC COVID-19 Action Plan. Available at https://www1.nyc.gov/site/doc/media/coronavirus-news.page (last visited May 17, 2020). See LaSonde v. Seabrook, 89 A.D.3d 132, 137 n.8 (1st Dept. 2011) ("This Court has discretion to take judicial notice of material derived from official government Web sites") (citing Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 61 A.D.3d 13, 20 (2d Dept. 2009) (holding contents of a government agency's website can be the proper subject of judicial notice)).

d. DOC reopened the Eric M. Taylor Center for new intakes showing symptoms and for detainees who have tested positive for COVID-19.

e. Where possible in dormitory housing units, DOC is ensuring there is an empty bed between people in custody to increase space while sleeping.

f. DOC has suspended all in-person visitation and most in-person court appearances.

g. The City is taking additional measures to help detainees stay in contact with their families and communities, including increased access to phones and postage stamps.

h. DOC is cleaning and sanitizing all housing units, dayrooms, and common spaces once per day.

i. DOC is cleaning all shower areas three times per day and cleaning and sanitizing all transport buses daily.

j. DOC is providing free hand soap and cleaning supplies to all detainees and providing soap at every sink; information regarding the availability and presence of soap and a list of detainee complaints is provided to area captains and documented three times during their eight-hour tours.

The implementation of these measures was described in the two affidavits submitted to the habeas court as part of the District Attorney's response to petitioners' motion for leave to renew their habeas corpus petition, specifically, the April 2, 2020 affidavits of Richard D. Bush, Senior Correctional Institution Administrator for Health Affairs at DOC (JA032-JA034), and that of Patricia Feeney, Deputy Commissioner of Quality Assurance and Integrity (JA035-JA039). In accordance with its plan, DOC monitors at-risk individuals in its custody, while maintaining regular contact with CHS, the medical provider for persons in DOC

custody (see JA033-JA035, Bush Aff. ¶¶1, 5). DOC has provided guidance to staff on how to recognize COVID-19 symptoms and instructed staff to refer all detainees exhibiting COVID-19 symptoms to CHS (id. at ¶5).

As recounted by Bush, DOC screens all individuals entering its custody in order to identify health issues, including signs and symptoms of COVID-19, and requires all staff entering its facilities to be screened for such symptoms, which encompasses mandatory temperature screening (id. at ¶6). Detainees who exhibit symptoms of COVID-19 are referred to CHS for evaluation and, if necessary, are placed in special housing units for isolation and monitoring (id. at ¶3). Any employee who does not meet the criteria for approval is sent home and advised to follow New York City's Department of Health guidelines for medical care and treatment (id. at ¶6).

The Bush affidavit further states that DOC has a dedicated housing unit for detainees entering its custody who show symptoms of COVID-19 so that those detainees may be segregated from the general population and have access to increased clinical attention (id. at ¶¶3, 6). Specifically, on March 22, 2020, DOC re-opened the Eric M. Taylor Center for newly admitted individuals exhibiting symptoms "to expand capacity for housing and separation of people who have tested positive for COVID-19," and additional units have been opened for the same purpose within the Rose M. Singer Center for female detainees (id. at ¶6). DOC has also created a dedicated intake

area in the Manhattan Detention Center ("MDC") for new detainees with no symptoms, in order to monitor and house them appropriately (id.).

Notably, according to Bush, a total of 1,278 individuals, roughly 20 percent of the population, were discharged from DOC custody between March 17 and April 1 (id. at ¶7). This was due, in part, to collaborative efforts by the New York City District Attorneys, the Mayor, and DOC to release medically vulnerable individuals in custody, as described in the District Attorney's response to petitioners' motion to renew the habeas corpus petition (see JA003, ¶5, JA040-JA043). This measure added to the already reduced inmate population on Rikers Island due to bail reform legislation that took effect on January 1, 2020 and resulted in the release of nearly all non-violent offenders, as well as some violent offenders who had no history of failing to appear in court. Rikers Island is not only not overcrowded; the last time it had so few inmates was 1946.[13] Entire buildings that can house inmates now sit empty and are available for purposes of segregating inmates. This dramatic reduction in the DOC population allows for greater social distancing and further undercuts the claim, pervasive in petitioners' brief, that DOC's continued efforts are ineffective and that nothing short of immediate release will fulfill its constitutional obligations to protect them from serious harm.

[13] Pix 11, City jail population lowest since 1946 due to virus-related releases, 4/21/20, available at https://www.pix11.com/news/coronavirus/city-jail-population-lowest-since-1946-due-to-virus-related-releases.

In fact, since the date of Bush's affidavit, the inmate population has continued its downward trend. As of May 19, 2020, the total population in custody was 3,940, which reflects a population reduction of 1,617 between March 16 and May 19, 2020.[14] As a result of the dramatic reduction in the inmate population, DOC is currently operating at 49% capacity: as of May 7, 2020, the dormitory facilities were at 37% occupancy, with non-COVID dorms at 36% capacity, and COVID dorms at 40% capacity.[15] Such occupancy rates allow for greater social distancing, including the placement of an empty bed between people in custody. Across the 12 different detention facilities, a total of 234 open housing areas are available to house current inmates—including nine COVID housing areas for the 66 inmates who are either currently positive for or exhibiting symptoms of the virus, and 48 housing areas for inmates who may have been exposed but remain asymptomatic.[16]

While petitioners and Amici describe Rikers Island as the "epicenter" of the disease to the point of being the most dangerous cruise ship on the planet, the actual data to date demonstrates a very different picture. Included in the daily COVID-19

