

<b>People of State of New York ex rel. Stoughton v Brann</b>
2020 NY Slip Op 20081
Decided on April 6, 2020
Supreme Court, New York County
Dwyer, J.
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Decided on April 6, 2020

Supreme Court, New York County

**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,  
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.**

Index No. 451078/2020

For Petitioners:

Lauren Gottesman, Esq. Mary Lynne Werlwas, Esq.

The Legal Aid Society

Robert Briere, Esq.

for Petitioner Nicholas Kilgore

For Respondents:

Martin Bowe, Esq.

New York City Law Department

for Respondent Cynthia Brann

James Cooney, Esq.

New York State Department of Law

for Respondent Anthony Annucci

Patricia Bailey, Esq.

New York County District Attorney's Office

for Respondents

Mark Dwyer, J.

Petitioners, 32 inmates at the Rikers Island prison, have demanded release on due process grounds. Each petitioner faces one or more charges in New York County. Many are also

incarcerated pending hearings on alleged parole violations. Their complaint concerns the Covid-19 pandemic. Petitioners contend that they are particularly vulnerable to serious injury and death should they contract the disease. And they assert that prisoners at Rikers are dangerously likely to contract it, to the point that continued confinement there violates their due process rights under the federal and state constitutions.

The only relief sought is release. The court will grant release, sometimes with conditions, to a fair number of petitioners. This opinion explains why. But this opinion will not do two other things. It will not describe the nature of the Covid-19 pandemic, as it is far too [\*2]familiar to New Yorkers already. And it will deal with the circumstances of individual petitioners only briefly, as examples to explain particular points.

## A

The health of prison inmates is the business of governments who incarcerate them. Indeed, it has long been settled that the United States Constitution requires the government to provide effective medical care for inmates. *Brown v. Plata*, 563 US 493, 508-09 (2011); *Farmer v. Brennan*, 511 US 825, 832-33 (1994); *Estelle v. Gamble*, 429 US 97 (1976). These decisions involved convicted prisoners, and were decided under the Eighth Amendment. But the Due Process protections of the 5th and 14th Amendments and of the New York Constitution provide comparable protection to pretrial inmates. *See, e.g., Kingsley v. Hendrickson*, 576 US \_\_\_\_ (2015); *Cooper v. Marin*, 49 NY2d 69 (1979). That makes sense, as it could not be thought that pretrial detainees should enjoy less protection than convicted inmates. Contemporary law as to the rights of all prisoners simply "codif[ies] the commonlaw view that 'it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.'" *Estelle v. Gamble*, 429 US at 103-04, *supra*.

To invoke the federal due process clause successfully, a petitioner may establish that the government's actions impose a serious, medically threatening condition on prisoners. Alternatively, and to the point here, the petitioner may show that the government failed to act "with reasonable care" to mitigate a risk created by a seriously threatening prison condition, even

though the responsible authorities knew or should have known that the condition posed an excessive risk to the health or safety of the inmates. *Helling v. McKinney*, 509 US 25, 331-32 (1993). The cases differ on precisely how to interpret the mens rea requirement, and in particular on whether the prison officials must be aware of the danger. Compare *Darnell v Pineiro*, 849 F3d 17 (2nd Cir 2017) with *Caiozzo v. Koreman*, 581 F3d 63 (2nd Cir 2009). But the issue is moot here. There is no doubt that Rikers officials are aware of the Covid-19 threat. The New York due process test is simpler. A court weighs the benefit sought by the government from a condition against the harm that the condition imposes on inmates. *Cooper v. Morin*, 49 NY2d at 79, *supra*.

If the government cannot satisfy the due process requirement, the court must accord a remedy — including, where appropriate, release from prison. *Brown v. Plata*, 563 US at 511, *supra*. Courts "must not shrink from their obligation to 'enforce the constitutional rights of all , including prisoners.'" Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Id.* (citation omitted). Notably, *Brown* itself approved an order requiring the release of numerous convicted California prisoners unless the state quickly relieved long-standing prison overcrowding that, *inter alia*, threatened the health of the inmates.

There can be no doubt that the presence of a communicable disease in a prison can constitute a serious, medically threatening condition. The point need not be belabored in this case. Covid-19 is at large at Rikers Island. The current epidemic poses a deadly threat to inmates, and its presence at the prison equates to an "unsafe, life-threatening condition" endangering "reasonable safety." See *Helling v. McKinney*, 509 US at 33, *supra*. Given such circumstances and the absence of a viable alternative, a court has no choice but to order release. *Brown v. Plata*, 563 US at 511, *supra*.

Respondents do not deny that much. They assert, however, that Corrections officials at Rikers Island have not been "deliberately indifferent" to the danger. To the contrary, they maintain, officials at Rikers have sought diligently to prevent the spread of the Covid-19 disease among the inmates. They assert that they have provided soap and cleaning supplies that allow

petitioners and their fellow prisoners to protect themselves from the virus. They also urge the inmates to engage in "social distancing," *i.e.*, to maintain a distance of six feet between themselves and other inmates. Some inmates have been released with the consent of the District Attorney. Thus, respondents assert, they have satisfied the constitutional mandate by taking "reasonable care" to mitigate the risk of the disease. It follows, they continue, that no due process violation has occurred, and no remedy is due petitioners.

