

COUNTY COURT OF THE COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*
Stefen R. Short, Esq., on behalf of GIANNA CARRIUOLO,
DIN 19G0082; SANDRA LAWSON, DIN 18G1002;
GEORGE MARTINEZ, DIN 07A4008; BRYAN PITTSLEY,
DIN 12A4129; SINCERAY SOLIS, DIN 19G0273; A.A.,
DIN *****; and B.B., DIN *****,

Petitioners,

– against –

MICHAEL CAPRA, Superintendent, Sing Sing Correctional
Facility; AMY LAMANNA, Superintendent, Bedford Hills
Correctional Facility; TANYA MITCHELL-VOYD,
Superintendent, Taconic Correctional Facility; and
ANTHONY J. ANNUCCI, Acting Commissioner, New York
State Department of Corrections and Community Supervision,

Respondents.

**VERIFIED PETITION
FOR HABEAS CORPUS**

Index No. 54815/2020

TO: COUNTY COURT OF COUNTY OF WESTCHESTER

Petitioners, by their attorney Stefen R. Short, Esq., respectfully state:

PRELIMINARY STATEMENT

1. We submit this petition for habeas corpus to request the immediate release of the above-captioned individuals because, given their vulnerability to contracting COVID-19 in prison, and suffering serious complications or death as a result, their continued confinement violates their rights under the Eighth Amendment to the United States Constitution and Article I, Section 5 of the New York State Constitution.

2. Respondents' constitutional violations can be remedied only by Petitioners' immediate release from incarceration. As New York State Courts have held, prison officials' deliberate indifference to the risk that Petitioners will suffer serious complications from COVID-19 can render continued confinement illegal and create an entitlement to release by habeas corpus. (*See, e.g., People of the State of New York ex rel. Gregor v Reynolds*, 2020 NY Slip Op

20086 [Sup Ct, Essex County, April 20, 2020]; *People of the State of New York ex rel. Stoughton v Brann*, 2020 NY Slip Op 20081 [Sup Ct, NY County, April 6, 2020]. Federal Courts in New York have reached the same holding. (See *Barbecho et al v Decker et al*, No. 20-cv-2821 [AJN], 2020 WL 1876328 [SDNY Apr. 15, 2020].)

3. Under the dire and exigent circumstances posed by the current pandemic, outright release of Petitioners is the only adequate remedy. The invisible nature of the virus—and its rapid proliferation—makes it virtually impossible for DOCCS to adequately protect Petitioners from infection given their heightened risk and the realities of the prison environment.

4. I, Stefen R. Short, am a Staff Attorney with the Prisoners' Rights Project of The Legal Aid Society and counsel for Petitioners in this action along with my Prisoners' Rights Project colleagues Dori A. Lewis, Robert M. Quackenbush, Sophia Gebreselassie, and Mary Lynne Werlwas, and my colleagues Elizabeth L. Isaacs, Andrea Yacka-Bible, and David E. Loftis of The Legal Aid Society's Criminal Appeals Bureau. The Legal Aid Society is assisted by attorneys from the law firm of Kasowitz Benson Torres LLP in this matter.

5. We make this verified petition for habeas corpus on Petitioners' behalf because Petitioners are confined outside the county in which my office is located, because further delay will cause them material injury, and because the pertinent factual allegations are within my knowledge or information and belief.

6. COVID-19 is a global pandemic, with New York State currently at the epicenter.¹ The virus has killed over 247,500 people worldwide, including at least 67,700 people in the United States and over 24,500 in New York.²

¹ Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, WSJ, Mar. 11, 2020, available at <https://www.wsj.com/articles/u-s-coronavirus-cases-top-1-000-11583917794> [last accessed Apr. 10, 2020]; *Coronavirus Map: Tracking the Global Outbreak*, N.Y. Times, Mar. 23, 2020, available at <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html> [updating live; numbers expected to rise]

7. The State of New York operates three prisons in Westchester County, New York: Sing Sing Correctional Facility (“Sing Sing”), Bedford Hills Correctional Facility (“Bedford”), and Taconic Correctional Facility (“Taconic”) (collectively, “Westchester Prisons”). The Westchester Prisons have a collective capacity of over 3,000 people and employ hundreds more. Countless interactions occur inside these closed facilities on a daily basis. Incarcerated people share meals, play sports, and congregate in housing blocks and dormitories together. Staff members gather during shift change, share breaks, and clock out together.

8. The closed nature of these prisons fosters a uniquely intimate form of human contact. Incarcerated people share meals, play sports, and congregate in housing blocks and dormitories together. Staff members gather during shift change, share breaks, and clock out together. Incarcerated people and staff members occupy the same tight quarters where they breathe the same poorly ventilated air. Housing blocks and communal spaces are often dirty, with cleaning supplies and hygiene products frequently unavailable. Due to uniquely restrictive rules and institutional norms, incarcerated people often lack the freedom or means to clean their cells or maintain their hygiene.

9. Authorities elsewhere have slowed the spread of COVID-19 in their prisons and jails by releasing a critical mass of incarcerated individuals.³ DOCCS, by contrast, has thus far failed to do the same.

[last accessed April 23, 2020]; Mitch Smith et al., *Coronavirus Map: U.S. Cases Surpass 10,000*, N.Y. Times, Mar. 23, 2020, available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> [updating live; numbers expected to rise] [last accessed Apr. 23, 2020]; William Feuer, *New York State Just Surpassed China's Hubei Province for Reported Coronavirus Cases*, CNBC, Mar. 31, 2020, available at <https://www.cnbc.com/2020/03/31/new-york-state-just-surpassed-chinas-hubei-province-for-reported-coronavirus-cases.html> [last accessed April 10, 2020].

² *Coronavirus Map: Tracking the Global Outbreak*, N.Y. Times, Mar. 23, 2020, available at <https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html> [updating live; numbers expected to rise] [last accessed May 4, 2020].

³ Articles reporting the COVID-19 impact on prisons are listed in Exhibit 1.

10. COVID-19 entered the prisons in Westchester County over one month ago.⁴ In spite of its relatively recent appearance, COVID-19 is already spreading exponentially in these prisons, particularly at Sing Sing, where four incarcerated people have succumbed to the virus.⁵ The medically vulnerable and aging in each of these prisons, along with staff members, their families, and the communities to which they return on a daily basis, are all particularly imperiled by the continued spread of this deadly pathogen. Every day that the State fails to act, the risk mounts.

11. Respondent Michael Capra (“Capra”) is the superintendent of Sing Sing. Respondent Tanya Mitchell-Voyd (“Mitchell-Voyd”) is the superintendent of Taconic. Respondent Amy LaManna (“LaManna”) is the superintendent of Bedford. Respondents Capra, LaManna, and Mitchell-Voyd are collectively referenced as the “Superintendents.”

12. Respondent Anthony J. Annucci (“Annucci” or “Commissioner”) is the Acting Commissioner of DOCCS. Respondent Annucci oversees the New York State prison system, including Sing Sing, Bedford, and Taconic.

13. Subject to the direction of the Commissioner, each of the Superintendents is defined as the chief administrative officer of a correctional facility and is legally responsible under the laws of the State of New York for the management and supervision of their respective facilities and for directing the work and defining the responsibilities of all of the employees of their respective facilities.

14. Petitioners are Gianna Carriuolo, DIN 19G0082 (“Carriuolo”); Sandra Lawson, DIN 18G1002 (“Lawson”); George Martinez, DIN 07A4008 (“Martinez”); Bryan Pittsley, DIN

⁴ John J. Lennon, *The Day the Coronavirus Came to Prison*, Esquire, Mar. 19, 2020, available at <https://www.esquire.com/news-politics/a31785266/coronavirus-prison-sing-sing-covid-19/> [last accessed Apr. 10, 2020].

⁵ *DOCCS COVID-19 Report*, New York State Department of Corrections and Community Supervision, available at <https://doccs.ny.gov/doccs-covid-19-report> [last accessed April 27, 2020].