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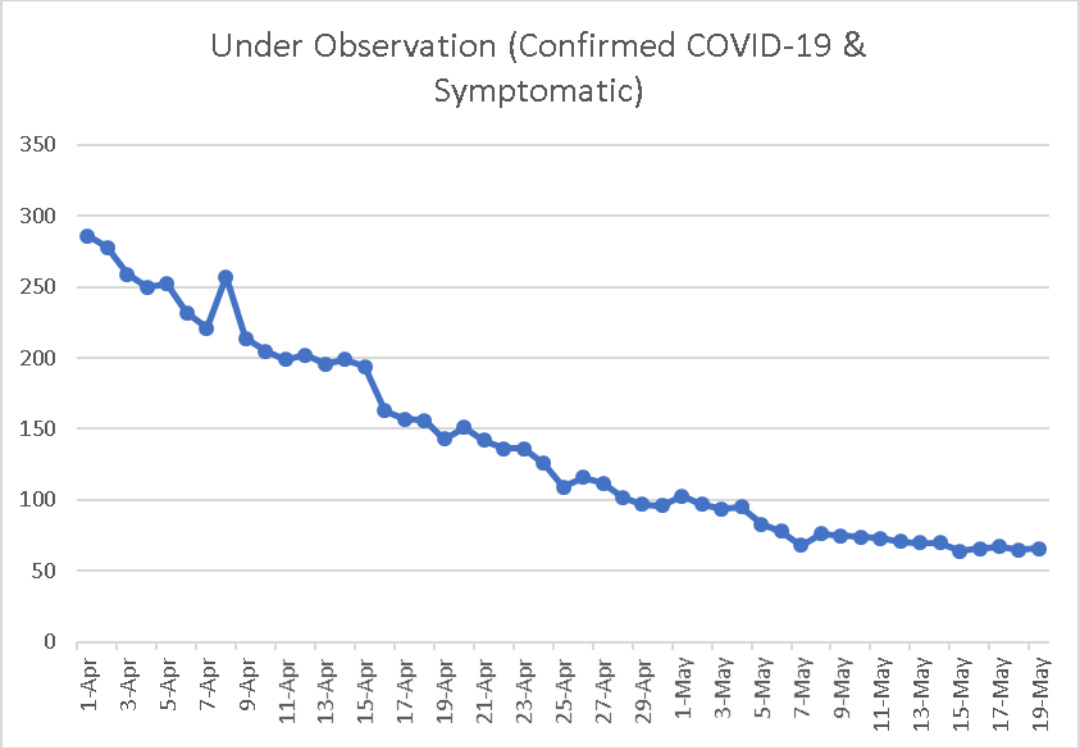
[14] NYC Board of Correction and COVID-19: May 19, 2020 Daily Report. Available at https://www1.nyc.gov/site/boc/covid-19.page (last visited May 20, 2020).

[15] See NYC Board of Corrections ("BOC") and COVID-19: "DOC Update: COVID-19 Preparedness & Response: Housing." Available at, https://www1.nyc.gov/assets/boc/downloads/pdf/may_2020_covid_19_preparedness_and_response_5_12_20.pdf (last visited May 17, 2020).

[16] NYC Board of Correction and COVID-19: May 19, 2020 Daily Report. Available at https://www1.nyc.gov/site/boc/covid-19.page (last visited May 20, 2020).

reports issued by the Board of Correction ("BOC"), the independent oversight agency for the City's jails, are the number of inmates who are under observation, either because they are currently positive for COVID-19 or are symptomatic. As inmates recover from the virus and are returned to general housing, that number has steadily declined from April 1 to May 19, from 286 to 66 inmates, a 77% percent reduction, as depicted in the graph below:[17]



[17] Id. (see also previous Daily COVID-19 Updates, April 1 – May 19, available at https://www1.nyc.gov/site/boc/covid-19-updates.page).

The BOC also reports on the cumulative number of those current inmates who have tested positive in the past along with those currently infected. As of May 19, there was a total of 363 in that category. Given that 66 of those inmates are currently positive, the remaining 297 have recovered from the virus and returned to general population, consistent with DOC and CDC guidelines. That so many inmates have recovered under the medical care of CHS and have been returned to the general population belies Amici's claim that "Rikers Island cannot provide adequate care for inmates suffering from COVID-19" (Amicus Br. at 19). [18]

The BOC also provides the public with the numbers for DOC and CHS staff who have been infected with the virus. That data shows the growth rate of staff higher than that of the inmates. On this point, petitioners rely on April 15, 2020 as a bench mark date but cite numbers different from those reported by the BOC (App.

[18] Amici argue, without source attribution, that DOC "does not have adequate medical facilities to meet the needs of coronavirus patients who become seriously ill. . . . Adequate treatment requires expensive hospital care involving an entire team of providers, including physicians with specialized backgrounds . . . ." (Amicus Br. at 19-20). Amici is apparently unaware that CHS is part of the NYC Health + Hospitals system and thus, detainees have access to the same medical care system as the general public. As such, should a detainee become seriously ill, from COVID-19 or any other medical ailment, he has access to the same hospitals, the same specialists, the same medical equipment—including ventilators—as any other resident of New York City. CHS assumed responsibility for the medical care and treatment of inmates as of 2016. Amici's outdated claim of "well-documented inadequacy of medical care at Rikers Island" (id. at 20), and their failure to review and opine on the actual medical care being provided to petitioners, speaks to Amici's lack of actual knowledge of the current conditions at the facility.

Br. at 3). In any event, on April 15, 2020, the BOC reported that 657 DOC and 95 CHS staff (cumulatively 752) had been confirmed positive for COVID-19. On May 8, 2020, the date of petitioners' appellate filing, the cumulative number for both DOC and CHS staff was 1440. And, as of May 19, 2020, the cumulative number for staff was 1546. These numbers are not surprising given that it is staff who are daily out in the public and subjected to the community spread that has been virulent in New York City.[19] As discussed above, when staff are confirmed for COVID-19 or exhibit symptoms of the virus, they are sent home (see Bush Aff., ¶¶ 3, 6) (JA033-JA034), and when inmates are newly admitted, they are quarantined, regardless of testing status or symptoms.[20]

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[19] NYC Board of Correction and COVID-19: May 19, 2020 Daily Report. Available at https://www1.nyc.gov/site/boc/covid-19.page (last visited May 20, 2020). See previous Daily COVID-19 Updates, at April 15, May 8, May 19, 2020.

[20] Since late April, all new admissions are administered a COVID-19 test prior to housing assignments. See New York City Council: Committee on Criminal Justice System May 19, 2020 Hearing on COVID-19 in City Jails (NYC City Council Hearing) Written Testimony Dr. Patricia Yang (JA093-JA095) Upon screening, even asymptomatic admissions are assigned to Manhattan Detention Center (MDC) housing units for a 14-day quarantine period or until cleared by CHS. Those new admissions who test positive for the virus or are symptomatic are assigned to housing units at either West Facility or EMTC. If an inmate tests positive for the virus after admission, he is moved to a COVID housing unit and the remainder of the housing unit is placed on quarantine. See NYC Council Hearing, Commissioner Brann Testimony: Video testimony available at https://livestream.com/nyccouncil/events/9081844/videos/206262012 at time stamp 1:04:43-1:07:10.

As further shown in Deputy Commissioner Feeney's affidavit, DOC has implemented robust sanitation protocols throughout its facilities and in its transportation vehicles in its continued attempts to contain the spread of COVID-19. As recounted by Feeney, DOC has "implemented the containment and control of transmission guidelines recommended by the CDC and DOHMH [Department of Health and Mental Hygiene]" (JA0036-JA037, Feeney Aff. ¶6). Those guidelines include personal hygiene and sanitary measures, social distancing, the suspension of in-person visits and religious services, and the closure of facility barbershops (id. at ¶¶6-7).

As further shown by Feeney's affidavit, all housing units, dayrooms, and common spaces are cleaned and sanitized once per day; shower areas are sanitized daily; and all transport buses are cleaned and sanitized daily (id. at ¶8). DOC provides each individual in its custody with a personal bar of soap and access to cleaning supplies in the janitor's closet for each housing area (id. at ¶ 8). DOC also allows each detainee to keep soap in his cell; a detainee may request additional soap from the housing area officer, and DOC has placed soap in the bathrooms of the housing areas (id. at ¶9). Further, DOC has communicated to staff and detainees that they should cover their mouths when coughing or sneezing, wash their hands frequently with soap for at least 20 seconds, and refrain from touching their faces (id. at ¶6).

DOC has also instituted social distancing measures within the general prison population. For example, the capacity in housing units has been reduced so as to

allow for greater space between persons in the units (id. at ¶7). Where possible, DOC has maintained an empty bed in between each person in custody (id. at ¶7). And persons are encouraged to engage in social distancing during mealtime, as well as instructed not to sit on each other's beds (id.).

Finally, DOC has taken steps to ensure that its policies are being effectively implemented, such as through daily inspections by officials and staff at its facilities (id. at ¶¶9-10). Commanding officers and staff regularly tour the facilities to inspect whether adequate soap, cleaning, and sanitation supplies are available to individuals in custody, and to check that sinks and showers are operable (id. at ¶10). DOC is also tracking complaints concerning sanitation issues, including the availability of working sinks, and is instituting remediation measures when necessary (id.). Individuals housed in a cell with an inoperable sink are relocated to a cell with a working sink (id.).[21]

[21] BOC, as the oversight agency for the City's jails that has monitored DOC's response to COVID-19, has access to, among other information, DOC's data systems, surveillance cameras, and daily sanitation supply audits. On May 11, 2020, they issued a report on their observation of housing areas for COVID-19 patients, symptomatic patients, and those in the "likely exposed" housing units. See New York City BOC and COVID-19 Report Representing Observational Date. Available at https://www1.nyc.gov/site/boc/covid-19.page (last visited May 19, 2020). With respect to masks and gloves, BOC found that staff wore them but that there were challenges to getting inmates to wear their masks and recommended further education. Their review of a sampling of DOC's sanitation and supply availability audits showed high rates of sanitation supply availability and work orders submitted when sinks were observed to be inoperable. See NYC Council Hearing: Written Testimony of Margret Egan, Executive Director of BOC (JA099-JA102). https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=787231&GUID=7657E251-6C3D-4D81-839B-16BBEDCC6FC9&Options=info|&Search=

As further provided to the habeas court, DOC Commissioner Brann issued an order on April 3, 2020, requiring all staff to wear a face mask at all times when near other persons (JA045-JA047). Brann also required that "all persons in custody" be given a face mask, and ordered that face masks be worn while such persons are "locked out in a congregant setting." (id.). Finally, Brann ordered that staff not engage in "unnecessary assembly," and further required that persons during "roll-call assembly" maintain a six-foot distance (id.). Respondent Brann implemented these measures more than a week prior to a similar directive issued by Governor Cuomo on to persons in New York City. See N.Y. Exec. Order No. 202.17 (Apr. 15, 2020) (requiring that all persons over the age of two "cover their nose and mouth with a mask" when in a public space and unable to maintain social distancing).[22]

A major assumption underlying petitioners' due process claim is that the infection rate at Rikers Island is soaring and is significantly higher than within the New York City population (App. Br. at 3; Amicus Br. at 14 (citing Legal Aid Society

[22] The information in the April 2, 2020 Bush and Feeney affidavits and in the April 3 order of Commissioner Brann regarding the protective measures taken by DOC and CHS in response to the COVID-19 pandemic has been updated by various affidavits of DOC personnel that post-date Justice Statsinger's April 13, 2020 decision. Petitioners refer to an April 14, 2020 affidavit of Dr. Patricia Yang, Senior Vice-President of CHS, and they include it in their appendix, but they incorrectly identify it as an exhibit to the District Attorney's response in opposition to their motion for leave to renew the habeas petition, which is dated April 8, 2020 (App. Br. at 40-41; A315-A320). They also refer in their brief and include in their appendix an affidavit of Dr. Jonathan Giftos, former CHS physician (who left his position in January 2020), that was not presented to Justice Statsinger (App. Br. at 11, 40-41; A531-A542).

reports)). But this comparison is misleading because petitioners are comparing two population groups that are dissimilar in terms of their access to both testing and medical evaluation. According to Dr. Patricia Yang, Senior Vice-President of Health + Hospitals for CHS, CHS "institute[d] an early and aggressive COVID-19 antigen testing strategy that exceeds the standards being employed in the larger community. [CHS] tests at a rate 4.3. times higher than New York City."[23] As of late April 2020, all new admissions into DOC are universally tested for COVID-19. To date, CHS has tested 1, 270 detainees, of which 537 have tested positive. [24]

By contrast, testing in the City at large has been limited. The following guidance by Health + Hospitals to health care professionals is to conduct COVID-19

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[23] See New York City Council: Committee on Criminal Justice System May 19, 2020 Hearing on COVID-19 in City Jails and Juvenile Detention Centers. Written Testimony of Patricia Yang, Senior Vice President at NYC Health + Hospitals for CHS. (JA094). In addition, CHS' "more aggressive testing strategy, even from the beginning, makes it very hard do make comparisons with the rest of the City of NY. The rest of the city is not as aggressively testing. It is not universal by any means. It is not available across the board. It is not being offered to every 8.5 million people in the city." NYC Council Hearing Video Recorded testimony: Patricia Yang available at https://livestream.com/nyccouncil/events/9081844/videos/206262012 time stamp 1:11:16 - 1:13:08.

[24] Written Testimony of Patricia Yang (JA094). Without support or citation Amici's brief repeatedly refers to insufficient test kits (Amicus Br. at p. 6), "testing constraints" (Amicus Br. at p. 14), a "scarcity of testing" (Amicus Br. at p. 16), and insufficient medical equipment "including testing kits" (Amicus Br. at p. 20) in the City's jails. As noted above, CHS tests at a rate 4.3 times higher than NYC and further has "enough tests" to do so. Id. NYC Council Hearing: Dr. Ross MacDonald: Video Recorded Testimony available at https://livestream.com/nyccouncil/events/9081844/videos/206262012 at time stamp 53:00.

tests only on individuals who require hospitalization: "Persons with COVID-like illness not requiring hospitalization should be instructed to stay home. It is safer for patients and health care workers and testing does not currently change clinical management or recommendations about staying home."[25] Had New York City been testing more widely, we would no doubt have learned that many more New Yorkers had contracted the virus. In fact, recent antibody tests, sampling 7,500 New York City residents, showed that approximately 1 in 4 (24.7%) tested positive for antibodies to the virus, demonstrating that it had spread far more widely than previously known.[26]

In short, comparing the rate of infection between a heavily monitored and tested inmate population with readily accessible health care on the one hand, and the public at large on the other, is an unreliable indicator of the relative risk of exposure to these two populations. [27] A more persuasive comparison is the rate of death from

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[25] NYC Health + Hospitals New Coronavirus Testing Guidelines. Available at https://www1.nyc.gov/assets/doh/downloads/pdf/han/advisory/2020/covid-19-03202020.pdf (last visited May 17, 2020).

[26] CBS News: "Coronavirus Antibodies Present in nearly 25% of All NYC Residents; Un-Pause In Certain Regions Of NY Might Be In May." April 27, 2020. Available at https://newyork.cbslocal.com/2020/04/27/coronavirus-antibodies-present-in-nearly-25-of-all-nyc-residents/ (last visited May 19, 2020).

[27] The Legal Aid Society website, referred to in petitioners' brief as a source of data on infection rates (App. Br., at 3, n.2), should be viewed with the caveat that prior to May 9, 2020, the infection rate multiplier was based solely on the inmate population, but as that number went down by over 50% and was continuing to drop, the website was retooled to include both inmates and staff. As noted above, DOC staff members leave the facility daily and are exposed to the general population, including family members. More to the point, the issue here concerns whether the care and treatment of inmates, not staff, comports with due process.

the virus as to each population, known as the Case Fatality Rate, which measures the rate of death from a disease in relation to the number of diagnosed cases. The number of deaths of inmates in City jails stands at 3 as of May 14. In relation to the 362 incarcerated inmates on that date who at some point had tested positive, this translates to a 0.83% Case Fatality Rate.[28] By contrast, in New York City, the Case Fatality Rate is 8.21**%** (15,422 confirmed deaths of 187,848 cases), which is almost 10 times higher than the rate in city jails.[29] See People ex rel. Ackerman v. Brann (Torres), Index No. 40075/2020 (Sup. Ct., Bronx Co., May 9, 2020) (Iacovetta, J.) (JA157-JA158) (noting, with respect to 3 inmate deaths, the last of which occurred on April 23, the low "fatality rate" and the "rate of infection has reached a plateau by declining or remaining steady between April 21, 2020 and May 3, 2020," as contributing to court's conclusion that DOC was not deliberately indifferent to petitioner's health concerns).

New York City's high fatality rate likely reflects the enormous strain on its health care system during this epidemic. As Amici note, "[T]he explosion of numbers

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[28] NYC BOC Daily COVID-19 Update Reports: May 14, 2020. Available at https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Public_Reports/Board%20of%20Correction%20Daily%20Public%20Report_5_14_2020.pdf (last visited May 19, 2020).

[29] NYC Health: Coronavirus Disease 2019 (COVID-19) Daily Data Summary May 14, 2020. Available at Available at https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-daily-data-summary-05152020-1.pdf (last visited May 19, 2020).

of seriously ill and hospitalized individuals has plunged many hospitals and public health systems into chaos, as health care professionals and facilities struggle to cope with a flood of patients far exceeding the system's design and previous demand" (Amicus Br. at 9). By contrast, an on-site dedicated CHS staff regularly tests symptomatic inmates and asymptomatic inmates considered at a high risk for infection and last month began testing all new admissions into DOC custody. The much lower death rate in City jails is likely, at least in part, the result of CHS' monitoring of at-risk individuals, wide testing of inmates, and ready access to medical care and New York City hospitals for those who become seriously ill.

These facts, viewed in the totality, thoroughly undermine petitioners' claim that the habeas court erred in finding that "Rikers Island's efforts to limit the spread of the novel coronavirus are, at a very minimum, 'reasonable' or 'adequate' and in fact are probably far greater than that" (JA085). Given the above-described extensive protocols by DOC to reduce the risk of harm to detainees from the COVID-19 pandemic as of the time the habeas court considered the petition, and the further extensive measures taken since then, the court below correctly rejected petitioners' federal and State due process claims as meritless.

Turning first to federal law, a pretrial detainee's claim alleging unconstitutional conditions of confinement in a state facility is assessed under the Due Process Clause of the Fourteenth Amendment. See County of Sacramento v. Lewis, 523 U.S. 833, 849-50 (1998); Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017); Cooper v. Morin, 49

N.Y.2d 69, 75-76 (1979). A pretrial detainee may establish a due process violation under the Fourteenth Amendment "by showing that [corrections] officials acted with deliberate indifference to the challenged conditions." Darnell, 849 F.3d at 29; see also County of Sacramento, 523 U.S. at 849-50. The deliberate-indifference standard applicable to pretrial detainees' claims under the Fourteenth Amendment is derived from the deliberate-indifference standard that applies under the Cruel and Unusual Punishment Clause of the Eighth Amendment to sentenced prisoners' challenges to prison conditions. See Darnell, 849 F.3d at 30. Although those two standards are similar, the Fourteenth Amendment standard is less demanding than the Eighth Amendment standard.

Both the Eighth Amendment and Fourteenth Amendment deliberate-indifference standards have two prongs. See Darnell, 849 F.3d at 29; Rodriguez v. City of New York, 87 A.D.3d 867, 868 (1st Dept. 2011). Prong one of those tests is the same, requiring that the inmate show an "objective deprivation"—a requirement met by showing that the conditions of confinement "either alone or in combination, pose an unreasonable risk of serious damage to [the inmate's] health." Darnell, 849 F.3d at 30. See Rodriguez, 87 A.D.3d at 868 (applying Eighth Amendment deliberate-indifference standard to a sentenced prisoner's claim and explaining that prong one requires that the alleged deprivation be "objectively[ ] 'sufficiently serious'") (citation omitted). "'There is no static test to determine whether a deprivation is sufficiently serious; instead, the conditions themselves must be evaluated in light of contemporary

standards of decency." Darnell, 849 F.3d at 30 (internal quotation marks omitted). Moreover, courts must "analyze challenged conditions of confinement on a case-by-case basis." Narvaez v. City of New York, 2017 WL 1535386 *5 (S.D.N.Y. 2017).

Under prong two of both standards, the inmate must show that the prison official "acted with at least deliberate indifference to the challenged conditions." Darnell, 849 F.3d at 29; accord Rodriguez, 87 A.D.3d at 869. However, the Eighth Amendment applies a subjective test, which requires a showing of "subjective intent" on the part of the official to punish or harm the individual. See Farmer v. Brennan, 511 U.S. 825, 836-37, 861 (1994). That is, the prisoner must prove that the prison official "[knew] of and disregard[ed] an excessive risk to inmate health or safety." Darnell, 849 F.3d at 32.

By contrast, the Fourteenth Amendment imposes an objective test for determining whether the second prong is satisfied, one that is akin to objective recklessness. Darnell, 849 F.3d at 35; Kingsley v. Hendrickson, 135 S.Ct. 2466, 2472-73 (2015) (explaining that deliberate indifference is an objective test for purposes of claim under Fourteenth Amendment). As such, a detainee must show that the prison official "recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety." Darnell, 849 F.3d at 35. The deliberate-indifference standard under the Fourteenth Amendment, although objective in nature, is not met by a showing of mere

negligence. Id. (a showing of negligence does not satisfy the objective deliberate indifference test that is applicable under the Fourteenth Amendment); Rodriguez, 87 A.D.3d at 869 (explaining that "deliberate indifference" under the Fourteenth Amendment requires "more than a showing of mere negligence"); Kingsley, 135 S.Ct. at 2472 ("[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.").

Additionally, a pretrial detainee in New York State may challenge a regulation or condition imposed on him during confinement under the Due Process Clause of the New York State Constitution. See Cooper, 49 N.Y.2d at 79. When a pretrial detainee lodges such a challenge, a court must "balanc[e] the harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement." Id. The harm to the individual can be "offset" by a governmental measure that is "reasonable and necessary" to protect a "countervailing governmental benefit," such as the need to "assure the presence of the detainee for trial." Powlowski v. Wullich, 102 A.D.2d 575, 587 (4th Dept. 1984).[30]

[30] Although several lower courts have applied the Cooper standard to determine whether a pretrial detainee's state due process right was violated by his confinement during the COVID-19 pandemic, they fail to grasp that the COVID-19 pandemic was not created by DOC's imposition of any regulation or condition, but rather by a worldwide viral outbreak over which DOC, quite obviously, had no control. Accordingly, the Cooper balancing test is not the appropriate standard for assessing petitioners' claims. But even if it is applied, petitioners' claims lack merit, for the reasons discussed above.

Petitioners have not established a violation of either the federal or the State Due Process Clause. As shown in our initial argument (see supra, Point A), they failed to make the requisite showing before the habeas court that their ages (over 50) and/or physical conditions put them at a high risk for severe illness or death if they contracted COVID-19. They introduced no documentation before the habeas court and even now, their submissions, made for the first time on appeal, consist mostly of letters from CHS physician, Dr. Rachel Bedard, stating in conclusory terms that the particular petitioner is "in the highest risk group," without any further documentation or information regarding the severity of his condition or ongoing treatment (A484, A486, A494, A499, A501, A502, A503). Moreover, those letters all state that the City "is taking extreme precautions to prevent transmission of the coronavirus strain COVID-19 to individuals at high risk of severe illness, including the elderly and patients with serious or chronic disease" and that "CHS is employing all available strategies to contain risks of exposure" (id.).

Accordingly, even if the Court were to consider petitioners' medical submissions, they have not made the requisite showing that DOC acted with deliberate indifference in responding to the COVID-19 pandemic or that the harm they face as incarcerated individuals outweighs the State's substantial interest in detaining them pending trial. As its actions clearly demonstrate, DOC has responded diligently and reasonably to the medical risks that COVID-19 poses to persons in its custody. Of course, the risk of harm petitioners complain of—contracting COVID-

19—is a risk facing the population generally and one that petitioners would face even if they were not incarcerated. DOC, far from being indifferent to or dismissive of that risk, has taken concerted, reasonable steps to reduce the risk to the detainees in its facilities. A correctional official who "respond[s] reasonably to [a] risk" of harm to an inmate's health or safety does not violate the inmate's constitutional rights, "even if the harm ultimately was not averted." See Farmer v. Brennan, 511 U.S. at 825.

As shown, the record here solidly establishes that DOC and CHS have undertaken substantial efforts and enacted appropriate protocols for combatting the spread of the COVID-19 virus in its facilities. Heeding the early calls by CHS Doctors Rachel Bedard and Ross MacDonald and others for a reduction of the inmate population so as to increase the ability for social distancing, DOC worked collaboratively with the Mayor's Office, the City's District Attorney Offices, and New York State Parole officials to dramatically reduce the jails' population, resulting in a reduction of more than 1,600 inmates.

In addition, DOC has instituted enhanced sanitation procedures, including daily cleaning of common areas and transport vehicles, and provided detainees with access to soap and cleaning supplies. DOC has also distributed face masks to its staff and persons in its custody, and required that masks be worn in congregant settings. DOC has significantly reduced the capacity of the housing units in its facilities so as to allow for detainees to practice social distancing. And DOC is continually assessing and monitoring the health-care needs of the persons in its facilities, as well as the

appropriateness of its responsive measures. For purposes of establishing a due process violation under the Fourteenth Amendment, petitioners have not come close to meeting their burden of demonstrating that DOC has acted with deliberate indifference to their health and medical needs, as Justice Statsinger rightly determined.

Indeed, that is the same conclusion that the overwhelming majority of New York Supreme Court judges have reached when confronted with the same claim by inmates in the custody of the DOC. The courts have denied such detainees' petitions seeking release from custody based wholly or in part on their findings that DOC's practices and preventative measures in response to the COVID-19 pandemic are reasonable and adequate to protect the health and safety of the persons in its custody. See, e.g., People ex rel. v. Ackerman v. Brann (Torres), Index No. 40075 (Sup. Co, Bronx Co. May 9, 2020) (Iacovetta, J.) (JA152, JA157-JA158) (rejecting claim of deliberate indifference after considering remedial measures by DOC and CHS officials, dramatic reduction in inmate population from March to May 2020, decrease in inmates testing positive or awaiting test results, low number of fatalities (3) and rate of infection reaching plateau or declining); Moulter, 67 Misc.3d 1206(A), Slip. Op. 50436(U), at *2 (finding that City "has addressed this serious public health crisis in its jails with responsible concern, and attentiveness"); People ex rel. Grossfeld (Petion) v. Brann, Index No. 704990/2020 (Sup. Ct., Queens Co. Apr. 15, 2020) (Jackman Brown, J.) (JA115, JA119) (petitioner failed "to show that his Asthma condition is a risk of serious medical harm given the safety and health measures implemented by

DOC"); People ex rel. Jackson (Pichardo) v. Brann, Index Nos. CR-005432-20BX, 005433-20BX (Sup. Ct., Bronx Co. Apr. 8, 2020) (Fabrizio, J.) (JA120, JA127) ("This unprecedented public health crisis has been met by detailed, well-planned, and in some cases an unprecedented response by the City to address the medical and sanitary needs of our vulnerable jail population"); People ex rel. James (Otero) v. Brann, Index No. 260169/2020 (Sup. Ct. Bronx Co. Apr. 2, 2020) (Lieb, J.) (JA131, JA134-JA135) (denying habeas relief, finding petitioner, housed in a quarantined floor in the Rose M. Singer Center, failed to provide sufficient documentation of the severity of her Hepatitis condition or that DOC acted with deliberate indifference to the risks of COVID-19); People ex rel. Stoughton (Aponte et al.) v. Brann, (Sup. Ct. Queens Co. March 15, 2020) (Holder, J.) (JA113-JA114) (concluding that detainees had not shown deliberate indifference where DOC had instituted "extensive plans and actions" to "combat the transmission of the virus" and those measures were "meaningful responses" intended to reduce the "risks of transmission in the jail facilities").

Petitioners do not acknowledge this growing body of decisional law rejecting the same argument they make here and cite only one decision reaching a different conclusion regarding DOC, although, notably, even in that case, the court denied relief to those petitioners who did not make the requisite showing regarding their medical conditions (see App. Br. at 33). The case, People ex rel. Stoughton (Jeffrey et al.) v. Brann, 2020 WL 1679209 (Sup. Ct., N.Y. Co. April 6, 2020) (Dwyer, J.), where the court granted habeas relief to 18 out of 32 Rikers Island inmates who sought relief

on due process grounds, is distinguishable from this case in several important respects. First, the court granted release only to those inmates who made the requisite showing that they suffered from serious underlying medical conditions that placed them "dramatically at risk" of serious illness or death if they were to contract COVID-19. Id. at *4. Second, the court's decision was based on alleged conditions within DOC existing as of March 26, 2020, prior to having the benefit of the updated information provided in the Bush and Feeney affidavits regarding ongoing measures taken by DOC. The continued reduction in the Rikers Island population renders the court's repeated reliance on "crowded" conditions within the jail obsolete (id. at *2), and the significant measures taken by DOC since March 26 undermine any determination that DOC is not able to manage the virus in a manner consistent with constitutional requirements.

A third reason why Jeffrey should not affect this Court's decision is that the court there appeared to acknowledge, but failed to properly apply, the "deliberate indifferent" standard that governs these due process claims and instead applied a much lower "reasonable care" standard, thereby implying that release of inmates may be an appropriate remedy when prison officials are merely negligent in dealing with the risks associated with COVID-19. See id. at *1, *4. For this proposition, the court cited Helling v. McKinney, 509 U.S. 25 (1993), but that case simply reaffirms the governing standard of "deliberate indifference to serious medical needs of prisoners" (id. at 32), which, as shown above, requires a showing that prison officials "*recklessly*

failed to act with reasonable care." Darnell, 849 F.3d at 35 (emphasis added). By isolating the requirement of "reasonable care" from the "recklessly failed to act" part of the test, the court incorrectly diluted the "deliberate indifference" standard to mere negligence. As another court commented, the approach in Jeffrey "takes law-based due process analysis on a dangerous path that ends up in unpredictable discretionary decision making." Moulter, 67 Misc.3d 1206(A), at *3. In any event, as has been amply documented, there is no question that DOC's substantial efforts in dealing with this health crisis have been entirely reasonable, indeed highly effective, responses to the risks presented by COVID-19 and in no way can its conduct be characterized as negligent. Here, in contrast to the finite number of petitioners who were released in Jeffrey, petitioners have not met their burden of showing that DOC is deliberately indifferent to their medical needs.

None of the myriad authorities cited by petitioners supports their claim of DOC's deliberate indifference to their medical needs because all of the cases except for Jeffrey deal with different detention facilities and prisons in other states and in the federal system and therefore shed no light whatsoever on the conditions of petitioners' confinement in New York City DOC facilities, which is what is at issue in this case. Indeed, one group of the cited cases does not relate to detainees in custody on criminal charges, but rather to individuals in ICE custody on civil immigration detainers awaiting removal hearings. Moreover, in such cases, the courts were presented with sufficient evidence—as to a petitioner's medical status, specific

housing conditions, and his or her risk of flight and danger to the community—to enable a hearing court to address the merits of the claim (App. Br. at 22-23).[31]

[31] E.g., Basank v. Decker, 2020 WL 1953847 (S.D.N.Y. Apr. 23, 2020) (where petitioners submitted individual declarations as to conditions of confinement, court granted temporary, conditional release, finding ICE had not implemented specific measures to identify, protect, and treat inmates who are at a heightened risk of contracting or suffering grave complications from COVID-19); Da Silva Medeiros v. Martin, 2020 WL 2104897 (D.R.I. May 1, 2020) (relying on evidence submitted by petitioners, including declarations regarding conditions at ICE detention facility, court found precautions taken by ICE did not address specific medical needs of high-risk detainees and granted temporary release with conditions); Gayle v. Meade, 2020 WL 2086482 (S.D. FL. Apr. 30, 2020) (after reviewing evidence, including petitioners' declarations, court ordered ICE, *inter alia*, to evaluate 34 immigration and other detainees in 3 facilities for potential release to alternative-to-incarceration program by evaluating each petitioner's health, eligibility for bond, immigration and criminal history, with goal of reducing capacity to 75%; further ordered ICE to comply with CDC and ICE guidelines and provide masks to all detainees, to be replaced once a week.); Coreas v. Bounds, 2020 WL 2201850 (D. Md. Apr. 30, 2020) (court found, based on submitted evidence, including declaration, that ICE facility had not addressed previously identified deficiencies, including having no measures aimed at protecting detainees with high-risk conditions); Chavez Garcia v. Acuff, 2020 WL 1987311 (S.D. Ill. Apr. 27, 2020) (after hearing, where petitioner testified and submitted declaration, court found immigrant detainee not flight risk or danger to community and ordered temporary release with conditions); Roman v. Wolf, 2020 WL 1952656 (C.D. CA. Apr. 23, 2020) (after hearing and submission of petitioners' declaration, preliminary injunction granted, ordering Adelanto ICE Processing Center, a private, for profit detention facility with a documented history of health and safety risks, to comply with CDC guidelines); Kaur v. U.S. Dept. of Homeland Sec., 2020 WL 1939386 (C.D. CA. Apr. 22, 2020)(immigration detainee housed at Adelanto ICE Processing Center released on conditions); Zaya v. Adducci, 2020 WL 2487490 (E.D. Mich. May 14, 2020) (preliminary injunction granted, releasing immigration detainee, finding he failed to show high blood pressure or asthma increased risk of negative outcome from COVID-19, but finding his obesity and diabetes placed him at high risk and that measures taken by facility were not sufficient); Christian A.R. v. Decker, 2020 WL 2306565 (S.D.N.Y. May 8, 2020) (granting conditional release of immigration detainees who provided declarations regarding medical conditions and direct accounts of conditions in their housing units and finding facility failed to take meaningful preventive steps); Ortuño v. Jennings, 2020 WL 1701724 (N.D. CA. Apr. 8, 2020)(TRO application denied as to those immigrant detainees whose medical claims were inconsistent with medical records but granted conditional release to those with proven high- risk conditions where evidence showed that (Continued…)

For example, crucial to one ruling relied on by petitioners was ICE's uncontested failure to take "any action to address the particular risks COVID-19 poses to high risk individuals," and the concession of federal experts that ICE had a "track record" of "failing to develop early detection and containment protocols for infectious diseases outbreaks" and "problems" with "protocols surrounding screening, testing, and isolation." Coronel v. Decker, 2020 WL 1487274 *4 (S.D.N.Y. Mar. 27, 2020). Even after ICE was notified of the petitioner's medical condition in that case (partial lung loss), ICE pointed to "*no specific action* that it took in direct response to this serious, unmet medical need." *Id.* at *5. No such findings can be made with respect to conditions at DOC or the efforts of DOC and CHS to anticipate and meet the individualized health care needs of those in their custody. Further, consistent across petitioners' string cites of federal habeas applications by immigration detainees is that hearing courts had specific, individualized evidence before them (e.g., petitioner and facility declarations or affidavits and medical records). With that evidence, the courts were able to evaluate petitioners' medical conditions, the specifics of the conditions of their housing areas, the health risks imposed, and whether individual petitioners posed a flight risk or danger to the community. That was not the situation presented in the habeas petition and renewal

(…Continued)
facility had not provided masks, had no intention to do so, and only limited number of staff wore protective equipment).

motion before Justice Statsinger, who distinguished Coronel in his decision (see JA084).

The second group of federal rulings cited by petitioners primarily involve the temporary release of pretrial detainees under a federal statute, 18 U.S.C. § 3142(i), that has no New York equivalent (App. Br. at 35, 40, 42). That statute authorizes a federal court to order the "temporary release" of a detainee "into the custody" of "a United States Marshal or another appropriate person." Id. And, in the cases in which a pretrial detainee was granted temporary release under § 3142(i), the federal court imposed a condition, *inter alia*, that the detainee post a substantial bond.[32] By contrast, the petitioners in this case are already held on bail or bond conditions and seek immediate release without conditions or the posting of bail or bond. More fundamentally, none of the federal rulings addresses the discrete issue raised by petitioners' writ, namely, whether DOC has displayed deliberate indifference to the

[32] See, e.g., United States v. Kennedy, 2020 WL 1493481 (E.D. Mich. Mar. 27, 2020) (temporary release under 18 U.S.C. § 3142(i) with previously-set bond conditions); United States v. Fellela, 2020 WL 1457877 (D. Conn. Mar. 20, 2020) (temporary release under different federal statute, 18 U.S.C. § 3143(a)(1), with conditions of home confinement and electronic monitoring); Banks v. Booth, 2020 WL 1914896, at *6 (D. D.C. Apr. 19, 2020) (upon submission of declarations by pretrial and presentence detainees and others, briefing and report by court-appointed amici who monitored conditions of facilities, court denied release but ordered facility to enhance protocols by adopting recommendations of amici).

risk posed by COVID-19. As shown above, a host of New York state court justices have answered that question with a firm no.[33]

In sum, even if the Court decides to address the merits of petitioners' due process claim, they have not shown that DOC acted with deliberate indifference to their health needs during the COVID-19 crisis and their claim of a violation of their Fourteenth Amendment rights should be rejected.

Likewise, petitioners have also failed to establish a due process violation under the State Due Process Clause. In light of DOC's response to the COVID-19 outbreak, the risk of harm to petitioners from their incarceration does not outweigh the government's substantial interest in ensuring their presence for trial. See Cooper, 49 N.Y.2d at 81 (explaining that State's "legitimate purpose for pretrial detention" is to "assure the presence of the detainee for trial").

Of particular importance, petitioners have failed to show that the harm posed to them by COVID-19 is worse while they are incarcerated than if they were at liberty. COVID-19 has spread worldwide; it is not an illness unique to correctional facilities and, indeed, New York City is the hardest hit area in the nation, if not the entire

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[33] Reliance on other federal rulings cited by petitioners is entirely misplaced because they concern sentenced inmates where the courts engaged in no constitutional analysis but applied a federal statute authorizing "compassionate release" pursuant to 18 U.S.C. § 3582(c)(1)(A) for "extraordinary and compelling reasons" (App. Br. at 35) (citing United States v. Rodriguez, 2020 WL 1627331 (E.D. Pa. Apr. 1, 2020); United States v. Pabon, 2020 WL 2112265 (E.D. Pa. May 4, 2020)).

world.[34] As discussed above, DOC has instituted substantial measures to reduce the risk that individuals in its custody will contract the virus and inmates in its custody have continuous access to free medical care provided by CHS. Petitioners, in addition to not providing the habeas court with any documentation of their health conditions, also did not provide any information regarding the medical care and treatment, or lack thereof, while in custody, nor have they have provided any information about their medical treatment available to them upon release. Without a showing to the habeas court that, upon release, petitioners will go to living situations allowing adequate social distancing and affording medical care for their conditions, they did not meet their burden of showing a greater risk of harm from incarceration than if they were to be released.

This was the conclusion of the habeas court when it applied the Cooper balancing test, namely that petitioners had failed to make a showing "of the harm to the individual resulting from the condition imposed" which, petitioners claim, is "beyond dispute," "a grave risk of death if they continue to be confined in New York City's jails" (App. Br. at 47). The court rejected that conclusion, finding that the record before it established that "Rikers Island's efforts to limit the spread of the

[34] New York State has more COVID-19 cases than any country in the world outside of the United States. https://www.cnn.com/2020/04/11/opinions/new-york-hit-hard-coronavirus-sepkowitz/index.html. New York City and its suburban counties—Nassau, Suffolk, Westchester, and Rockland—are responsible for 90% of the statewide case count. Furthermore, in New York City, the COVID-19 death rate is about 6% higher than in most countries. Id.

novel coronavirus are, at a very minimum, 'reasonable' or 'adequate,' and in fact are probably far greater than that" (JA085). The court further rejected petitioners' contention "that *no* set of remedial conditions in a setting such as Rikers Island could ever be constitutional in the face of the COVID-19 pandemic" (id.) (emphasis in opinion).