## B

This court disagrees. A look at the conditions at Rikers Island explains why.

First, communicable diseases could not ask for a better breeding ground than a crowded prison. Rikers facilities are crowded. Prisoners eat in communal dining rooms. Cooking is done by inmates and the food is dished out by inmates. Entertainment is found in common rooms. Many detainees reside in barracks-style dormitories. Many have a neighbor who sleeps less than six feet to the side. The inmates share sinks, showers, and toilets. Much of the space is so cramped that the inmates are physically unable to stay far enough from their fellow prisoners to be safe from the risk of contagion. Moreover, for many prisoners, a natural concomitant of confinement is a desire to associate in groups with one another. They communicate face-to-face, without the luxury of Skype or twitter. And, as elsewhere, even individuals without apparent Covid-19 symptoms can spread disease in all these areas and situations.

Beyond that, inmates in a local urban jail like Rikers are constantly exposed to additional potential sources of contagion. Arrests do not stop for a plague. New inmates arrive daily from around New York City. Every day, members of the prison staff commute to the prison from their homes in the city and its nearby suburbs. Until the epidemic hit this city, on five days a week inmates were taken in crowded and unsanitary buses to crowded and unsanitary courthouse holding pens.

Second, these conditions have produced the results one might expect. Diagnoses of the disease are "spiking" at Rikers — exponentially. As of March 20 it had reported that one case of the disease had been diagnosed at the prison. On March 21, 21 inmates and 17 members of the staff were reported ill from the virus, and one member of the staff was dead. By March 24, the day the petition was filed, there were a reported 39 cases. By April 1, 184 prisoners and 179 members of the staff were ill. As this opinion is being issued, the most recent report is that on April 2 there were 231 sick prisoners, in addition to 223 sick staff members. The rate of increase is about 5 times higher than that of New York City in general — and the rate in New York City, the national "epicenter" of Covid-19, has dramatically exceeded that of the rest of the country.

The New York City Board of Correction, established by the City Charter, is an independent oversight board charged with regulating, monitoring, and inspecting the city's correctional facilities. On March 21 the Board issued an advisory letter to judges and prosecutors calling for the release of prisoners over 50 years old who have conditions placing [\*3]them at high risk if they contract Covid-19. Many of the petitioners are among those at risk. The Board's plea has since been joined by Ross MacDonald, the Chief Medical Officer of the Correctional Health Services, and Rachel Bernard, a geriatrician at Rikers. For whatever it might be worth, the press reports that inmates feel helpless, with some suggesting that they are facing a "death sentence." And it is critically important to remember that petitioners have been convicted of nothing. They instead face contested charges.

Under the best of circumstances, there are far better places to be than Rikers Island. And these are not the best of circumstances.

## C

Before the law is applied to the facts of this case, one final point should be made. The experts agree on the best practices to avoid the Covid-19 virus — frequent hand-washing, covering coughs and sneezes, social distancing, and so on. They also agree on this critical factor: the individuals who catch the disease face differing consequences. It was originally thought that

the young rarely were in serious danger from the disease. That conclusion is now subject to serious doubt. But the experts agree that certain pre-existing conditions are aggravators.

Age is among them. Different estimates are given — age 50, 60, 65, 70 — as to when the calendar presents a special threat of harm from the virus. The current CDC number is 65. The different estimates are natural enough. Unlike the law, nature and its diseases do not respect a bright line crossed on a particular birthday. But it is agreed that infected individuals of a relatively advanced age are likely to suffer more than the young.

Age is not often thought of as a disease. The other conditions classified as aggravators are. Covid-19 attacks the respiratory system. Accordingly, pre-existing respiratory inhibitors like serious asthma or chronic lung disease can complicate a patient's Covid-19 symptoms. Combating the virus is a task for the immune system, and those afflicted with HIV or another condition that weakens the immune system can be at special risk. Covid-19 puts a strain on the heart, and therefore serious heart conditions can expose an individual to extra danger. Diabetics and those afflicted with some other diseases may have issues on more than one of these fronts.

Petitioners do not argue that it violates due process to hold at Rikers a young prisoner who has no aggravating conditions. Instead, each contends that, while infection at Rikers is quite likely for all inmates, for those with aggravators the danger after Covid-19 strikes is much greater than the danger facing their fellows. Each petitioner claims to have one or more aggravating conditions. And each concludes that holding him or her at Rikers, where the prospect of Covid-19 infection is so great, must be deemed a violation of his or her rights.

## D

The stage is set for consideration of how due process principles apply here. Respondents assert that they have taken "reasonable care" to mitigate the risk posed by Covid-19, and thus have satisfied the due process mandate. This court disagrees.

