

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- X

PEOPLE OF THE STATE OF NEW YORK EX REL.
LISA FREEMAN, Esq.

On behalf of

ALL YOUTH IN JUVENILE DETENTION

Petitioners,

-against-

DAVID HANSELL, Commissioner, New York City
Administration for Children's Services,

Respondent.

----- X

**AFFIRMATION OF DAVID S.
THAYER IN OPPOSITION
TO PETITIONER'S
VERIFIED PETITION FOR
WRIT OF HABEAS CORPUS**

Index No. 451130/2020

DAVID S. THAYER, an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms under penalty of perjury and pursuant to Rule 2106 of the Civil Practice Law and Rules the following:

1. I am an Assistant Corporation Counsel in the General Litigation Division of the Office of the Corporation Counsel of the City of New York, James E. Johnson, attorney for Respondent Commissioner DAVID HANSELL in the above-captioned proceeding.¹

2. I write this Affirmation in opposition to the Petitioners' Verified Petition for Writ of Habeas Corpus, verified on March 25, 2020.

3. The allegations set forth in this Affirmation are based upon my personal knowledge, such knowledge being formed from my review of books and records of the Office of

¹ At present, the parties continue discussions to see if they can resolve the issues set forth in the Verified Petition. This filing is made to preserve the Respondent's rights and not to suggest that a resolution may not be reached..

the Corporation Counsel and of the New York City Administration for Children's Services ("ACS") and from conversations with employees of the Office of the Corporation Counsel and of ACS. Where it is so stated, the allegations in this Affirmation are also based upon information and belief.

PRELIMINARY STATEMENT

4. The Court should decline to issue a writ of habeas corpus with respect to the unidentified Petitioners. Petitioners have not adequately alleged that they are enduring unconstitutional conditions of confinement that pose an excessive risk to their health or safety to which ACS is deliberately indifferent. To the contrary, ACS has taken appropriate measures, consistent with New York State Department of Health guidelines, to ensure the safety and wellbeing of the youths in its custody.

5. Furthermore, the Verified Petition is plagued by procedural defects. Foremost among these is Petitioners' failure to identify themselves or to allege the individualized risks posed to each Petitioner by exposure to COVID-19, depriving Respondent of an opportunity to meaningfully respond to the Verified Petition. Petitioners' failure to identify themselves also avoids the question of appropriate venue. Additionally, a special proceeding is an improper vehicle for class-wide relief. Finally, Petitioners should be directed to move in the Family Court, rather than in this Court, to be released from detention.

BACKGROUND AND PROCEDURAL HISTORY

6. Relator Lisa Freeman filed her Petition for a writ of habeas corpus on March 26, 2020.

7. Relator Freeman gave Respondent timely notice of this filing on March 25, 2020.

8. However, Relator has not identified any named Petitioners. Instead, Relator informed counsel for Respondent by email at about 10:45 p.m. on March 25, 2020, that only seven youths have affirmatively consented to the filing of the Verified Petition on their behalf; eight youths have expressed that they do not wish to participate in this proceeding; and Ms. Freeman (speaking for the Legal Aid Society) “can not represent we have spoken to all detained [juvenile delinquency] kids.”²

POINT I

THE CONDITIONS OF PETITIONERS’ CONFINEMENT DO NOT VIOLATE THEIR RIGHTS UNDER THE UNITED STATES OR NEW YORK CONSTITUTIONS.

9. Petitioners contend that their rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution are being violated because ACS is deliberately indifferent “to the[ir] serious medical needs.” (Ver. Pet. ¶ 59 (citing *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017))).

10. Petitioners are mistaken.

11. As set forth in the accompanying Affidavit of Charles Barrios, the Associate Commissioner of Juvenile Justice Programs & Services within ACS’s Division of Youth & Family Justice (“the Division”), dated March 26, 2020 (“Barrios Aff.”), ACS has undertaken substantial efforts in response to the COVID-19 pandemic to ensure the health and

² Upon information and belief, not all of the Petitioners are represented in Family Court by the Legal Aid Society.

Additionally, because Petitioners are juveniles, Relator’s representations on behalf of Petitioners must be made pursuant to the principles of substituted judgment.

safety of persons in ACS's custody to the greatest extent possible. Barrios Aff. ¶¶ 6-20. This Affidavit is **attached hereto as Exhibit A.**³

12. Mr. Barrios oversees ACS's implementation of service delivery models of health and medical services to youths in ACS's custody. Mr. Barrios explains that, since the outbreak of COVID-19, he has "been instrumental in increasing awareness of sanitation protocols and comprehensive cleaning measures to combat [COVID-19's] spread, which [has been] disseminated throughout the Division's directly-operated secure detention facilities as well as the Division's contracted congregate care provider-operated non-secure detention facilities. This includes implementing enhanced cleaning and sanitizing procedures in areas in these facilities which have heavy traffic, including hallways and bathrooms." Barrios Aff. ¶ 5.

13. As Mr. Barrios makes clear in his Affidavit, ACS's efforts to keep the youths in its custody safe and healthy are comprehensive and ongoing. *See* Barrios Aff. ¶¶ 6-20 (describing various measures being taken and implemented, consistent with New York State Department of Health guidelines). This well-considered response by ACS to COVID-19 demonstrates the baselessness of Petitioners' assertion that ACS disregarded "an excessive risk" to Petitioners' health and safety.

14. Relatedly, the Verified Petition lacks any allegations concerning the risks posed to any particular identified Petitioner. For example, it does not allege that any particular Petitioner actually suffers an underlying medical condition that would serve as a risk factor, and instead relies on general assertions regarding the correlation between the demographics of youths in juvenile detention and certain health conditions. *See, e.g.,* Ver. Pet. ¶¶ 20-22 (using asthma as

³ Since the drafting and execution of this affidavit on March 26, 2020, additional information that is new or modifies information contained therein has been shared with the undersigned. In

an example of such a health condition). This is an inadequate basis on which to conclude that continued detention by ACS poses “an excessive risk” to any particular Petitioner and instead amounts to an attempt to seek release of these juvenile detainees based on generalized assertions untethered to an actual Petitioner.

15. Petitioners, therefore, cannot meet their burden of showing that ACS is deliberately indifferent to their health and safety. Accordingly, the Court should decline to issue a writ of habeas corpus.

16. With regard to Petitioners’ claim that their detention violates their rights under the New York Constitution, this assertion also fails.

17. As the Court of Appeals has made clear, in considering claims under the Due Process Clause of the New York Constitution, “what is required is a balancing of the harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement.” *Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979).

18. As set forth above, however, Petitioners have failed to articulate any individualized harm because they have failed to identify themselves.

19. For the foregoing reasons, Respondent respectfully requests that the Court deny the Verified Petition for Writ of Habeas Corpus and decline to issue a writ of habeas corpus, together with such other and further relief as this Court deems just and proper.

the interests of fullness, the affidavit is attached nonetheless for the Court’s reference.

POINT II**THE VERIFIED PETITION IS DEFECTIVE.****A. This Proceeding Was Improperly Brought By a Class of Petitioners.**

20. Seemingly, Petitioners purport to file this proceeding seeking class-wide relief. This is inappropriate in the context of special proceedings. *See Conrad v. Regan*, 155 A.D. 931, 932 (4th Dep't 1989) (citing *In re Leone v. Blum*, 73 A.D.2d 252, 274 (2d Dep't 1980)).

21. Even if Petitioners could bring this proceeding in a class-format, they have failed to meet the requirements of article 9 of the CPLR.

B. A Petition Purporting to Seek Relief on Behalf of “All Youth in Juvenile Detention” Does Not Provide Respondents With Sufficient Notice to Respond to the Petition.

22. Because Petitioners have failed to identify themselves, ACS is unable to determine, for example, the extent of risk, if any, posed to any particular Petitioner by continued detention.

23. ACS should be afforded an opportunity to respond to a Verified Petition that specifies the actual persons it purports to have been filed on behalf of.

C. Venue Is Likely Improper.

24. Because Petitioners have failed to identify themselves, the Court is unable to determine whether this proceeding's venue is proper. CPLR 7002(b)(1)-(4) sets out the general venue provisions applicable to habeas corpus provisions, but CPLR 7002(b)(5) is addressed specifically to cities in which the population is one million or more inhabitants. *See also* CPLR 7002(b) (providing that “[e]xcept as provided in paragraph five of this subdivision” venue determined by 7002(b)(1)-(4)).

25. CPLR 7002(b)(5) states that “in a city having a population of one million or more inhabitants, a person held as a trial inmate in a city detention institution shall petition for

a writ to the supreme court in the county in which the charge for which the inmate is being detained is pending. . . .”

26. To the extent that any of the Petitioners’ underlying cases are pending in City counties other than the County of New York, those Petitioners’ writ applications should be heard in those respective counties. The Verified Petition as drafted does not permit a determination of appropriate venue and should therefore be denied.

D. This Court Should Defer to the Family Court’s Judgment About Any Release of Juvenile Offenders.

27. In criminal court, a pretrial detainee may rely on habeas corpus to seek review of “a denial of bail or the fixing of the amount of bail if it appears that the constitutional or statutory standards inhibiting excessive bail or the arbitrary refusal of bail are violated.” *People ex rel. Klein v. Kruger*, 25 N.Y.2d 497, 499 (1969).

28. A bail hearing in criminal court is analogous to an initial appearance in Family Court, where the Court first considers whether the youth should be detained. *In re Daniel C.*, 15 Misc. 3d 543, 546 n.2 (N.Y. Fam. Ct. Queens Cty. 2007) (“While there is no right to bail in a juvenile delinquency proceeding and a juvenile may not be released on recognizance, an order entered at the initial appearance pursuant to Family Court Act § 320.5 is the functional equivalent of a securing order entered in a criminal action.”) (internal citations omitted).

29. A habeas court reviewing a Family Court determination to remand a youth into pretrial detention must therefore be reviewed under a deferential standard; the habeas court may only review the Family Court remand order to determine whether it “was the product of ‘an exercise of discretion resting on a rational basis.’” *People ex rel. Schreiber v. Warden*, 282 A.D.2d 555, 555 (2d Dep’t 2001) (citing *People ex rel. Phimister*, 29 N.Y.2d 580, 581 (1971)). If it was “an exercise of discretion resting on a rational basis,” it may not be overturned. Indeed,

habeas corpus may not be used as a means to secure a second opinion on a youth's remand. *See People ex rel. Shapiro v. Keeper of City Prison*, 290 N.Y. 393, 399 (1943).

30. This review by the habeas court is also limited to the record before the remanding Family Court. *See People ex rel. Rosenthal v. Wolfson*, 48 N.Y.2d 230, 231-32 (1979). If there are materially changed circumstances since the issuance of the remand order, then “principles of orderly process dictate that a renewal of the application for [alternatives to detention] be made on return to the [Family Court].” *Id.* at 233 (citing *People ex rel. Llauguet v. Cyrta*, 35 A.D.2d 724 (2d Dep’t 1970)).

31. The unidentified Petitioners should, in the first instance, seek a modification of their remand orders with the Family Court in accordance with the foregoing principles. This accords with the general principle that a writ of habeas corpus should be employed only when a petitioner has no other avenue for the relief he or she seeks.

32. This Court should decline to issue a writ of habeas corpus and instead direct Petitioners to seek relief in the Family Court.

33. Should this Court determine, notwithstanding the above arguments, that it will review the continuing legal validity of the Family Court's remand decisions underlying this matter, then the Court should order Petitioners to identify themselves to Respondents, so that the appropriate records of each Petitioner's remand can be produced for the Court's review under the deferential standard outlined above.

Dated: March 27, 2020
New York, New York

/s/ David S. Thayer

DAVID S. THAYER

Assistant Corporation Counsel

New York City Law Department

100 Church Street, Room 2-106

New York, NY 10007

t: (212) 356-2649

f: (212) 356-1148

e: dthayer@law.nyc.gov