12A4129 ("Pittsley"); Sinceray Solis, DIN 19G0273 ("Solis"); A.A., DIN ***** ("A.A."); and B.B., DIN ***** ("B.B.").⁶

15. All of the Petitioners are incarcerated in a Westchester Prison and by virtue of their age and/or underlying medical condition, are particularly vulnerable to serious illness or death if infected by COVID-19. Two of the Petitioners also have near-term release dates from DOCCS. As detailed *infra*, all of the Petitioners have serious health conditions that have been defined by the World Health Organization ("WHO") and the Centers for Disease Control ("CDC") as putting them at higher risk of dying should they contract COVID-19.

16. As the Superintendent of Sing Sing, Respondent Capra is the legal custodian of, and responsible for the wellbeing of, Petitioners Martinez and Pittsley.

17. As the Superintendent of Taconic, Respondent Mitchell-Voyd is the legal custodian of, and responsible for, the wellbeing of Petitioners Carriuolo, Lawson, Solis, and B.B.

18. As the Superintendent of Bedford, Respondent LaManna is the legal custodian of and responsible for the well-being of Petitioner A.A.

19. As prisoners within the Westchester Prisons, all Petitioners are ultimately in the charge and custody of Respondent Annucci, who is the legal custodian of all Petitioners.

20. Petitioners have written to DOCCS and the Governor to ask for protection from COVID-19, but received no response. Petitioners now seek an order from this Court releasing them from prison on the grounds that continuing to incarcerate them under these unprecedented conditions constitutes deliberate indifference to a risk of serious medical harm, and imposes upon them punishment that is grossly excessive and grossly disproportionate to their offense, in violation of the Eighth Amendment to the United States Constitution and Article I, Section 5 of

⁶ A.A. and B.B. are proceeding anonymously pursuant to Petitioners' May 6, 2020 Order to Show Cause Application.

the New York State Constitution. In light of recent precedent, habeas is a proper remedy in this case.

21. Petitioners seek their release from confinement because the only known strategy to protect vulnerable groups from COVID-19 is effectively impossible in prisons. Petitioners cannot, in prison, engage in the risk mitigation necessary to protect themselves and each other. Release is the only effective means to protect the people with the greatest vulnerability to COVID-19 from transmission of the virus, and allows for greater risk mitigation for all people who remain held or working in New York State prisons.

JURISDICTION AND VENUE

22. This court has subject matter jurisdiction pursuant to CPLR Article 70.

23. Venue is proper pursuant to CPLR 7002[b][4] and CPLR 7004[c].

24. Joinder is appropriate pursuant to CPLR 1002.

25. On April 16, 2020, Petitioners Lawson, Martinez, Pittsley, Solis, A.A., and B.B. collectively applied for the relief requested herein. Petitioners voluntarily dismissed their application before the court decided its merits. This application joins an additional petitioner and introduces further evidence.

26. Petitioner Carriuolo has never applied, as an individual or as part of a collective, for the relief requested herein.

27. Copies of the mandates pertaining to each individual petitioner are not attached hereto due to the emergency nature of this proceeding.

STATEMENT OF FACTS

A. *Petitioners' Individual Health and Release Status.*

28. **Petitioner Carriuolo** is 51 years old and diagnosed with asthma, Type II diabetes, degenerative arthritis, and hypertension. She is therefore at high risk of serious complications or death if she contracts COVID-19.

29. Petitioner Carriuolo's conditions significantly impair her ability to ambulate and make her prone to infection. She often experiences shortness of breath, near constant skin infections, muscle spasms from the waist down, loss of feeling in her hands and legs, and near constant pain throughout her body. Petitioner Carriuolo is prescribed no less than 15 medications to treat these symptoms. Although she takes these medications on a daily basis, her symptoms do not subside.

30. Petitioner Carriuolo frequently signs up for sick call due to the pain in her hip and back caused by degenerative arthritis, but medical staff often tell her there is nothing else they can do. Surgery is the only treatment that will resolve the pain.

31. Due to her medical conditions, Petitioner Carriuolo often relies on other people in custody to assist her with daily living tasks such as carrying packages, obtaining commissary items and cleaning supplies, and even getting herself dressed. This dynamic is profoundly unsafe.

32. Petitioner Carriuolo also says that she struggles to maintain her personal hygiene due to her conditions. She only showers three times a week because she simply cannot get to the showers regularly on her own. On days that she wants to shower, she takes extra medication to ease the pain. She is rarely able to clean her cell for similar reasons. She cannot ambulate without experiencing shortness of breath, loss of feeling and extreme pain throughout her body.

33. Ms. Carriuolo has spent two years in state prison for a marijuana offense. She has an impeccable disciplinary record and is currently pursuing a Bachelor's degree in Human Rights through Hudson Link for Higher Education in Prison, a college education and life skills program for incarcerated men and women.

34. **Petitioner Lawson** is 61 years old and diagnosed with Type II diabetes and hypertension. She is therefore at high risk of serious complications or death if she contracts COVID-19

35. Lawson was first diagnosed with Type II diabetes four years ago when she was admitted to St. Luke's - Roosevelt Hospital in Manhattan for seven days with Legionnaire's Disease. She currently takes metformin on a daily basis to control her condition. Additionally, she takes Losartan for hypertension, Atorvastatin for high cholesterol and Propranolol for migraines so severe they cause blurry vision. In addition, she was recently placed on a 24-hour heart monitor after a recent routine wellness checkup, which revealed that she had an abnormally elevated heart rate, a condition she is continuing to monitor.

36. Petitioner Lawson has significant family support and a strong reentry plan. Upon her release, Petitioner Lawson plans to live with her father in Georgetown, South Carolina. To facilitate her release directly to South Carolina, she has applied for an out-of-state transfer of parole under the Interstate Compact and is awaiting approval. Because she has family living in the receiving state who are willing and able to support her, she will be considered a "mandatory transfer case."⁷ In the event that her out of state transfer approval is not secured before her release, she can stay with a family member in Manhattan, where she was living prior to her incarceration. Petitioner Lawson's sister lives in New York City and will ensure that Petitioner Lawson has a smooth transition if she is released to parole in New York.

⁷ See DOCCS Directive 9700: Interstate – Compact, Out of State, Cooperative, Dual Supervision Cases.

37. Petitioner Lawson's instant conviction, Criminal Possession of a Controlled Substance in the Third Degree, occurred in the context of her life-long struggle with substance abuse. To date, she has served one year and eight months of her two-year sentence (to be followed by two years of post-release supervision) and is scheduled for release upon the maximum expiration of her drug sentence on August 22, 2020.

38. During her time in custody, Petitioner Lawson has completed Aggression Replacement Training ("ART"), a 6-week cognitive behavioral intervention program. Since January, she had been participating in the Alcohol and Substance Abuse Treatment Program ("ASAT"), until the program was paused a few weeks ago due to the coronavirus. She works diligently as a porter in the school building, buffing and waxing the floors. Her prior felony convictions for grand larceny, forgery, and drug possession, as well as her multiple misdemeanor convictions, were also connected to her opioid addiction.

39. **Petitioner Martinez** is 59 years old and diagnosed with Chronic Obstructive Pulmonary Disease ("COPD"), advanced Type II diabetes, and hypertension, among other conditions. He is therefore at high risk of serious complications or death if he contracts COVID-19.

40. DOCCS has designated Petitioner Martinez as "Medical Level #1" – the highest level in the DOCCS system. Petitioner Martinez takes 11 medications daily pursuant to the instructions of the treating physicians there, to wit: sitagliptin; gemfibrozil; hydrochlorothiazide; aspirin; metformin; potassium chloride; glipizide XL; Invokana (canagliflozin); omega-3-acid ethyl esters; metoprolol; and pioglitazone.

41. Petitioner Martinez will live with his son's family in the Bronx upon his release. He has good prospects for employment as holds a Qualifying Certificate in Food Protection from

the New York City Department of Health, which qualifies him to act as a supervisor in a food establishment in New York City. Petitioner Martinez completed an Adult Basic Education course and is currently working towards earning his High School Equivalency Diploma. He also successfully completed numerous programs, including the Pro-Social Development and ASAT programs. He worked as a restaurant manager and cook prior to his incarceration and kept up with his cooking and food management skills by volunteering to cook for events at Sing Sing.

42. Petitioner Martinez has served 14 years of a 17.5-years-to-life sentence for Burglary in the Second Degree and Criminal Possession of Stolen Property in the Fourth Degree. He has no history of violence, and his record in prison demonstrates that he poses no threat to public safety. His exemplary behavior and close ties with his family qualified him to participate in the Family Reunion Program with his son and his granddaughters.

43. **Petitioner Pittsley** is diagnosed with HIV. He is therefore at risk of serious complications or death if he contracts COVID-19.

44. Petitioner Pittsley takes medication for HIV but reports that he often misses doses for days at a time due to the unreliability of sick call. During his most recent check-up, he was informed that his T-cell count dropped from 990 to 660 in three months, an indication that his immune system is becoming weaker.

45. Petitioner Pittsley is scheduled for conditional release on July 13, 2020 after having served eight years of his six-to-ten year sentence for Criminal Mischief in the Third Degree, Aggravated Vehicular Homicide, Attempted Arson in the Third Degree, and Attempted Assault in the Third Degree. During the past eight years, he has completed several programs including the Osborne Program, Rehabilitation Through the Arts, Anger Management, ART, and

ASAT. Due to his positive behavior, he has been granted permission to participate in the Family Reunion Program.

46. **Petitioner Solis** is a stroke survivor who has been diagnosed with heart failure, neuropathy, hypertension, and chronic asthma. She is therefore at high risk of serious complications or death if she contracts COVID-19.

47. In 2017, Petitioner Solis experienced a high-risk pregnancy due to a blood pressure spike. Her baby was born two weeks premature. Only a few months later, Petitioner Solis suffered a post-partum thrombotic stroke. This stroke caused a blood clot in her leg, which transversed through a hole in her heart. Petitioner Solis experienced language, cognitive, and physiological defects from this stroke. She still takes medication to combat these defects and requires both occupational and physical therapy.

48. Petitioner Solis recently had the hole in her heart repaired. In addition to her medication and therapy regimen, she uses albuterol to manage chronic asthma.

49. Petitioner Solis has been enrolled in an education program with Bard Prison Initiative, and the Anti-Violence Program at Taconic. She is also on the waitlist for ART, ASAT, and cosmetology. She has completed over half of her two-year sentence, and is eligible for conditional release in December.

50. Prior to her incarceration, Petitioner Solis earned an Associate's Degree and worked at a hotel. She is the mother of a two year-old daughter and a teenage daughter. If released, Petitioner Solis will return to her grandmother's apartment in Manhattan.

51. **Petitioner A.A.** will be 57 years old next month and has multiple health conditions placing her at high risk of serious complications or death if she contracts COVID-19.

She has Lupus (an autoimmune disease), heart disease, asthma, and hypertension, and is on anti-seizure medications, among other medications.

52. Petitioner A.A. suffers from co-morbidities that the CDC and WHO have determined place people at high risk of serious complications or death if they contract COVID-19. Petitioner A.A. is also on an intensive medication regimen. She relies on medication and an albuterol pump to manage her asthma, takes hydroxychloroquine to help control her lupus, takes nitroglycerin for her heart disease, and is on anti-seizure medication, to name a few. Stents have been recommended to address her cardiac condition.

53. Petitioner A.A. was granted parole at her initial Parole Board appearance on March 9, 2020 and is due to be released on July 10, 2020, after service of the minimum on her twenty-five years to life sentence.

54. Just shy of twenty-five years ago, Petitioner A.A., with a painful history of childhood abuse and intimate partner violence, and while mentally ill and struggling to parent four children in the midst of an unhealthy marriage, killed her youngest child. Petitioner A.A. immediately turned herself into the police, and has never denied her conduct. In the more than twenty years since, her family has forgiven her and she has done everything possible to redeem and rehabilitate herself.

55. The act was committed in the midst of a documented history of serious mental illness, which Petitioner A.A. has addressed. She has taken advantage of every available mandatory and voluntary psychiatric rehabilitative program in order to understand her actions and treat her mental health conditions. She has earned numerous certificates of achievement for completing these programs reflecting antiviolence, anger and stress management, decision-

making, positive motivation, and life skills. She has prioritized her mental health, and the Office of Mental Health reports she has been stable for ten years.

56. Petitioner A.A. has also taken the educational and vocational opportunities presented to her. In 2009, she graduated as valedictorian with a bachelor's degree in Sociology from Marymount Manhattan College. Additionally, she has held jobs while in custody since 2003. She worked as a teacher's aide for high school equivalency examinations from 2003 and 2018. Since 2018, she has worked full time at the New York State Department of Motor Vehicles Call Center, where she has been entrusted with interacting with the public.

57. Petitioner A.A. has volunteered to help and counsel others. She is deeply religious and involved in the Protestant faith. She has held a leadership role at the Protestant church since 2017 and reads words of encouragement at services. She crocheted blankets for newborn babies in neonatal intensive care units with the Lions Club from 2006 to 2007. She completed the Sighted Guide Technique Education Program in 2014 and worked as a visual aide until her health deteriorated. Petitioner A.A. also completed the facilitative program for AIDS Counseling and Education in 2017.

58. Petitioner A.A. has a strong disciplinary record and has earned the privilege of living in Fiske Cottage, which is honor housing.

59. Petitioner A.A. was subjected to sexual assault by a male correctional officer assigned to her housing unit while in DOCCS custody. This officer was disciplined and no longer works for DOCCS. Petitioner A.A. took the skills she has learned from her years in prison and reported that abuse, using the legal process to vindicate her rights.

60. Recognizing Petitioner A.A.'s rehabilitation, insight and readiness for release, the Parole Board granted her parole. She has a strong reentry plan that includes living with her sister

in the Albany area. Petitioner A.A. also has the strong support of her mother, who is ardently advocating for her immediate release and with whom Petitioner A.A. will live when her request for an out-of-state parole transfer is approved. Petitioner A.A. has offers of employment in New York and the state where her mother and another sister reside, that she will take advantage of as soon as the COVID-19 crisis ends.

61. **Petitioner B.B.** is 61 years old, is HIV+, and is diagnosed with severe asthma. She is therefore at high risk of serious complications or death if she contracts COVID-19.

62. Petitioner B.B. is a transgender⁸ woman whose repeated access to medical areas places her at an increased risk of exposure to COVID-19. Her asthma, which she manages with multiple inhalers, will worsen as warm weather approaches. Her HIV severely compromises her immune system.

63. Petitioner B.B.'s crimes involve shoplifting, but because she has entered stores to which she was not supposed to return, she has been convicted of burglaries. In the instant case, she took items of clothing, including scarves, from a department store. She has never been accused of an act of violence.

64. Petitioner B.B. has an impeccable disciplinary record while in custody. She has taken advantage of all programs available to her and worked steadily throughout her stay in the women's jail while in New York City custody. She has been participating in the ASAT until the program was paused a few weeks ago due to the coronavirus.

⁸ Transgender is a term that refers to someone whose gender identity is different from the gender identity typically associated with the sex they were assigned at birth. Cisgender is a term that refers to someone whose gender identity aligns with the gender identity typically associated with the sex they were assigned at birth. *See* Transgender FAQ, GLADD, <https://www.glaad.org/transgender/transfaq> [last accessed Apr. 13, 2020].

65. Because of Petitioner B.B.'s gender identity, calm disposition, soft-spoken and traditionally feminine presentation, and because she poses absolutely no risk to others, she is one of less than a handful of transgender women to have ever been confined in a women's prison.

66. The Highbridge Woodcrest Center, a 90-bed skilled nursing facility in Bronx, has agreed to accept Petitioner B.B. for residential treatment upon her release. For 29 years, the Center has specialized in the treatment and care of people living with HIV/AIDS. Petitioner B.B. is eligible for her merit board hearing in July 2020, and for parole release in less than a year, March 2021.

B. *The COVID-19 Pandemic Presents a Grave Risk of Harm, Including Serious Illness and Death, to People Over Age 50 and Those with Serious Medical Conditions in the Westchester Prisons.*

43. Infectious disease is nothing new to the Westchester Prisons, which in the past have been hotbeds for airborne contagious diseases, including Tuberculosis and Staphylococcus Aureus.⁹

44. The first incarcerated person to die in New York from COVID-19 was in Respondent Capra's charge: on March 30, 2020, a 58-year-old person incarcerated at Sing Sing died from COVID-19.¹⁰ As of May 2, 2020, there have been 88 COVID-19 cases among people incarcerated at Sing Sing, 61 COVID-19 cases among people incarcerated at Bedford, and 2 COVID-19 cases among people incarcerated at Taconic.¹¹

45. As of May 2, 2020, the New York State Department of Corrections and Community Supervision ("DOCCS") the state agency that operates New York State's prisons,

⁹ Franklin D. Lowy et al., *Saphylococcus Aureus Colonization and Infection in New York State Prisons*, 196(6) Journal of Infectious Diseases 911, Sept. 15, 2007, available at <https://academic.oup.com/jid/article/196/6/911/2192114> [last visited Apr. 9, 2020].

¹⁰ Andrew Denney, *First New York Prisoner with Coronavirus Dies at Sing Sing*, N.Y. Post, Apr. 2, 2020, available at <https://nypost.com/2020/04/02/first-new-york-prisoner-with-coronavirus-dies-at-sing-sing/> [last visited Apr. 10, 2020].

¹¹ See *supra* note 5.

reports that 1100 staff, 396 incarcerated people, and 52 parolees have had the virus.¹² Two staff members, ten incarcerated people, and four parolees have succumbed to the virus.¹³

46. DOCCS has not taken necessary steps to limit the spread of this disease by invoking its authority to release people pursuant to New York State statutes.

47. While Governor Cuomo has committed to release a small subset of medically vulnerable people within 90 days of their maximum expiration date, and to consider clemencies and commutations, these commitments are insufficient.¹⁴ The Commissioner and the Superintendents have put their prison populations, including Petitioners, and prison staff in the crosshairs of the COVID-19.¹⁵

48. Petitioners have written to DOCCS and the Governor to ask for protection from COVID-19, but received no response. Petitioners now seek their release from confinement because the only known strategy to protect them from COVID-19 is near impossible in the Westchester Prisons. Prison environments preclude Petitioners from engaging in the risk mitigation necessary to protect themselves and each other. (*See* Exhibit 2, Affirmation of Robert B. Greifinger, M.D. [hereinafter "Greifinger Aff."].)

49. On March 7, 2020, Governor Cuomo issued Executive Order Number 202, declaring a disaster emergency for the entire State of New York.¹⁶ On March 20, 2020 the Governor signed the "New York State on P.A.U.S.E." Executive Order, a public health and

¹² *See supra* note 5.

¹³ *See id.*

¹⁴ Ryan Tarinelli, *Cuomo Weighs Grants of Clemency Amid Coronavirus Concerns Amid Outbreak in Prison System*, NYLJ, Mar. 30, 2020, available at <https://www.law.com/newyorklawjournal/2020/03/30/cuomo-weighs-grants-of-clemency-amid-coronavirus-outbreak-in-prison-system/> [last accessed Apr. 10, 2020].

¹⁵ John J. Lennon, *The Day the Coronavirus Came to Prison*, Esquire, Mar. 19, 2020, available at <https://www.esquire.com/news-politics/a31785266/coronavirus-prison-sing-sing-covid-19/> [last accessed Apr. 10, 2020].

¹⁶ Jesse McKinley & Edgar Sandoval, *Coronavirus in N.Y.: Cuomo Declares State of Emergency*, N.Y. Times, Mar. 7, 2020, available at <https://www.nytimes.com/2020/03/07/nyregion/coronavirus-new-york-queens.html>. [last accessed April 10, 2020].

safety policy that, *inter alia*, closed non-essential businesses and banned non-essential gatherings.¹⁷

50. COVID-19 is a particularly contagious disease. (Greifinger Aff. ¶ 8.) A recent study showed that the virus could survive for up to three hours in the air, four hours on copper, up to twenty-four hours on cardboard, and up to two to three days on plastic and stainless steel.¹⁸ Several studies also show that controlling the spread of COVID-19 is made even more difficult because of the prominence of asymptomatic transmission—people who are contagious but who exhibit limited or no symptoms, rendering ineffective any screening tools dependent on identifying symptomatic behavior.¹⁹ Indeed, these studies show that people infected with COVID-19 are most contagious about one to three days *before* they begin to show symptoms.²⁰

51. There is no vaccine for COVID-19. (Greifinger Aff. ¶¶ 9.) Certain underlying medical conditions increase the risk of serious COVID-19 disease for people of any age – including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and pregnancy. (Greifinger Aff. ¶¶ 10, 12.)

¹⁷ Press Release, *Governor Cuomo Signs the 'New York State on P.A.U.S.E' Executive Order*, Office of Governor Andrew M. Cuomo, Mar. 20, 2020, available at <https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order> [last accessed April 10, 2020].

¹⁸ *Novel Coronavirus Can Live on Some Surfaces for Up to 3 Days, New Tests Show*, TIME, Mar. 19, 2020, available at <https://time.com/5801278/coronavirus-stays-on-surfaces-days-tests/> [last accessed April 10, 2020].

¹⁹ Apoorva Mandavilli, *Infected but Feeling Fine: the Unwitting Coronavirus Spreaders*, N.Y. Times, Mar. 31, 2020, available at <https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html> [last accessed April 10, 2020].

²⁰ *Id.*

52. For people over the age of 50 or with medical conditions that increase the risk of serious COVID-19 infection, symptoms such as fever, coughing and shortness of breath can be especially severe.²¹

53. COVID-19 can cause severe damage to lung tissue, sometimes leading to a permanent loss of respiratory capacity, and can damage tissues in other vital organs including the heart and liver. Patients with serious cases of COVID-19 require advanced medical support, including positive pressure ventilation and extracorporeal mechanical oxygenation in intensive care. (Greifinger Aff. ¶¶ 7,10-11.) Patients who do not die from serious cases of COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurological damage and loss of respiratory capacity.

54. COVID-19 may also target the heart muscle, causing a medical condition known as myocarditis, or inflammation of the heart muscle. Myocarditis can affect the heart muscle and electrical system, reducing the heart's ability to pump. This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits exercise tolerance and ability to work.

55. Most people in higher risk categories who develop serious disease will need advanced supportive care requiring specialized equipment that is in limited supply, and an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians. This level of support is nearly impossible to staff in the Westchester Prisons.

56. According to recent estimates, the fatality rate of people infected with COVID-19 is about ten times higher than a severe seasonal influenza, even in advanced countries with highly effective health care systems.

²¹ *Id.*

57. There is no cure for COVID-19 nor is there any known medication to prevent or treat infection. (Greifinger Aff. ¶ 9.)

58. The only known methods to reduce the risk to people vulnerable to serious illness or death from COVID-19 are to prevent infection in the first place through social distancing and improved hygiene, including washing hands frequently with soap and water. (Greifinger Aff. ¶ 13.)

59. COVID-19 has reached New York State prisons and is rapidly spreading. (Greifinger Aff. ¶ 17.) The case numbers the state has published likely drastically underestimate the number of incarcerated individuals who have contracted the virus. (Greifinger Aff. ¶ 22.) According to its protocol, DOCCS tests only those incarcerated individuals who are symptomatic and have received a medical evaluation.²² As of March 31, 2020, DOCCS had reported only testing 57 incarcerated people.²³ Further compounding this situation, there is growing concern among medical professionals that COVID-19 tests may have false negative rates of 30 percent or higher.²⁴

60. The conditions in New York State prisons create an extraordinarily high risk of the spread of COVID-19. (Greifinger Aff. ¶¶ 19-26, 28-29, 31.) Statistics show that other carceral settings, such as New York City jails, have outpaced all other locations in the rate of

²² Andrew Derminio, *New York State Department of Corrections Responds to COVID-19 Concerns*, WIBX 950 AM, Mar. 30, 2020, available at <https://wibx950.com/new-york-state-department-of-corrections-responds-to-covid-19-concerns/> [last accessed Apr. 10, 2020]. In response to an inquiry, DOCCS stated that its “testing of incarcerated individuals is based on an individual exhibiting symptoms and after a medical evaluation is conducted.”