This judge does not at all question the good faith of the Rikers officials. Certainly no [\*4] American prison is equipped to deal with a health crisis of the severity of this one. Rikers has medical facilities, but it is not a hospital — and this epidemic is a fierce challenge even for our hospitals. A crowded prison, for example, has no ability to quarantine the large number of prisoners exposed to inmates who eventually display symptoms. Indeed, in this case that would essentially mean a quarantine of everyone at the prison, inmates and staff. There certainly are not the necessary kits to administer tests for the disease to all inmates, much less the repeated tests required to assess their condition at subsequent times. And the ability to allow adequate distance to be maintained among detainees and staff is decisively precluded by the nature of prison construction and operation — as noted, for example, barracks-like sleeping quarters and communal dining. Even hand sanitizer, now a staple tool for preventing spread of the disease, cannot be employed: its alcohol content makes it contraband, a danger to prisoners who might drink it and to guards who, because the alcohol content is high, fear that it can be used as a weapon.

Due process does not excuse prison officials who mean well, but have no effective way to protect inmates from potentially fatal epidemics. Again, prison officials are obliged to take "reasonable care" to mitigate the risk posed by Covid-19. That is so especially for prisoners who can fairly expect extremely serious consequences if they contract the disease. "Reasonable care" and "mitigation" obligations are not satisfied by tossing a bucket of water on a four-alarm house fire, or by placing a band-Aid on a compound bone fracture. Reasonable care to mitigate must include an effort to employ an *effective* ameliorative measure. As would be expected when the Department of Corrections' own doctors ask for release, the escalating numbers of the infected show that what Rikers has done is not remotely effective. Prisoners with dangerous conditions are dramatically at risk. For some of them, only release can offer protection.

At this point, the court has ruled that 18 petitioners are in this category. (A few other petitioners have been released on consent or on bail). All 18 are afflicted with conditions acknowledged to endanger them: heart disease, serious respiratory conditions, cancer, diabetes, uncontrolled HIV, and so forth. For some of them, the condition or conditions are more



dangerous because those prisoners are relatively old. Those 18 petitioners have been ordered released.

For others, the petition has been denied. Some of the inmates are between 50 and 60 years old, and have nothing beyond that to suggest that they are in more danger than the average inmate. This judge does not believe that to be sufficient to justify release. One petitioner also has glaucoma; that ocular condition is not reported to complicate Covid-19. One has HIV, but the condition is well controlled. The petitioner's viral count is easily low enough, and the T-cell count high enough, to take the condition out of the category of an enhanced threat. One petitioner was convincingly shown by his medical history to be a malingerer, in no special danger at all.

These are not normal times. Courthouses are almost completely closed. Staffing is short — judges, court officers, court reporters, clerks, and IT employees. The ability of Rikers Island officials to arrange internet conferences with inmates is very limited. Medical records are not available. Expert medical witnesses are, to say the least, occupied. But the claims of these petitioners, and hundreds of other inmates who believe they are in immediate danger, deserve to [\*5]be treated as emergency questions for courts and other officials who can grant release. Perhaps two months from now, when the disease has abated, the courtrooms will reopen, weeks can be spent marshaling evidence, and cross-examinations can be conducted. But there is no time to wait — the issues will be moot. The court's conclusions about inmate conditions had to be based on the records available to the parties, the lawyers' phone calls to busy experts, work on the internet, and Skype conversations held in the absence of affected petitioners.

Three final notes should be made. First, for a court to order a release of prisoners on account of a due process violation is "a matter of undoubted, grave concern." *Brown v. Plata*, 563 US at 501, *supra*. Still, this judge does not believe that release can be denied even to those charged with violent crimes if they are at substantial risk of death or other serious physical injury. Such inmates have the same due process rights as others. They may be treated differently from others, even in a pretrial context. Some can be shackled. Some can be subjected to unusual intrusions on privacy. Some can be isolated from other inmates. Even under New York law, some charges justify assessments of dangerousness that can lead to higher bail or remand. But

these prisoners cannot be punished with the unnecessary exposure to a highly communicable, and for them a potentially deadly, disease. Thus, one of the inmates ordered released is a man who is over 60, suffers from very serious heart conditions, has a chronic obstructive pulmonary condition as well as asthma, is diabetic — and is charged with a vicious murder.

Second, and relatedly, what has been ordered for petitioners is temporary release. No charges are being dismissed. The inmates facing criminal charges will still face those charges. The inmates on parole will remain on parole, and the relevant parole violation allegations can be pursued. Moreover, the court has agreed with restrictions on release suggested by the government. For example, for some petitioners home confinement except for visits to mental health services has been directed. The petitioners cannot legitimately complain; at least they will not be confined on Rikers Island.

Finally, the petition sought relief only on the ground that the petitioners are in special danger if they become infected. Nothing in this opinion necessarily applies to how inmates without such conditions should be treated.

ENTER:

Dated: New York, New York

April 6, 2020

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Mark Dwyer, J.

Appearances of Counsel: