

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

----- X
PEOPLE OF THE STATE OF NEW YORK
EX REL. Corey Stoughton, Esq.,
on behalf of

HOGAN JEFFREY, REGINALD JONES, MICHAEL
COUCHON, SEKOU KANE, NELSON CORPORAN,
JOSEPH BRYANT, CLAYTON BARRY, DOMINICK
WILLIAMS, UCEFF WADE, CECILIA HOWARD,
BRANDI FELCI, MARJORIE CHAMBERS, ALUDIEN
MARKS, BRIGHTON MONTGOMERY, NICHOLAS
KILGORE, JONATHAN PEREZ, EVA DOUBLERG,
KEITH JOHNSON, JASON BORRERO, PEDRO
VINCENT BARCIA, ABDULLAH SPENCEREL,
SERGIO BRUNO, DARLY BRITT, MALCOLM
DAWSON, BRIAN KING, ALLEN NANCE,
CHRISTOPHER ANDRETTA, HERBERT BARRON,
JOHN PIVETZ, GLEN SNYDER, SAMUEL SAEZ, and
TOLIB AKILOV,

Petitioners,

v.

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

Respondents.

**SUPPLIMENTAL
AFFIRMATION OF MARTIN
BOWE IN OPPOSITION TO
WRIT OF HABEAS CORPUS**

Index No. _____/2020
Scid No. _____
(Dwyer, J.)

-----X
MARTIN BOWE, being duly sworn deposes and says under penalty of perjury:

1. I am an Assistant Corporation Counsel assigned to represent Cynthia Brann, Commissioner of the New York City Department of Correction (“City Respondent”), in the above-captioned proceeding. I submit this supplemental affirmation in opposition to Petitioners’ Verified Petition for Writ of Habeas Corpus, dated March 25, 2020, seeking an order directing the immediate release of 110 persons in the custody of the New York City Department of Correction (“DOC”) pursuant to C.P.L.R. § 7001.

2. Petitioners' request should be denied for two reasons: (1) the Petition is barred as a successive abuse of the writ following the denial of essentially the identical writ which was brought and denied on March 20, 2020 by Justice Steven Statsinger, *In the Matter of Petition for release Venus Williams, et al.*, SCID No. 20042-20 ("Prior Writ"); and (2) the Petition fails to state a cause of action because the DOC is actively working to ensure the health and safety of persons in DOC custody through extensive sanitary and training efforts to combat the COVID-19 epidemic, as set forth in detail below and in the accompanying affidavits of Patricia Feeney, dated March 25, 2020, DOC's Deputy Commissioner for Quality Assurance and Integrity; and of Richard D. Bush, dated March 25, 2020, the Senior Correctional Institution Administrator for Health Affairs.

A. The Petition Must Be Dismissed as an Abuse of the Writ due to the Substantially Similar Prior Writ Having Been Heard on the Merits and Denied.

3. It is well-settled that, while the doctrine of *res judicata* does not bar successive writs brought by the same party, courts "will normally dismiss a [successive] writ containing nothing new." *People ex rel. Anderson v. Warden, N.Y.C. Correctional Institution for Men*, 68 Misc. 2d 463, 325 N.Y.S.2d 829 (Sup. Ct. Bronx County 1971) (citing Weinstein, Korn & Miller); *see also People ex rel. Leneau v. Warden of Otis Bantum Corr. Facility*, 158 A.D.3d 773 (2d Dep't 2018) (successive habeas petition denied where not "supported by any changed circumstances"); *People ex rel. Woodard v. Berry*, 163 A.D.2d 759 (3rd Dep't) ("orderly administration require[s] at least a showing of changed circumstances" to grant a successive habeas petition); *People ex rel. Gonzalez v. Deegan*, 29 A.D.2d 865, 288 N.Y.S.2d 362 (2d Dep't 1968) (writ denied where writ had been previously denied).

4. Indeed, in *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73, 75 (1st Dep't 2017) the First Department recently denied a habeas petition which appeared to be

brought by different petitioners but contained the same arguments as the prior petitions, “virtually the same” affidavits in support of the petitioners, and did not present “new information or new ground not previously considered.” In that case, the court stated, “we find that the motion court properly declined to sign the orders to show cause since these were successive habeas proceedings which were not warranted or supported by any changed circumstances.” *Id.* Moreover, in *McCleskey v. Zant*, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991), the Supreme Court held that when the government pleads abuse of the writ in response to a successive petition, the petitioner must demonstrate why a successive writ is not an abuse of the writ.

5. Here, while the Petitioners are different parties from those presented in the Prior Writ—as was the case in *Matter of Nonhuman Rights Project, Inc. v. Lavery*—the argument is identical to the one presented by the same counsel who argued the Prior Writ before the Court on March 20, 2020, in that it seeks a mass release of persons in DOC custody alleging that DOC is deliberately indifferent to the health and safety of the petitioners.

6. On March 20, 2020, Justice Statsinger held that:

THE COURT: I am going to deny the petition for writ of habeas corpus. I’m not going to make a long ruling now. I will eventually file something in writing. I am not prepared in this case that the constitutional standard of deliberate indifference is met. 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.*

See Transcript attached hereto as Ex. A (emphasis added). It is without question that the current petition presents the exact same argument presented in the Prior Writ. *See e.g. Williams, SCID*

No. 20042-20, annexed hereto as Ex. B. For this reason alone, this petition should be denied as an abuse of the writ.

B. The Petition Should Be Dismissed Because Petitioners Have Not Shown that the Department of Correction is Deliberately Indifferent to the Petitioners' Rights.

7. As set forth in the accompanying Affidavit of Patricia Feeney, the Deputy Commissioner of Quality Assurance and Integrity, dated March 25, 2020 (“Feeney Aff.”), DOC has undertaken substantial efforts in response to the COVID-19 pandemic to ensure the health and safety of persons in DOC custody to the greatest extent possible. *See* Feeney Aff. annexed as Ex. C.

8. With a substantial professional background in both health and sanitation, Ms. Feeney is responsible for ensuring that DOC and its staff are adhering to the rules mandated by regulatory agencies and its internal policies. Ms. Feeney explains 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.” *See* Ex. C ¶ 7. DOC’s efforts also include extensive efforts to train all staff on encouraging all inmates on social distancing strategies, hand washing, avoiding sitting on other inmates’ beds, covering mouths when sneezing or coughing, and other sanitary practices. *Id.* ¶¶8(a)-(g). Ms. Feeney, along with the Bureau Chief of Facilities Operations, monitor compliance with all mandated continual inspections of housing areas by all DOC staff to ensure working faucets and constant adequate cleaning and sanitization supplies. *Id.* ¶ 14.

9. In addition, the Affidavit of Richard D. Bush, the Senior Correctional Institution Administrator for Health Affairs, dated March 25, 2020 (“Bush Aff.”), demonstrates that the DOC has undertaken efforts to ensure the health and safety of persons in DOC custody.

See Bush Aff., annexed hereto as Ex. D. Mr. Bush’s responsibilities include serving as a liaison between DOC and Correctional Health Services (“CHS”), the entity responsible for the delivery of health services to the incarcerated population in DOC’s care. CHS identifies medically vulnerable persons based on their medical backgrounds, and separates these individuals from the general population of inmates. *See* Ex. D ¶ 3. It is Mr. Bush’s understanding that individuals who have been diagnosed with COVID-19 are separated from those who have not been diagnosed, and that clinicians are available to communicate with their patients and reinforce guidance about how to prevent the spread of COVID-19, including frequent hand washing, social distancing, covering one’s mouth and nose when coughing and sneezing, among other things. *See id.* Moreover, DOC maintains regular contact with CHS to monitor at-risk individuals in DOC’s care, and DOC staff have been instructed to refer any individual in custody who is exhibiting COVID-19 like symptoms to CHS for an evaluation. Any vehicle used to transport an inmate exhibiting symptoms of respiratory illness is sanitized immediately after that use. *See* Ex. C. ¶ 10.

10. From March 16 to March 25 a total of 630 individuals have been discharged from DOC’s custody. The daily population census of all inmates held in DOC custody has been reduced as follows, reflecting the dramatic increase in the rate of release:

3/26/20.	5057 current census
3/25/20.	5169
3/24/20.	5236
3/23/20.	5232
3/20/20.	5348
3/19/20.	5371
3/18/20.	5391
3/17/20.	5385
3/16/20.	5447

11. As the Feeney and Bush Affs. make clear, DOC's efforts are comprehensive and ongoing. *See* Exs. C and D. Petitioners cannot meet their burden of showing that DOC is deliberately indifferent to the health and safety of the petitioners. Accordingly, the Petition should be denied.

12. For the foregoing reasons, City Respondent respectfully requests that the Court dismiss the Verified Petition for Writ of Habeas Corpus and deny the relief requested therein in its entirety, together with such other and further relief as this Court deems just and proper.

Dated: New York, New York
March 26, 2020

/s/

Martin Bowe

Cc: COREY STOUGHTON
MARIE NDIAYE
LAUREN GOTTESMAN
MICHELLE MCGRATH
Legal Aid Society
199 Water Street, 6th Floor
New York, NY 10036
(646) 884-2316
cstoughton@legal

JAMES B. COONEY
N.Y. State Office of the Attorney General
28 Liberty Street
New York, NY 10005
(917) 471-3587
James.Cooney@ag.ny.gov

STATE OF NEW YORK)
)
COUNTY OF QUEENS) ss:

PATRICIA FEENEY, being duly sworn, deposes and says:

1. I am employed by the New York City Department of Correction ("DOC" or "the Department") as the Deputy Commissioner of Quality Assurance and Integrity and have held this position since January 2018. I have been employed by DOC since January 6, 1992.
2. This affidavit is based on my personal knowledge, and on information available to me in the course of my official duties.
3. As the Deputy Commissioner of Quality Assurance and Integrity, I am responsible for ensuring that the Department and its staff are adhering to the rules mandated by regulatory agencies and its internal policies.
4. In my capacity as Deputy Commissioner of Quality Assurance and Integrity, I am responsible for the management and oversight of the Department's Internal Audit Operations; the Environmental Health Unit ("EHU"); the Fire and Safety Unit; the Financial Audits Unit; the Engineering Audits Unit; and the Compliance and Safety Center.
5. Prior to my appointment as Deputy Commissioner, I served as the Assistant Commissioner of EHU for 16 years.
6. Prior to joining the Department, I served as a public health sanitarian for the New York City Department of Health and Mental Hygiene ("DOHMH").

COVID-19 Background

7. With the recent pandemic of COVID-19, and in accordance with the Centers for Disease Control and Prevention ("CDC") and DOHMH guidelines, I have been instrumental in ramping up DOC sanitation protocols and comprehensive cleaning measures to combat its spread throughout our facilities. This includes implementing enhanced cleaning and sanitizing procedures in areas with a lot of traffic, which include hallways and bathrooms.
8. As part of its ongoing efforts to contain the spread of COVID-19, DOC has implemented the containment and control of transmission guidelines recommended by the CDC and DOHMH and has communicated these guidelines to staff and persons in custody through in-person meetings, teletypes, posters, intranet, social media, and DOC TV. These recommendations include:

- a. People should cover their mouth/nose with a tissue when coughing or sneezing or sneeze/cough into their elbow;
- b. Post signs to promote respiratory/cough hygiene in common areas
- c. Refrain from touching your face;
- d. Hand hygiene – Wash hands frequently with soap and water. If soap and water are not available, the use of alcohol based hand sanitizer shall be employed--only staff may carry hand sanitizer per DOC policy;
- e. Social distancing strategies have been employed which include:
 - i. Increasing distances between persons in custody in dormitories;
 - ii. Encouraging persons in custody to sleep head to toe in dormitories to further separate breathable spaces;
 - iii. Encouraging social distancing in the housing area, including during meal time;
 - iv. Suspending congregate services such as religious services, law library, and commissary. These services are now provided in the housing areas.
 - v. Persons in custody are also encouraged to not sit on each other's beds.
- f. Staff are instructed to stay home if they feel ill or have been in close contact with someone who is ill;
- g. Emphasizing that the required cleaning and sanitizing procedures are followed utilizing the Environmental Protection Agency's approved disinfectant and provided in the dispensers in all janitor closets.

Soap/Facility Cleaning

9. As part of its response to COVID-19, DOC's policy is to provide every individual in custody with their own bar of soap and access to cleaning supplies in the housing area janitor's closet, including, but not limited to: disinfectant, mold and mildew cleaner, general cleaner, floor cleaner, and cleaner without grit, all at its expense.
10. Further, sanitation work details are regularly assigned to sanitize the facilities, including housing areas, bathrooms, showers, and sinks. Preventative sanitation and cleaning measures include: cleaning and sanitizing DOC housing units, dayrooms, and common spaces once per day; cleaning shower areas daily; cleaning and sanitizing transport vehicles daily; any vehicle that is transporting a person who is symptomatic of respiratory illness will be sanitized immediately after transporting that individual.

11. Soap is placed in the bathrooms of the housing areas, and hand soap is allowed in each person's individual cell. Soap is also placed in intake pens; any individual may request additional soap from the housing area officer.
12. In addition, DOC implemented a quality assurance process that adequate soap and cleaning supplies are available and provided to individuals in custody which includes: conducting daily inspections followed up with quality assurance measures conducted by EHU so that housing areas, dayrooms, intakes and common spaces have operable soap dispensers, functional sinks and adequate cleaning supplies. In areas where soap or cleaning supplies are not fully stocked, staff are expected to take the necessary steps to obtain the supplies and remedy the situation as soon as possible.
13. EHU is also providing additional sanitation and sanitization trainings to institutional aides and sanitation work details to highlight appropriate cleaning and sanitizing procedures that are being utilized to combat the spread of COVID-19.

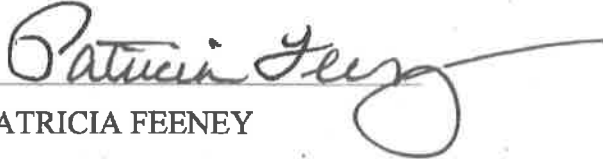
Supplies/Sink Audit Process

14. Additionally, in response to COVID-19, DOC implemented a process for facility tours and inspections by Commanding Officers, Tour Commanders, Captains, and staff, to regularly inspect housing areas to determine whether cleaning and sanitation supplies are provided. During this process, facilities are expected to regularly check housing areas and take the necessary steps to provide adequate cleaning supplies and to check that sinks and showers are operable and I, along with the Bureau Chief of Facility Operations, monitor compliance.
15. DOC is continuing its practice of tracking complaints concerning any necessary sanitation issues, including the availability of working sinks, and instituting remediation measures as necessary. Any individual in custody who is housed in a cell with an inoperable sink, will be relocated to a cell with an operable sink, and a work order will be submitted and addressed for any inoperable showers.

DOC/CHS coordination

16. DOC maintains regular contact with Correctional Health Services ("CHS"), which is the medical provider for persons in custody, to monitor at-risk individuals in the Department's care. In addition, DOC staff have been instructed to refer any individual in custody who is exhibiting COVID-19 like symptoms to CHS for an evaluation.

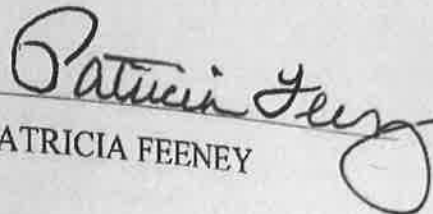
17. The Department takes the spread of COVID-19 very seriously and is committed to protecting the health, safety and security of the individuals who work in, live in and visit its facilities. Thus, it is taking the steps necessary to prevent the widespread community transmission of COVID-19.


PATRICIA FEENEY

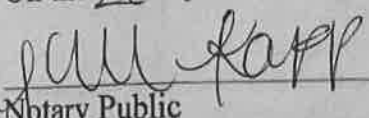
Sworn to and subscribed before me
On the ____ day of March, 2020

Notary Public

17. The Department takes the spread of COVID-19 very seriously and is committed to protecting the health, safety and security of the individuals who work in, live in and visit its facilities. Thus, it is taking the steps necessary to prevent the widespread community transmission of COVID-19.


PATRICIA FEENEY

Sworn to and subscribed before me
On the 26 day of March, 2020


Notary Public

JANINE LUCIA KAPP
NOTARY PUBLIC, STATE OF NEW YORK
NO. 02KA634492
MY COMMISSION EXPIRES 7/18/2020

STATE OF NEW YORK)

) ss:

COUNTY OF QUEENS)

RICHARD BUSH, being duly sworn, deposes and says:

1. I am employed by the New York City Department of Correction ("DOC" or "the Department") as the Senior Correctional Institution Administrator for Health Affairs and have held this position since January 6, 2020. As part of my responsibilities, I serve as a liaison between the New York City Department of Correction and Correctional Health Services ("CHS") the entity responsible for the delivery of health services to the incarcerated population in the Department's care. Prior to this position, I was employed by the University of Connecticut Health Center-Correctional Managed Health Care and the Connecticut Department of Correction from August 1999 to December 31, 2019. For about 16½ years out of the 20 years (approximately 2002-2018), I served as a Health Services Administrator at the University of Connecticut Health Center. In that role, I was responsible for overseeing health services of multiple correctional institutions in the State of Connecticut, including jails and prisons. Specifically, I oversaw the delivery of health services to the incarcerated population in the State of Connecticut Department of Correction.
2. This affidavit is based on my personal knowledge, and on information available to me in the course of my official duties.
3. With the recent pandemic of COVID-19, I have worked with CHS to facilitate the delivery of health services on behalf of the Department for incarcerated persons in need of medical care, including identification of appropriate housing placement. To this end, when CHS identifies medically vulnerable persons based on their medical background, DOC separates these individuals from the general population who are less vulnerable as directed by CHS. My understanding is that individuals who have been diagnosed with COVID-19 are separated from those who have not been diagnosed. I am not aware that medically vulnerable incarcerated persons are necessarily separated by age. With respect to individuals with mental health issues, these individuals may be housed in a mental observation unit or housing unit dedicated to seriously mentally ill individuals which also have clinical staff accessible on the housing units. It is my understanding that the clinicians are available to communicate with their patients and reinforce guidance about how to prevent the spread of COVID-19, including frequent hand washing, social distancing, covering one's mouth and nose when coughing and sneezing, among other things.
4. The Department maintains regular contact with CHS to monitor at-risk individuals in the Department's care. In addition, DOC staff have been instructed to refer to any individual in custody who is exhibiting COVID-19 like symptoms to CHS for an evaluation.
5. I am informed by the Department's Population Management that from March 16—March 25, 2020, a total of 630 individuals have been discharged from the Department's custody.
6. The Department takes the spread of COVID-19 very seriously and is committed to protecting the health, safety and security of the individuals who work in, live in and visit its facilities. Thus, it is taking the steps necessary to prevent the widespread community transmission of COVID-19.

Dated: Queens, New York
March 25, 2020


Richard D Bush

Sworn to and subscribed before me
On the ____ day of March, 2020

Notary Public

STATE OF NEW YORK)


) ss:

COUNTY OF QUEENS)

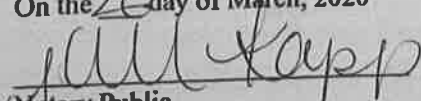
RICHARD BUSH, being duly sworn, deposes and says:

1. I am employed by the New York City Department of Correction ("DOC" or "the Department") as the Senior Correctional Institution Administrator for Health Affairs and have held this position since January 6, 2020. As part of my responsibilities, I serve as a liaison between the New York City Department of Correction and Correctional Health Services ("CHS") the entity responsible for the delivery of health services to the incarcerated population in the Department's care. Prior to this position, I was employed by the University of Connecticut Health Center-Correctional Managed Health Care and the Connecticut Department of Correction from August 1999 to December 31, 2019. For about 16½ years out of the 20 years (approximately 2002-2018), I served as a Health Services Administrator at the University of Connecticut Health Center. In that role, I was responsible for overseeing health services of multiple correctional institutions in the State of Connecticut, including jails and prisons. Specifically, I oversaw the delivery of health services to the incarcerated population in the State of Connecticut Department of Correction.
2. This affidavit is based on my personal knowledge, and on information available to me in the course of my official duties.
3. With the recent pandemic of COVID-19, I have worked with CHS to facilitate the delivery of health services on behalf of the Department for incarcerated persons in need of medical care, including identification of appropriate housing placement. To this end, when CHS identifies medically vulnerable persons based on their medical background, DOC separates these individuals from the general population who are less vulnerable as directed by CHS. My understanding is that individuals who have been diagnosed with COVID-19 are separated from those who have not been diagnosed. I am not aware that medically vulnerable incarcerated persons are necessarily separated by age. With respect to individuals with mental health issues, these individuals may be housed in a mental observation unit or housing unit dedicated to seriously mentally ill individuals which also have clinical staff accessible on the housing units. It is my understanding that the clinicians are available to communicate with their patients and reinforce guidance about how to prevent the spread of COVID-19, including frequent hand washing, social distancing, covering one's mouth and nose when coughing and sneezing, among other things.
4. The Department maintains regular contact with CHS to monitor at-risk individuals in the Department's care. In addition, DOC staff have been instructed to refer to any individual in custody who is exhibiting COVID-19 like symptoms to CHS for an evaluation.
5. I am informed by the Department's Population Management that from March 16—March 25, 2020, a total of 630 individuals have been discharged from the Department's custody.
6. The Department takes the spread of COVID-19 very seriously and is committed to protecting the health, safety and security of the individuals who work in, live in and visit its facilities. Thus, it is taking the steps necessary to prevent the widespread community transmission of COVID-19.

Dated: Queens, New York
March 25, 2020


Richard D Bush

Sworn to and subscribed before me
On the 26 day of March, 2020


Notary Public

Janine Lucia Kapp
NOTARY PUBLIC, STATE OF NEW YORK
No. 02KA634492
MY COMMISSION EXPIRES 7/18/2020