To be argued by:
DEBORAH A. BRENNER
10 minutes requested

New York County Clerk's Index No. 451069-2020

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 COMMUNITY SUPERVISION,

Respondents-Respondents.

BRIEF FOR RESPONDENT CYNTHIA BRANN

JAMES E. JOHNSON
Corporation Counsel
of the City of New York
Attorney for Respondent Brann
100 Church Street
New York, New York 10007
212-356-0826
dbrenner@law.nyc.gov

DEBORAH A. BRENNER
of Counsel

May 22, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

QUESTION PRESENTED 3

STATEMENT OF THE CASE 3

A. The COVID-19 statistics reported by the NYC Board of Corrections, an independent governmental oversight entity 3

B. DOC's strategies for enhancing hygiene and achieving social distancing for those remaining in its jails 5

1. Efforts toward depopulation 7

2. Sanitation, hygiene, and personal protective equipment 10

3. Aggressive testing of the inmate population, including all new arrivals and all those at high risk of complications 13

4. Therapeutic housing and health monitoring 14

ARGUMENT 18

FAR FROM BEING DELIBERATELY INDIFFERENT, THE CITY HAS BEEN DILIGENTLY WORKING TO PROTECT INMATES FROM COVID-19 18

CONCLUSION 22

PRINTING SPECIFICATIONS STATEMENT 23

TABLE OF AUTHORITIES

Page(s)

Cases

Jabbar v. Fischer,
683 F.3d 54 (2d Cir. 2012) ....

Matter of LaSonde v. Seabrook,
89 A.D.3d 132 (1st Dep't 2011) 3

Statutes

Correction Law Article 6-A 7

Other Authorities

CDC: "Recommendation Regarding the Use of Cloth Face Coverings"
https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html 13

CNN: "Inside New York's notorious Rikers Island jails"
https://www.cnn.com/2020/05/16/us/rikers-coronavirus/index.html 9, 10, 14

FACT SHEET: NEW YORK CITY JAIL POPULATION REDUCTION IN THE TIME OF COVID-19, MAY 15, 2020
https://criminaljustice.cityofnewyork.us/briefs/ 8

NYC BOARD OF CORRECTION COVID-19 SUMMARY REPORT
https://www1.nyc.gov/site/boc/covid-19.page.................. 3, 4, 8, 9

NYC BOARD OF CORRECTION DAILY COVID-19 UPDATE
https://www1.nyc.gov/site/boc/covid-19.page.......................... 4, 5

PRELIMINARY STATEMENT

Petitioners-appellants in this habeas corpus proceeding are ten incarcerated inmates who claim that the COVID-19 pandemic, given their vulnerability to the virus, gives them a constitutional right to immediate release. This brief is filed by the City of New York on behalf of its Department of Correction (DOC), which has custody of all inmates by virtue of unchallenged court orders.

Considering DOC's circumscribed role in this area, we take no position on the ultimate question of whether appellants should or should not be released. We write only to explain why, when appellants claim that DOC has been deliberately indifferent to the risk of life-threatening harm from the COVID-19 virus, nothing could be further from the truth.

Indeed, though appellants urge that *any* measures short of releasing them from custody amount to deliberate indifference by DOC, release is not within the Commissioner's power to bestow. All appellants are confined pursuant to court orders that the agency cannot override. And since release is not an avenue open to

DOC, the purported "refusal" to grant it cannot constitute deliberate indifference, and may not figure into the calculus.

In any case, DOC has tackled this public health crisis with the utmost care and concern for all those in its custody. Objective statistics released by the independent Board of Correction confirm that the virus has been fairly well controlled in DOC facilities, with a "curve" that remains flattened in many respects, and—crucially—a very low fatality rate. Given how this novel virus has ravaged congregant care facilities elsewhere, this fatality rate, while undoubtably tragic, on its own speaks volumes of DOC's attentive efforts to protect the health and well-being of its inmate population—the antithesis of deliberate indifference.

Despite the challenges of managing the pandemic in a carceral setting, DOC's proactive response is well documented in the record and in judicially noticeable governmental material, which we urge the Court to review. In short, DOC has shown careful solicitude for its inmate population in general—and its at-risk inmates in particular—not indifference of any kind.

QUESTION PRESENTED

Did Supreme Court correctly conclude that DOC has not displayed deliberate indifference to its inmates' well-being during the COVID-19 pandemic?

STATEMENT OF THE CASE

A. The COVID-19 statistics reported by the NYC Board of Corrections, an independent governmental oversight entity

First, the data. The exponential worldwide spread of the novel coronavirus has stymied the best efforts of epidemiologists and public health officials, and exhaustive cumulative statistics available on the website of the NYC Board of Correction reveals that the DOC inmate population has been broadly affected by the virus. *See* https://www1.nyc.gov/site/boc/covid-19.page (COVID-19 SUMMARY REPORT, 5/11/2020 version).[1] We encourage the Court to review the comprehensive information published on the Board of

---

[1] The NYC Board of Correction is an independent oversight agency that regulates, monitors, and inspects the correctional facilities of the City, with the goal of "support[ing] safer, fairer, smaller, and more humane NYC jails." *See* https://www1.nyc.gov/site/boc/about/about.page (last visited May 15, 2020). This Court may take judicial notice of data published on its website. *See Matter of LaSonde v. Seabrook*, 89 A.D.3d 132, 137, n.8 (1st Dep't 2011).

Corrections' website, which documents trends in the data from March 16 to May 8 (*id.*), and also provides daily updates (https://www1.nyc.gov/site/boc/covid-19.page (BOARD OF CORRECTION DAILY COVID-19 UPDATE)).

As of the date of this writing—despite complexities stemming from continued arrivals—the data reveal that the City is largely succeeding in flattening the curve of infection and protecting DOC's inmate population against the worst effects of the virus (*see generally* COVID-19 SUMMARY REPORT of 5/11/2020). Only three DOC inmates infected with COVID have passed away to date (*id.* at 12; Joint Respondents' Appendix ["JA"] 93).[2] The fatality rate has moreover remained at zero since April 23 (*id.*). Far from being neglected, too, all three inmates had been transferred previously to Bellevue Hospital's prison ward for more intensive medical care than may be provided on-site (*id.*). Given the virus's pernicious nature, the demographics of the City's

[2] As petitioners have not limited their appendix to the submissions before the lower court (*see* Petitioner's Appendix (PA) 484-542), and in light of the fast-breaking developments in this unprecedented public health crisis, we have included updated information in the joint respondents' appendix for the Court's information.

incarcerated population, and the dismal track record reported in other congregate care settings nationwide (such as nursing homes), this low fatality rate alone attests to the concerted care provided by the City to the people in its custody, including those most vulnerable to complications.

Statistics for older inmates are also listed in the Board of Corrections website. Currently, of the 506 inmates aged 50 or older in DOC custody, 125 inmates are being monitored for likely exposure but remain asymptomatic, while only 23 are confirmed as positive for the virus and are showing symptoms of it (5/20 DAILY COVID-19 UPDATE, 3).

B. DOC's strategies for enhancing hygiene and achieving social distancing for those remaining in its jails

The record details the attentive and proactive efforts behind these encouraging statistics. From the earliest days of the pandemic, DOC officials have worked alongside Correctional Health Services (CHS), a division of NYC Health + Hospitals and the provider of health care to DOC's incarcerated population, to combat and contain the novel virus. Preparedness planning began

early in the calendar year (JA187). And, since March, DOC and CHS personnel have been taking aggressive steps to reduce the inmate population, inhibit viral spread, test broadly, segregate and monitor those exposed or at high risk for symptoms, treat the symptomatic, and transfer those who require more advanced medical treatment to hospitals. Indeed, to the extent practicable, DOC's protocols have faithfully followed emerging federal, state, and local public health guidance.