Petitioners' claim—that the court engaged in circular or flawed reasoning when it applied those findings to the State due process balancing test—is simply incorrect (App. Br. at 47-48). The State constitution may afford detainees more protection than its federal counterpart, but the two standards are not unrelated and the court's finding regarding the conditions at Rikers Island was surely relevant to its application of the Cooper test. Petitioners' complaint with the court's reasoning is more a function of the significant distinctions between Cooper—a civil rights class action seeking an injunction or money damages as a remedy for claimed unconstitutional conditions of confinement—and this case, where petitioners seek immediate release as a remedy for what they claim is a due process violation.

The habeas court was further correct in finding that "[t]he other side of the Cooper balancing, assuring the petitioners' 'presence . . . for trial,' is a compelling governmental interest that would be affected to an extreme degree by the relief requested," namely "the release of a large number of inmates who would then be expected to return to jail, on their own, on [a] date that would be determined and communicated to them in the future, and without the equivalent of Parker warnings"

(JA087). See People v. Parker, 57 N.Y.2d 136, 141 (1982) (requiring that defendant be informed of the right to be present and of consequences for failing to appear for trial). The court aptly noted the challenges surrounding the novel situation of the release of 67 inmates, on a temporary basis, who would be expected to return on some unknown date without the usual in-person warnings "that collectively work to reduce the risk of non-appearance. The mass release *from jail* contemplated by this petition would allow for none of these salutary measures to take place. Since the necessary return date would be unknown at the time of release, that date could not be communicated to the releasee, and there would be no mechanism for warning each releasee of the consequences of a failure to return" (JA0834) (emphasis in opinion). The court concluded that "the action complained of in this case, the failure to release these detainees, does not amount to a violation of the Due Process Clause of the New York State constitution" (JA087) (citing Cooper, 49 N.Y.2d at 81).

Petitioners claim that the court "exaggerat[ed] the State's interest in continuing to incarcerate" them in order to assure their appearance at trial, and that the court could have taken other measures to assure their return or simply assumed that they would stay in touch with their lawyers who would advise them of their obligations (App. Br. at 48-49). But petitioners' suggestions, that the court could have "requir[ed] their production to the court" or "issu[ed] written warnings from the Court about the consequences of failing to return," are unrealistic (App. Br. at 48).

First, the petitioners could not be produced to court given the current prohibition against any party, defendant, or counsel from courtroom appearances. To the extent petitioners are suggesting that the court should have conducted 67 separate video conferences, that suggestion points to the need for an individualized assessment by a habeas court before ordering the release of a petitioner. And the further suggestion about written Parker warnings ignores the fact that a forfeiture of the right to be present at trial must be knowingly and voluntarily waived and will be litigated at a hearing, based on objective facts and circumstances. Parker, 57 N.Y.2d at 140; People v. Corley, 67 N.Y.2d 105, 110 (1986). Even where a defendant is found to be deliberately absent and to have thus waived his right to be present at trial, trial *in absentia* is not automatically authorized. Parker, 57 N.Y.2d at 142. Before proceeding in the defendant's absence, the court must consider "all appropriate factors, including the possibility that defendant could be located within a reasonable period of time, the difficulty of rescheduling trial and the chance that evidence will be lost or witnesses will disappear." Id. Under petitioners' proposal, each defense attorney would necessarily need to testify at such a hearing, against their clients' interest, thereby creating the potential for claims of ineffective assistance of counsel.

Added to the legitimate concerns expressed by the court were those expressed by the District Attorney in response to petitioners' motion for leave to renew in which it provided the court with summaries of petitioners' pending charges, which include persistent sexual abuse, robbery, burglary, felony assault, and weapons

possession offenses (JA048-JA069, Exh. 11). Petitioners' histories include prior violent felonies, prior sex offenses, and patterns of flouting court appearances (id.). Yet, in appealing the habeas court's balancing of interests' analysis, petitioners never address or otherwise dispute these facts or their relevance to the court's determination below or even now on appeal. As the District Attorney argued, petitioners "have demonstrated a significant willingness to put their interests above society, a point that was not lost on the judges who set bail," and their continued detention following coordinated efforts with the Mayor's Office to reduce the inmate population without compromising public safety "reflects the fact that these individuals are among the highest flight risks in the system," such that the "governmental and societal interests in their continued detention are as compelling as can exist under the current circumstances" (JA009).

In light of all this, as several lower courts presented with similar circumstances have concluded, the State's interest in detaining petitioners pending trial outweighs the harm to petitioners from continued incarceration. See, e.g., People ex rel. Taylor v. Brann, Index No. 400100-2020 (Sup. Ct., Bronx Co. May 18, 2020) (Greenberg, J.) (JA 159, JA162) (where petitioner, charged with arson, failed to show that he was not receiving adequate care for HIV and was "an exceedingly poor candidate for bail," "the benefit conferred upon the government by petitioner's continued confinement is clear"); People ex rel. v. Ackerman (Torres) v. Brann, Index No. 40075 (Sup. Ct, Bronx Co. May 9, 2020) (Iacovetta, J.) (JA152, JA158) ("After considering . . .

Petitioner's health concerns, the conditions at Rikers Island, and the steps taken by the City of New York and DOC to alleviate the spread of the virus at Rikers Island, this court finds that the government's interest in assuring the Petitioner's presence when required outweighs any harm to his health that may be caused by his continued detention"); People ex rel. Hinds (Melendez) v. Brann, Index No. 260171/2020 (Sup. Ct. Bronx Co. Apr. 3, 2020) (Lieb, J.) ((JA141, JA147-JA149) (concluding that State due process rights were not violated because State's interest outweighed risk of harm posed by COVID-19 to asthmatic petitioner facing charges of first-degree robbery and other offenses); People ex rel. Ackerman (Reyes) v. Brann, Index No. 260245/2020 (Sup. Ct., Bronx Co. May 13, 2020) (Mitchell, J.) (JA137, JA140) ("[T]aking into consideration the serious nature of the crimes with which [petitioner] is charged and the State's legitimate interest in ensuring his appearance in court, his application does not establish that the risk of harm [based on COVID-19] inherent in his continued detention outweighs the legitimate interests of the State in this matter.").

In short, petitioners have not met their burden of showing that DOC has acted with deliberate indifference to their medical needs and, therefore, they have failed to establish that their continued confinement violates the federal Due Process Clause. Petitioners have also failed to show a violation of their State due process right because the factors supporting their continued detention are not outweighed by any countervailing considerations relating to their health and safety while in custody.

CONCLUSION

The court's dismissal of the petition for habeas corpus should be affirmed on the grounds that (1) petitioners failed to provide the Court with a factual basis to support their claims of federal and State due process violations; (2) release from detention is not the proper remedy for the claims made in this petition; (3) and even if the Court addresses the substance of petitioners' claims, they have failed to show a violation of their due process rights under the federal or State constitutions.

Respectfully submitted

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