We refer the Court to the affidavits of DOC Deputy Commissioner for Quality Assurance and Integrity Patricia Feeney (JA36-39, 182-85); Senior Correctional Institution Administrator for Health Affairs Richard D. Bush, who serves as liaison between DOC and CHS (JA33-34); and Senior Vice President of CHS Dr. Patricia Yang (JA186-91). All three officials have accrued years of experience in the delivery of health care in a penological setting.

Along with the recent testimony of Dr. Yang and Commissioner Brann at a May 19 meeting of the City Council's Criminal Justice committee (JA93-98), these affidavits confirm

that DOC and CHS have been actively engaged in preparing for and combating the effects of the pandemic for months. At the City Council hearing, Board of Correction Executive Director Margaret Egan praised the efficacy of this work (JA102) ("DOC and CHS leadership staff … should be proud of their efforts" to contain the virus).

1. Efforts toward depopulation

The City has taken affirmative steps to achieve early decarceration for many inmates, especially those whose age and underlying medical conditions put them at high risk of harm from COVID (JA93). But its power to do so is circumscribed by bright-line legal constraints.

The City's own authority to release is limited to certain "city-sentenced" inmates—that is, those serving a sentence of less than one year in a DOC jail (JA42; *see* Correction Law Article 6-A). At the start of the pandemic, those inmates represented about 10% of the total DOC population (JA42). As the Mayor's Office of Criminal Justice (MOCJ) confirms, from mid-March to mid-May, the Commissioner exercised that authority to release more than

300 city-sentenced inmates to serve out the rest of their sentences at home. *See* https://criminaljustice.cityofnewyork.us/briefs/ (FACT SHEET: NEW YORK CITY JAIL POPULATION REDUCTION IN THE TIME OF COVID-19, MAY 15, 2020). Priority consideration was given to inmates over age 50 and those with high-risk underlying health conditions (*id.*).[3]

Beyond that, the City has worked with state and local officials to identify those most vulnerable to COVID-19's effects and put them forward for early release review (*id.*; JA187; JA93; JA97). And, combined with court orders directing release, these coordinated efforts toward decarceration have borne fruit.

From March 16 to May 8, 2020, the total DOC census declined by 1,652 inmates, before beginning to climb slightly (*see* COVID-19 SUMMARY REPORT OF MAY 11, 2020, at 4). Among older prisoners, the release data are even higher: the number of inmates aged 50 and older declined by 438 during the same period, a 48%

---

[3] As of May 14, a total of 457 city-sentenced people have been released (some may have completed their sentences or been released by court order) (*id.*). Only 118 (or 3%) of those remaining in DOC jails are city-sentenced. and 10% of that number have an independent hold as well, such as a warrant (*id.*).

decrease (*id.*; *see also* JA93, JA97). But these figures undercount the rate of release, since inmates newly admitted to DOC custody are included in the daily population count. By mid-May, more than 2,850 inmates had been released, almost double the number of those entering on new arrests (JA177; *see* JA93). The City's jail population has not been this low since the 1940s (*see* MOCJ FACT-SHEET). And the "overwhelming majority" of dormitory units are now less than half full (JA97).

The vigorous release initiative has ameliorated the threat of close-quartering. It serves twin goals: increasing the available space for remaining inmates to practice social distancing, and freeing up resources to protect the health of remaining high-risk inmates.

For this reason, Dr. Ross MacDonald, Chief Medical Officer of CHS, gave a recent May 18 media interview hailing the "dramatic" improvement in conditions at Rikers Island since the early days of the pandemic (*compare* PA274, PA450-51 *with* https://www.cnn.com/2020/05/16/us/rikers-coronavirus/index.html (last visited May 21, 2020)). Dr. MacDonald stressed that DOC

and CHS have achieved a greater degree of success in combating COVID than carceral facilities in other jurisdictions, in spite of conditions that are "more severe" in New York "than anywhere in the country" (*id.*).[4] The release initiative continues today.

2. Sanitation, hygiene, and personal protective equipment

DOC has "ramp[ed] up" its sanitation protocols and comprehensive cleaning measures to combat the spread of COVID among those remaining in DOC facilities (JA36; *see* JA96-97). Congregant programs have been suspended; space has been optimized in dormitory settings—including an empty bed between each occupied bed wherever possible—and cues have been painted on chairs and benches to signal appropriate social distancing (JA37, JA96-97).

DOC staff have implemented a variety of enhanced cleaning and sanitizing procedures in high-traffic areas, such as hallways and bathrooms (JA36-37). Congregate spaces such as housing

---

[4] Along with Dr. Yang and Commissioner Brann, Dr. MacDonald appeared at the May 19 City Council hearing (*see* JA93). The City will obtain and provide a copy of his written testimony upon the Court's request.

units and dayrooms are sanitized on a daily basis (JA96-97). All vehicles used to transport inmates are also sanitized daily, as well as immediately after transporting anyone exhibiting respiratory symptoms (JA37-38, JA96-97). "High-touch" areas are sanitized every two hours, and showers are sanitized three times each day (JA96-97). These procedures are checked ten times per day by supervisors, the Quality Assurance and Integrity Division, and the Bureau Chief of Facility Operations' staff (JA96-97; *see* JA37-38).

DOC's strategies also include training initiatives in methods of inhibiting the spread of the virus and identifying its symptoms. In accordance with state and federal guidance, staff have been trained to encourage inmates to observe social distancing, stay off other inmates' beds, wash their hands frequently for at least 20 seconds, refrain from face-touching, and otherwise adhere to the sanitary practices recommended to the general public (JA36-38). Gatherings of inmates in common areas have been limited to small groups: a maximum of ten in dayrooms and four in showers or bathrooms (JA183; JA207).

To encourage frequent hand-washing, and although only staff may carry alcohol-based hand sanitizer per DOC policy, soap has been distributed to inmates free of charge, and replacement bars are available upon request (JA36-38). Soap is also placed in the bathrooms of housing areas and intake pens (*id.*). Also, Feeney helps ensure that sinks and faucets in all occupied cells are in working order (or that inmates are transferred elsewhere, if repairs are necessary), verify that inmates always have access to soap and adequate cleaning and sanitization supplies, and monitor compliance with mandated inspections of housing areas by DOC staff (*id.*; JA183-84; *see* JA101). The importance of such measures has been emphasized to inmates and staff through a host of media, including in-person meetings, posters prominently displayed in intake and common areas, teletype, and an informational slideshow displayed at intake (JA36-38; JA97; JA207).

The use of face coverings is a prime example of how the City has nimbly adjusted its proactive response to the pandemic. Despite early well-documented national and state-wide shortages

of personal protective equipment (PPE), masks began to be provided on March 11 (JA97). And, by April 3, DOC successfully procured and distributed masks to all inmates and staff, with replacement masks now available to all inmates "as frequently as desired" (JA97; JA192). Commissioner Brann issued an April 3 teletype message requiring all inmates to wear face masks when in congregate settings, and commanding all DOC staff to wear masks and carry latex gloves (JA46-47; JA97; *see* JA183). The requirement was initiated as soon as the CDC advised the public to wear masks in public settings—ten days before the State, on April 13, first advised the general public to wear face coverings in public places.[5]

3. Aggressive testing of the inmate population, including all new arrivals and those at high risk of complications

As Dr. Yang detailed in her City Council testimony, CHS recognized from the outset that testing was pivotal to containment of the virus, especially due to the high percentage of inmates with

[5] *See* https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html.

high-risk underlying conditions, and to help prioritize protective housing decisions across the board (JA94). Accordingly, DOC and CHS instituted an "early and aggressive" antigen testing strategy, and have been testing the incarcerated population at a rate 4.3 times higher than the city's general public (*id.*).

As of May 15, 1,270 antigen tests have been conducted, of which 537 were positive for the virus (*id.*). This ratio reflects the mostly targeted universe of those tested: symptomatic inmates and all those newly entering DOC's custody undergo tests—in addition to inmates with special vulnerabilities, even if asymptomatic, thus affording them the benefit of early detection (*id.*).

According to Dr. MacDonald, most positive results now come from the new arrestees. *See* https://www.cnn.com/2020/05/16/us/rikers-coronavirus/index.html.

4. Therapeutic housing and monitoring

Aside from the testing regimen, Dr. Yang also attested to the extraordinary quality of health care provided to DOC inmates, including screening for high-risk factors and segregation into

therapeutic housing units devoted to the monitoring and care of COVID-19 patients. All inmates are medically screened at various points, including pre-arraignment, admission, during any clinical encounters, and just before discharge (JA188-89; JA94). In this manner, inmates are identified for specialized care if they test positive for COVID-19, have a known exposure to the virus (even if asymptomatic), show COVID-like symptoms, or are most vulnerable to serious complications (JA94; JA33-34; JA188-89).

In the early days of the pandemic, CHS anticipated the need to expand its 88-bed communicable disease unit, a pre-existing ward unique among the state's jails that quickly reached capacity (JA93; JA188-89). CHS and DOC then worked together to find other facilities appropriate for housing and monitoring all inmates deemed to be "on the COVID spectrum," which is defined by "clinical need and status" (JA93-94; JA189).

To this end, DOC reopened the Eric M. Taylor Center (EMTC), which had recently been closed, and converted it for use as a "surge medical facility" devoted exclusively to treating and

monitoring male COVID patients (JA93-94; JA34; JA189).[6] The housing plan involves almost 200 housing units and thousands of beds (JA93).

Asymptomatic high-risk inmates are housed separately and closely monitored by DOC and CHS staff (JA93-94; JA34; JA38; JA189). Symptomatic inmates awaiting test results are housed in single cells, allowing them to remain at a greater distance from all other EMTC inmates, where they can self-isolate (JA189). Once test results are received, inmates who test positive are housed in segregated EMTC dormitories; since all have already contracted the virus, there is no reason to isolate them from each other (*id.*). And inmates who test negative are returned to their original (i.e., non-specialized) housing units (*id.*).

To determine when a symptomatic inmate has recovered and may be safely transferred to the general population, CHS follows the CDC's non-test based guidelines, monitoring the number of

---

[6] Female patients of the same COVID status are housed in the Rose M. Singer Center (RMSC) (JA34). In case current capacity is exceeded, CHS and DOC have planned ahead and identified additional facilities to expand both specialized wards (JA93; JA189).

days after symptoms have abated and after initial onset (JA189-90). Should an inmate's condition reach the point of requiring care that exceeds the limitations of the DOC facility, CHS "leverages" its relationship with two public hospitals to obtain more advanced care, whether on an inpatient or outpatient basis (JA190).

Asymptomatic but exposed inmates who are not in high-risk groups remain in the housing unit where they were exposed (JA189), where available space to achieve social distancing has been enhanced by a combination of early releases and the reopening of EMTC. In accordance with current CDC guidance, CHS monitors these inmates daily for development of symptoms for 14 days after the removal of any symptomatic person from their housing unit (*id.*).

All staff are instructed to refer any inmate exhibiting symptoms to CHS for evaluation (JA34; JA38). Also, and in addition to available round-the-clock emergency medical care, inmates have multiple avenues to contact CHS directly to bring their own concerns about the virus to the fore (JA94; JA190). Telehealth video connections are available, and new secure

telephone connections allow inmates in any housing area to contact CHS directly (JA94). Those in asymptomatic exposed COVID housing can contact CHS seven days a week, between 10:00 AM and 5:00 PM; while inmates housed elsewhere can call from their housing units with any complaints or concerns weekdays from 5:00 AM to 10:00 AM (JA190).

ARGUMENT

FAR FROM BEING DELIBERATELY INDIFFERENT, THE CITY HAS BEEN DILIGENTLY WORKING TO PROTECT INMATES FROM COVID-19

A petitioner seeking to prove deliberate indifference must meet an exacting standard. For a full analysis of that legal standard, we refer the Court to the brief filed by the New York County District Attorney's Office. While the City takes no position on the ultimate disposition of this appeal, we urge the Court to endorse the lower court's determination that deliberate indifference is absent here, and is not a basis for relief.

At the outset, appellants' argument is built on a fallacy. While they do not dispute the good-faith work by DOC and CHS to achieve containment of the virus, they insist throughout their

brief that DOC's "refusal" to release them by itself translates to deliberate indifference. But DOC has not "refused" to release them; rather, *it cannot lawfully do so* because they have been committed to DOC's custody by virtue of valid court orders. As detailed by our co-respondents, each appellant has been ordered incarcerated on a pending criminal proceeding or parole violation; none falls within the Commissioner's narrow authority to release "city-sentenced" inmates. A party legally foreclosed from acceding to the relief in question has not made "a deliberate decision" to deprive the claimant of life, liberty, or property, and so DOC can hardly be deemed deliberately indifferent. *Jabbar v. Fischer*, 683 F.3d 54, 57 (2d Cir. 2012).

Plainly, too, the facts detailed above foreclose any conclusion that DOC has been indifferent to the health and safety of any DOC inmates, much less deliberately so. On the contrary, as the data confirm, DOC has worked closely with CHS to successfully contained the inexorable progression of the outbreak to a manageable level. Its response to the pandemic has been responsible, proactive, and aligned with evolving best practices

recommended by federal and state public health authorities. It includes not only participation in cooperative efforts to reduce the population of at-risk inmates but also multi-faceted improvements in the conditions in DOC facilities, and diligent monitoring and treatment of those who remain.

As the low mortality rate also tends to confirm, assertions that Rikers Island is a COVID "hot-spot," or that the rate of infection in DOC facilities outstrips the rate in the general public, is predicated on an apples-to-oranges comparison of relative infection rates. The inmate population is being tested at a rate 4.3 times higher than others in the city—which ameliorates the threat of "silent spreaders"—and receives frequent medical evaluation to identify COVID-like symptoms early. Members of the public, under sheltering-in-place recommendations, are unlikely to obtain testing or medical attention until symptoms are long-lasting or severe. Comparison of infection rates between the closely scrutinized inmate population and the public at large is no indication that DOC has failed in its efforts to combat the spread of COVID, and certainly not a mark of deliberate indifference.

Moreover, as recently reported, demographic factors may account for asserted differences in the incidence of COVID-19 as between DOC's inmate population and the public at large. For instance, men—who constitute a pronounced majority of inmates held in City facilities—now appear to be five times more likely than women to contract COVID-19, and twice as likely to succumb to the disease, while high racial disparities in the rate of infection are also emerging as a factor.[7] To be clear, the City does not seek to minimize or capitalize on these disturbing disparities. We cite them only to debunk simplistic comparisons between the jailed population to public population, which do not provide the Court with reliable or meaningful metrics—especially not for assessing deliberate indifference.

In sum, DOC is acutely aware of the special risks a carceral setting poses to the spread of COVID, especially for inmates most susceptible to its worst effects. Those risks are not being ignored;

---

[7] *See* https://www.nytimes.com/2020/04/07/health/coronavirus-new-york-men.html; https://www.nytimes.com/2020/04/07/us/coronavirus-race.html (last visited May 16, 2020).

far from it. Rather, DOC and CHS staff are engaged in round-the-clock vigilance to protect its remaining inmate population from the virus.

CONCLUSION

This Court should decline to issue relief founded on the claim of deliberate indifference.

Dated: New York, NY
May 22, 2020

Respectfully submitted,

JAMES E. JOHNSON
Corporation Counsel
of the City of New York
Attorney for Respondent Brann

By:
DEBORAH A. BRENNER
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-0826
dbrenner@law.nyc.gov

DEBORAH A. BRENNER
of Counsel

PRINTING SPECIFICATIONS STATEMENT

This brief was prepared on a computer, using Century Schoolbook 14 pt. for the body (double-spaced) and Century Schoolbook 12 pt. for the footnotes (single-spaced). According to Microsoft Word 2010, the entire brief contains 4,074 words.