²³ Reuven Blau & Rosa Goldensohn, *Call for Cuomo to Free Ailing Prisoners as Virus Spreads*, The City, Apr. 1, 2020, available at <https://thecity.nyc/2020/04/call-for-cuomo-to-free-ailing-prisoners-as-virus-spreads.html> [last accessed Apr. 10, 2020].

²⁴ Harlan M. Krumholz, M.D., *If You Have Coronavirus Symptoms, Assume You Have the Illness, Even if You Test Negative*, N.Y. Times, Apr. 1, 2020, available at <https://www.nytimes.com/2020/04/01/well/live/coronavirus-symptoms-tests-false-negative.html> [last visited Apr. 10, 2020].

COVID-19 spread.²⁵ The “attack rate” of COVID-19 on Rikers Island—that is, the rate at which the population is being infected—is far higher than anywhere else in the United States of America.²⁶ Experts predict that “[a]ll prisons and jails should anticipate that the coronavirus will enter their facility[.]”²⁷

61. Community members who are not incarcerated are able to engage in social distancing, or quarantine themselves as necessary while eating meals, traveling to and from medical appointments, speaking with loved ones on the telephone, and using bathrooms. Incarcerated people do not have this ability. (Greifinger Aff. ¶¶ 23-24, 26.) By design and operation, New York state prisons make it impossible for Petitioners to engage in the necessary hygiene, cleaning, and social distancing measures that experts implore all of us to take to mitigate the risk of COVID-19 transmission. (*Id.*)

62. New York State prisons are in short supply of soap, disinfectant, and other basic cleaning supplies. Even where those supplies are available, they are rationed, sometimes arbitrarily, pursuant to prison rules and norms.

63. Furthermore, many incarcerated people live in dormitory-like sleeping arrangements. Others live in a cell with a cellmate. Even those who live in single cells are sleeping in quarters small enough that maintaining 6-foot distance from individuals walking down the cellblock is impossible. They have limited freedom of movement and no control over

²⁵ *Analysis of COVID-19 Infection Rate in NYC Jails*, The Legal Aid Society, Apr. 3, 2020, available at https://legalaidnyc.org/wp-content/uploads/2020/04/4_3_Analysis-of-COVID-19-Infection-Rate-in-NYC-Jails-1.pdf. [last accessed Apr. 14, 2020].

²⁶ *See id.*

²⁷ Nicole Westman, *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, The Verge, Mar 7, 2020, available at <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap> [last visited Apr. 24, 2020].

the movements of others with whom they are required to congregate on a daily basis.

(Greifinger Aff. ¶¶ 23-24.)

64. Similarly, officers often escort incarcerated people to other parts of the prison for medical appointments, calls with their attorneys, or recreation. This amounts to forced congregation of the type that can potentially result in COVID-19 transmission. (Greifinger Aff. ¶¶ 20, 24-26.)

65. Finally, incarcerated people are forced eat in communal settings, and share bathrooms and shower facilities regularly. Again, this forced congregation creates additional opportunities for the transmission of the virus. (Greifinger Aff. ¶ 24.)

C. *Due to Prison Conditions, Petitioners Cannot Implement the Hygiene and Cleaning Protocols Recommended by Public Health Experts for COVID-19 Prevention.*

66. Petitioners cannot maintain necessary levels of preventive hygiene and cleaning because they are required to share or touch objects used by others. Toilets, sinks and showers are often shared, without disinfection between each use. (Greifinger Aff. ¶ 24.)

67. Even where they have their own bathroom in their cell, Petitioners are not afforded the hygiene and cleaning supplies necessary to prevent the spread of COVID-19.

68. Petitioners report that **Sing Sing** has not provided hygiene and cleaning information and supplies necessary to implement a consistent and adequate hygiene and cleaning regimen.

69. Despite its promises, DOCCS has not provided **Petitioner Martinez** with hand sanitizer or a handkerchief for use as a mask.

70. Similarly, **Petitioner Pittsley** is experiencing dangerously unsanitary conditions in his housing unit. People held in Petitioner Pittsley's unit are only allowed to clean their cells once per week. In order to do so, he shares with approximately 64 people: two mops, one toilet

brush, watered-down germicides, and several "cleaning rags," which are simply torn up sheets, towels, and shirts. These draconian restrictions on hygiene and cleaning are the direct result of DOCCS' rules limiting cleaning supplies.

71. Petitioners report that due to restrictions imposed by **Taconic**, they are unable to engage in the hygiene and cleaning practices recommended by public health officials for COVID-19 prevention and management.

72. **Petitioner B.B.** states that at Taconic the incarcerated people responsible for cleaning the common areas in her dorm have not received training, nor is there supervision of their work, resulting in unsanitary conditions. These individuals clean inconsistently and incompletely. Petitioner B.B. cannot supplement this cleaning with her own cleaning because prison officials do not afford her the supplies, or the liberty, to do so.

73. **Petitioner A.A.**, reports that due to resources issues and restrictions at **Bedford**, she is unable to engage in the hygiene and cleaning practices recommended by public health officials for COVID-19 prevention and management.

74. Petitioner A.A. is housed with several other women on the honor block at Bedford. Petitioner A.A. shares a day room, toilets, sinks, and shower areas with other women. Prison officials do not keep these shared areas clean. Prison officials also persistently fail to make cleaning supplies readily available for Petitioner A.A. and others to use.

75. Food preparation presents similar problems for Petitioners. At the Westchester Prisons, most food service is communal. Petitioners are generally served by other incarcerated workers drawn from many different housing areas within the prison, with little opportunity for surface disinfection. Even the Petitioners who are served meals in their cell are forced to come within six feet of the people who pass them their food trays, often with ungloved hands.

76. Finally, DOCCS has failed to provide Petitioners the supplies it reported it would provide all incarcerated people. For example, as recently as the day of this filing, clients of the Legal Aid Society were reporting to their attorneys that they had no access to hand sanitizer. By contrast, DOCCS staff has ready access to hand sanitizer - hand sanitizer DOCCS pays incarcerated people a pittance to produce.²⁸

D. *Limitations of Prison Infrastructure Prevent Petitioners from Implementing the Social Distancing Protocols Recommended by Public Health Agencies for COVID-19 Prevention.*

77. New York State prisons lack adequate infrastructure to implement the social distancing measures required to address the spread of infectious disease and ensure treatment of people most vulnerable to illness. (Greifinger Aff. ¶¶ 19-21, 23-26.)

78. On March 31, 2020, health care providers at the Alice Hyde Medical Center in Malone, New York, wrote an open letter to Respondent Annucci and DOCCS Chief Medical Officer John Morley, M.D., raising the alarm about DOCCS' inability to provide care in the instance of “a major outbreak of the virus in the prisons which appears inevitable.” Their concern was predicated on both the likelihood of an outbreak and the fact that, in their view, the prison population has been “irresponsibly managed” by DOCCS.

79. The practitioners note that widespread failures by DOCCS to institute social distancing, limited or no screening at prisons, and the continuing practice of transferring sick inmates between prisons “substantially increase the risk of spreading the virus.” The writers also note that many incarcerated individuals have co-morbidities and/or are elderly. Having been

²⁸ Kenya Evelyn, *New York State to Produce Hand Sanitizer Using Prison Labor*, The Guardian, Mar. 9, 2020, available at <https://www.theguardian.com/world/2020/mar/09/coronavirus-new-york-state-hand-sanitizer-prison-labor> [last accessed Apr. 10, 2020].

given “no assurance that those wards of the State would be adequately cared for by the State,” the writers warn of a “potential disaster for [their] hospital, its staff and [their] community.”²⁹

80. Petitioners report that they are unable to engage in social distancing at **Sing Sing** due to the physical infrastructure at Sing Sing.

81. **Petitioner Martinez** is at imminent risk because prison authorities have required him to continue to work in the Sing Sing kitchen even though kitchen and mess hall workers have tested positive for COVID-19. He faces an impossible choice: either go to work each day in close quarters with no way to protect against the coronavirus, or refuse to work and receive a disciplinary infraction, which would mar his exemplary record and risk his being denied parole.

82. Similarly, Sing Sing staff requires Petitioner Martinez to traverse crowded walkways between his housing block and commissary, recreation, and the mess hall. In spite of the social distancing protocols in place in the mess hall, the lines for food are often packed, with individuals standing one foot apart.

83. Petitioner Pittsley has not received any advice on how to protect himself from the virus. There are no instructional videos, posters, or memos available to people in his housing unit who want to know more about the steps they can take to protect themselves and stop the spread of the virus.

²⁹ *Spread of COVID-19 Into Prisons A Concern*, My Malone Telegram, Mar. 31, 2020, available at https://www.mymalonetelegram.com/opinion/letters/spread-of-covid-19-into-prisons-a-concern/article_c8b4e3cc-979b-554c-a9f3-f7867f85939c.html [last accessed Apr. 10, 2020]. Malone, New York is home to three New York State correctional facilities: Bare Hill Correctional Facility, Franklin Correctional Facility, and Upstate Correctional Facility. The concern that outbreaks in jails and prisons will have consequences for public health in surrounding communities is echoed by other medical professional as well as correctional officials. See, e.g., Brie Williams and Leann Bertsch, *A Public Health Doctor and Head of Corrections Agree: We Must Immediately Release People from Jails and Prisons*, The Appeal, Mar. 27, 2020, available at <https://theappeal.org/a-public-health-doctor-and-head-of-corrections-agree-we-must-immediately-release-people-from-jails-and-prisons/> [“it is only a matter of time before a COVID-19 outbreak in one of our nation’s jails or prisons has significant public health consequences in surrounding communities”] [last accessed Apr. 10, 2020].

84. Petitioners report that they are unable to engage in social distancing at **Taconic** due to the physical infrastructure at Taconic.

85. **Petitioner B.B.** is not able to physically distance from others in her housing area where she is confined with a number of other women: there is a common dayroom area and showers are used by all. She requires additional treatment at an outside hospital for her ankle, which she broke in December; however, incarcerated people are transported together in vehicles and are required to wait together in holding areas for these outside appointments. Searches by staff are conducted that require close contact with officers. Tensions on her housing unit are rising, increasing her stress and anxiety.

86. Petitioner Lawson is still required to eat in the mess hall with her entire unit despite the pandemic. DOCCS has attempted social distancing in the mess hall by seating people two to a table, rather than four to a table. But as of April 6, Officers still were not wearing masks.

87. Petitioner A.A. is unable to engage in social distancing at **Bedford** due to the physical infrastructure there.

88. Due to her living arrangement at Bedford, **Petitioner A.A.** is unable to socially isolate, particularly during her program assignment at the Department of Motor Vehicles, where she works with several other people in close quarters. The lunch area there is small, resulting in her inability to maintain the recommended six feet of distance from others. When she leaves her room, she cannot socially distance in her housing unit despite the fact that it is an honor block.

89. Petitioners' experiences make clear that DOCCS simply cannot implement protocols sufficient to screen, detect, or identify incarcerated people or staff who have been infected. The nature of the prison environment simply will not allow it. DOCCS' own statements

have shown that some of the measures the agency has implemented—or has represented that it has implemented—fall far short of the recommendations of all credible public health agencies.

90. In an April 1, 2020 letter to all DOCCS employees, Respondent Annucci wrote, “every individual who has tested positive or displayed symptoms has been isolated and a contact trace completed leading to others being quarantined and monitored.”³⁰ These quarantining and monitoring measures are simply inadequate considering DOCCS' policy is to test incarcerated individuals only after they show symptoms.³¹ Such symptom-reactive policies overlook the well-established fact that many who are infected with COVID-19 do not show signs of illness.³² These policies are ineffective to stop the rampant asymptomatic transmission of the disease.³³ The dangers of asymptomatic transmission continue within DOCCS facilities.

E. *Petitioners' Risk of Infection is Increased by the Inadequate Supply of Personal Protective Equipment for Both DOCCS Staff and Incarcerated People.*

91. Both the White House and the CDC now unequivocally recommend that when in proximity to others, everyone should wear personal protective equipment ("PPE"), including

³⁰ Ltr. to All DOCCS Employees from Anthony J. Annucci, Acting Commissioner, Apr. 1, 2020, available at <https://www.scribd.com/document/454431544/Use-of-face-masks-by-NY-state-prison-employees> [last accessed Apr. 10, 2020]. See also Paul Kirby, *New York Corrections Boss Says State Prison Employees Can Wear Protective Masks*, Daily Freeman, Apr. 1, 2020, available at https://www.dailyfreeman.com/news/local-news/ny-corrections-boss-says-state-prison-employees-can-wear-protective-masks/article_126a3770-743f-11ea-8503-87152538c9db.html [last accessed Apr. 10, 2020]; Emily Russell, *"I Don't Want to Die in Prison": Coronavirus Fears Grow in North Country Prisons*, North Country Public Radio, Apr. 2, 2020, available at <https://www.northcountrypublicradio.org/news/story/41027/20200401/i-don-t-want-him-to-die-in-prison-coronavirus-fears-grow-in-north-country-prisons> [in response to media inquiry, individuals who show symptoms are isolated and quarantined] [last accessed Apr. 10, 2020].

³¹ See *supra* note 21 [in response to inquiry, DOCCS stated that its “testing of incarcerated individuals is based on an individual exhibiting symptoms and after a medical evaluation is conducted.”].

³² CDC, *Coronavirus Disease 2019 (COVID-19) Symptoms*, available at <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> [last accessed Apr. 10, 2020]; see also Yale New Haven Health, *Coronavirus (COVID-19) vs. Influenza (Flu)*, available at <https://www.ynhhs.org/patient-care/urgent-care/flu-or-coronavirus> [last accessed Apr. 10, 2020].

³³ Chelsea Ritschel, *Coronavirus: Are People Who Are Asymptomatic Still Capable of Spreading COVID-19?* Independent, Mar. 15, 2020, available at <https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html> [last accessed Apr. 10, 2020].

masks, whether or not they have displayed symptoms of coronavirus.³⁴ Such equipment helps prevent the wearer from both contracting the virus and, should they be infected themselves, transmitting it to others. Despite these public health advisories, DOCCS has not reported that it requires incarcerated individuals to use face coverings when in congregate settings, nor does it report ensuring universal access to regularly laundered, state-issued handkerchiefs.³⁵

92. DOCCS' reports make clear that its PPE policy does not comply with CDC recommendations. DOCCS reports that PPE, in the form of facemasks, is only given to correctional officers or medical staff when they are dealing with a "medical situation that would require interaction with an incarcerated individual who has tested positive or is displaying symptoms."³⁶

93. Individuals incarcerated in DOCCS facilities are given handkerchiefs, but they are not issued masks unless they themselves are subject to quarantine.³⁷ Perplexingly, incarcerated individuals are not given masks if they are interacting with individuals who are quarantined. Nor are they given masks if they are at high-risk for complications from COVID-19. In fact, our clients have reported being disciplined by DOCCS for wearing their own makeshift masks.³⁸

94. DOCCS has not and cannot sufficiently address the risk of serious medical harm to Petitioners. As Dr. Homer Venters, former chief medical officer of New York City jails, recently said, "[i]n ordinary times, crowded jails overlook prisoners' medical problems and

³⁴ See Use of Cloth Face Coverings to Help Slow the Spread of COVID-19, Centers for Disease Control and Prevention, available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html> [last accessed Apr. 13, 2020].

³⁵ *Id.* The CDC recommends that cloth face coverings worn to combat transmission of the virus should be routinely washed.

³⁶ Bernadette Hogan, *New York State Prison Guards Beg Cuomo to Protect Workers from Coronavirus*, N.Y. Post, Mar. 30, 2020, available at <https://nypost.com/2020/03/30/ny-state-prison-guards-beg-cuomo-to-protect-workers-from-coronavirus/> [last visited Apr. 10, 2020].

³⁷ See *supra* note 22 [announcing that incarcerated individuals subject to quarantine "will" be given masks]. It is unclear whether quarantined individuals were routinely given masks prior to April 1, 2020.

³⁸ Reuven Blau, *State Prisoners Punished for Wearing Masks as City Jails OK Them*, The City, Apr. 3, 2020, available at <https://thecity.nyc/2020/04/state-prisoners-punished-for-masks-as-city-jails-oks-them.html> [last accessed Apr. 10, 2020].

struggle to separate them based on their security classification . . . [i]f jails have to add quarantines and sequestration of high-risk prisoners to the mix . . . they will find managing a COVID-19 outbreak ‘*simply almost impossible.*’³⁹ (Greifinger Aff. ¶¶ 33-37.)

95. Because risk mitigation is the only known strategy to protect vulnerable groups from COVID-19, and because such mitigation is impossible in jails and prisons, (Greifinger Aff. ¶¶ 33-34), elected officials, correctional and public health experts, medical experts, and community advocates have called for decarceration, including the release of vulnerable individuals from prison.⁴⁰ In many cases, Courts have ordered such decarceration.

96. On March 19, 2020 New York State Senator Luis Sepulveda, Chair of the Senate Standing Committee on Crime Victims, Crime and Corrections, and New York State Assemblymember David Weprin, Chair of the Assembly Standing Committee on Corrections, wrote to Governor Cuomo urging him to facilitate the release of individuals in state correctional facilities, stating “coronavirus poses a great risk to correctional staff and incarcerated people” and “[i]t is imperative to release as many people as soon as possible to avoid a public health disaster in our prison system.” Assemblymember Weprin stated that “[b]y releasing persons from custody, especially older, sicker individuals, the prisons will become safer for everyone,”

³⁹ Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, Mother Jones, Mar. 12, 2020, available at https://www.motherjones.com/crime-justice/2020/03/coronavirus-jails-bail-reform-arrests/?utm_source=The+Appeal&utm_campaign=0a31827f48EMAIL_CAMPAIGN_2018_08_09_04_14_COPY_01&utm_medium=email&utm_term=0_72df992d84-0a31827f48-58432543 [last visited Apr. 10, 2020].

⁴⁰ See, e.g., Mary Bassett, et al., *Andrew Cuomo, Stop a Coronavirus Disaster: Release People From Prison*, N.Y. Times, Mar. 30, 2020, available at <https://www.nytimes.com/2020/03/30/opinion/nyc-prison-release-covid.html> [recommending the release of broad swaths of individuals from prison including elderly and otherwise vulnerable individuals, those held on noncriminal technical parole violations, those approaching the end of their sentences, and “low-risk inmates.”] [last visited Apr. 10, 2020]. Dr. Bassett was the New York City Health Commissioner; Rachael Bedard, M.D., *I’m a Doctor at Rikers Island. My Patients Shouldn’t Have to Die In Jail*, Wash. Post, Apr. 10 2020, available at https://www.washingtonpost.com/outlook/doctor-rikers-compassionate-release/2020/04/10/07fc863a-7a93-11ea-9bee-c5bf9d2e3288_story.html [Director of Geriatric and Complex Care Services for Correctional Health Service in New York City, discussing conditions at Rikers Island and opining that “[s]ocial distancing” is impossible in correctional facilities” and “decarceration on a mass scale is an urgent public health demand and an outbreak mitigation strategy”] [last visited April 24, 2020].

whereas “if the current prison population is maintained, it is likely that the correctional health services will be overwhelmed.”⁴¹

97. On March 20, 2020, Senator Sepulveda and Assemblymember Weprin, joined by New York State Senator Gustavo Rivera and New York State Assemblymember Richard Gottfried, sent a similar plea to Tina Stanford, Chair of the New York State Board of Parole. Senator Rivera and Assemblymember Gottfried also have decades of experience in public and correctional health issues. Assemblymember Gottfried, for example, has served in the Assembly for over 50 years and is the long-tenured chair of the Assembly's Standing Committee on Health.

98. Courts and public officials in New York State are undertaking efforts to reduce prison populations. (*U.S. v Stephens*, 15-cr-95, 2020 WL 1295155 [SDNY Mar. 19, 2020] [ordering release of federal pretrial detainee in part due to “unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic” which may place inmates, in particular, at “heightened risk”]; *United States v Perez*, 19-cr-297, Dkt. No. 62 [SDNY Mar. 19, 2020] [ordering the release of a detainee held on sex crime charges with serious progressive lung diseases after finding “compelling reasons exist for temporary release of the defendant from custody during the current public health crisis”]. *See also, e.g., United States v Raihan*, No. 20-cr-68, Dkt. No. 20 at 10:12–19 [EDNY Mar. 12, 2020] [ordering the continued release of a pre-trial detainee on the grounds that “[t]he more people we crowd into (the Manhattan Detention Center), the more we’re increasing the risk to the community”].)

99. Other states, including Massachusetts, Kentucky, West Virginia, California, Utah, New Jersey, and Rhode Island, are undertaking efforts to reduce prison populations.⁴²

⁴¹ Ltr. from Assemblymember David Weprin and Senator Luis Sepulveda to Governor Andrew M. Cuomo, Mar. 19, 2020, *available at* <https://twitter.com/DavidWeprin/status/1241076143626883075/photo/1> [last accessed Apr. 10, 2020].

California, a large state with demographics similar to those of New York, intends to grant early release to 3,500 inmates in response to the crisis.⁴³ Courts in other states have granted specific applications for the release of pretrial detainees, with many more such applications pending. (See *United States v Barkman*, 2020 U.S. Dist. LEXIS 45628 [D Nev Mar. 17, 2020] [“With confirmed cases that indicate community spread, the time is now to take action to protect vulnerable populations and the community at large”]; *In The Matter of The Extradition of Alejandro Toledo Manrique*, 19-mj-71055, 2020 WL 13077109 [ND Cal Mar. 19, 2020] [ordering pre-trial detainee’s release on bond despite finding the person was a flight risk and despite the fact that no cases had yet been confirmed in the San Mateo County jail, since by the time there is a case it will likely be “too late”].)

100. In a recent court filing seeking the release of federal immigration detainees, Dr. Marc Stern, a correctional health expert, concluded that “[f]or detainees who are at high risk of serious illness or death should they contract the COVID-19 virus, release from detention is a critically important way to meaningfully mitigate that risk.” For that reason, Dr. Stern has recommended the “release of eligible individuals from detention, with priority given to the elderly and those with underlying medical conditions most vulnerable to serious illness or death if infected with COVID-19.”⁴⁴

⁴² Courts and public officials throughout the country have also undertaken efforts to facilitate the release of elderly and sick prisoners from jails and prisons, and to reduce jail populations by refusing the admission to jails of individuals arrested for certain charges. See articles cited in Exhibit 3.

⁴³ Paige St. John, *California to Release 3,500 Inmates Early as Coronavirus Spreads Inside Prisons*, L.A. Times, Mar. 31, 2020, available at <https://www.latimes.com/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons> [“California intends to accelerate release and parole dates for 3,500 inmates serving terms for nonviolent crimes and already due to be released within 60 days”] [last accessed Apr. 10, 2020]. Departments of Correction in Iowa, Rhode Island, and Utah, as well as parole boards in Georgia and North Dakota, have also taken steps to reduce prison populations. See articles cited in Exhibit 3.

⁴⁴ Decl. of Dr. Marc Stern, ¶¶ 9, 11, *Dawson v Asher*, No. 2:20-CV-409-JLR-MAT, [Mar. 16, 2020], available at <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern> [last accessed Apr. 10, 2020].

101. Courts are already granting early release to individuals serving prison sentences in response to the dangers the pandemic poses to incarcerated people. (*See, e.g. United States v Zukerman*, No. 16-cr-194, 2020 WL 1659880, at *5 [SDNY Apr. 3, 2020] [noting that “the great risk[s] that COVID-19 pose [] to an elderly person with underlying health problems” such as the defendant constitute “extraordinary and compelling reasons” to modify his sentence under 18 U.S.C. § 3582(c)(1)(A)(i)]; *United States v Muniz*, 4:09-cr-199, 2020 WL 1540325, at *1 [SD Tex Mar. 30, 2020] [“Because Defendant is at high-risk for severe illness from COVID-19 and because inmates in detention facilities are particularly vulnerable to infection, the Court finds that Defendant has demonstrated an extraordinary and compelling reason for compassionate release”].)

102. New York State courts have held that release is the only remedy adequate to protect medically vulnerable incarcerated people from the serious risks attendant to COVID-19. (*See People of the State of New York ex rel. Stoughton v Brann*, 2020 Slip Op 20081 [Sup Ct, NY County 2020] [“This judge does not at all question the good faith of the Rikers officials. Certainly no 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”]; *see also People of the State of New York ex rel. Gregor v Reynolds*, 2020 NY Slip Op 20086 [Sup Ct, Essex County, April 20, 2020] [granting habeas petition where “the risk to [petitioner] in [Essex County Jail] because of his own medical conditions and the lack of the full complement of preventive measures employed” rose to the level of deliberate indifference in violation of the federal and state constitutions].)

103. Federal Courts have also granted release to people susceptible to serious complications from COVID-19, noting that even where corrections agencies have represented

that they are taking steps to mitigate the risk, these steps are not enough -- release is the only remedy adequate to protect people. (*See United States v Campagna*, No. 16-cr 8, 2020 WL 1489829, at *3 [SDNY Mar. 27, 2020] ["Defendant's compromised immune system, taken in concert with the COVID-19 public health crisis, constitutes an extraordinary and compelling reason to modify to Defendant's sentence on the grounds that he is suffering from a serious medical condition that substantially diminishes his ability to provide self-care within the [prison] environment"]; *United States v Perez*, 2020 WL 1546422 [SDNY Apr. 1, 2020] [holding that defendant's medical condition combined with the limited time remaining on his sentence and the risks posed by the virus in his detention facility "clear[] the high bar set by" the extraordinary and compelling reasons requirement of the federal compassionate release statute]; *United States v Hernandez*, No. 18-cr-834, 2020 WL 1445851 [SDNY Mar. 25, 2020], Dkt. No. 451 [granting compassionate release under 18 U.S.C. § 3582(c) to asthmatic detainee because of the heightened medical risk posed by the COVID-19 epidemic]; *United States v Rodriguez*, No. 03-cr-00271, 2020 WL 1627331 [ED Pa Apr. 1, 2020], Dkt. No. 135, at *2 [granting compassionate release due to the fact that "[p]risons are tinderboxes for infectious disease" and that for diabetics such as the petitioner "nothing could be more extraordinary and compelling than [the COVID-19 pandemic]"]; *United States v Colvin*, No. 19-cr-179, 2020 WL 1613943 [D Conn Apr. 2, 2020)], Dkt. No. 38 [granting compassionate release and noting that diabetic defendant's continued exposure to jail population would impose "additional, unnecessary health risks which can be minimized by her early release"]; *United States v Meekins*, No. 1:18-cr-222-APM, Dkt. No. 75 [DDC Mar. 31, 2020] [finding that COVID-19's spread throughout jurisdiction's correctional facilities constituted prerequisite "exceptional reasons" for hypertensive and diabetic defendant's release pending sentence under 8 U.S.C. § 1345(c), where defendant had been convicted felon in

possession of a weapon and was still facing separate three assault charges]; *United States v Gonzales*, No. 18-cr-232, 2020 WL 1536155 [ED Wash Mar. 31, 2020], Dkt. No. 834 ["Defendant is the most susceptible to the devastating effects of COVID-19. She is in the most susceptible age category (over 60 years of age) and her COPD and emphysema make her particularly vulnerable"]; *United States v Doshi*, No. 13-cr-20349, 2020 WL 1527186 [ED Mich., Mar. 31, 2020], Dkt. No. 145 [granting motion for judicial recommendation for home confinement for diabetic and hypertensive defendant, noting that "though the Court does not doubt that the BOP is doing everything in its power to slow the spread of SARS-COV-2 within its facilities, the high density of prison populations makes federal prisons ideal transmission grounds for the virus"].⁴⁵

104. 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. Corrections agencies maintain that even hand sanitizer, now a staple tool for preventing spread of the disease, cannot be employed, arguing that its alcohol content makes it

⁴⁵ Professor Margo Schlanger, curator of the Civil Rights Clearinghouse, has generated a list of 66 (and counting) federal court cases in which the emerging COVID-19 pandemic has been addressed. *See* COVID-19 (Novel Coronavirus), Special Collection, University of Michigan Law School Civil Rights Clearinghouse, *available at* <https://clearinghouse.net/results.php?searchSpecialCollection=62> [last accessed Apr. 10, 2020].

contraband, a danger to prisoners who might drink it and to guards who, because of the high alcohol content, fear that it can be used as a weapon.⁴⁶

105. For these reasons, international bodies are recommending decarceration. Noting that "physical distancing and self-isolation" in crowded prisons is "practically impossible," and the "potentially catastrophic" consequences of neglecting those in confinement, the United Nations High Commissioner for Human Rights has called on governments to take urgent action to reduce the number of people in prison and examine ways to release those particularly vulnerable to COVID-19, including older and ill detainees, as well as low-risk offenders.⁴⁷

106. Release protects the people with the greatest vulnerability to COVID-19 from transmission of the virus and also allows for greater risk mitigation for all people held or working in prisons and jails. As experts have noted, release is the only means to adequately protect people who are incarcerated. Courts have already adopted this approach. (Greifinger Aff. ¶¶ 34-37.)

107. Release of vulnerable incarcerated people also benefits all New Yorkers, as it reduces the burden on New York's limited health care infrastructure and lessens the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time. (Greifinger Aff. ¶ 36.)

⁴⁶ See also Elizabeth Weill-Greenberg, *Parole Violations Nearly Sentenced These People to COVID-19*, The Appeal, Apr. 9 2020, available at <https://theappeal.org/parole-violations-coronavirus-new-york-city-jails/> [last accessed Apr. 10, 2020].

⁴⁷ Urgent Action Needed to Prevent COVID-19 "Rampaging Through Places of Detention", Office of the High Commissioner for Human Rights, United Nations, Mar. 25, 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=E>. [last accessed Apr. 10, 2020]. The crisis of COVID-19 in prisons and corresponding calls for release have been echoed by special proceedings of the Human Rights Council. See, e.g., *Eritrea Must Free Political Prisoners and Low-Risk Offenders to Reduce COVID-19 Threat In Crowded Jails*, Says UN Expert, Apr. 2, 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25764&LangID=E> [urging Eritrea to immediately release low-risk offenders and those particularly vulnerable to COVID-19 complications due to age or health] [last accessed Apr. 10, 2020].

ARGUMENT

POINT 1: Respondents Violate the Eighth Amendment to the United States Constitution and Article I, Section 5 of the New York State Constitution by Refusing to Release Petitioners.

Respondents' Refusal to Release Petitioners Constitutes Deliberate Indifference to a Serious Risk of Medical Harm.

108. Continuing to incarcerate people who have been deemed by the CDC to be especially vulnerable to a deadly pandemic, in conditions where preventative measures are effectively impossible, constitutes deliberate indifference to a serious risk of medical harm in violation of the United States and New York State Constitutions.

109. The Eighth Amendment to the United States Constitution and Article I, Section 5 of the New York State Constitution—which provides at least as much protection “in cases concerning individual rights and liberties” as its federal counterpart, *see People v P. J. Video*, 68 NY2d 296, 303 [1986] [citations omitted]—prohibit the infliction of “cruel and unusual punishments.” (US Const, 8th Amend, NY Const, art I, § 5.) These prohibitions encompass “the treatment a prisoner receives in prison and the conditions under which he is confined.” (*Farmer v Brennan*, 511 US, 825, 834 [1994].) The Eighth Amendment imposes a duty on prison officials to “take reasonable measures to guarantee the safety of the inmates.” (*Hudson v Palmer*, 468 US 517, 526-27 [1984].) It also imposes a duty upon prison officials to ensure that inmates receive “adequate” medical care. (*Estelle v Gamble*, 429 US 97 [1976]; *see also Salahuddin v Goord*, 467 F3d 263, 279 [2d Cir. 2006].) To that end, a prison official's “deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment.” (*Estelle*, 429 US at 104 [internal quotation marks and citation omitted].)

110. Courts may remedy a prison official's deliberate indifference before it results in serious medical harm. The Supreme Court has recognized that a “remedy for unsafe conditions need not await a tragic event.” (*Helling v McKinney*, 509 US 25 [1993].) Specifically, the Court noted that the Eighth Amendment prohibits prison officials from being “deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.” *Id.*

111. In order to establish an Eighth Amendment violation, an incarcerated person must meet two requirements. The “objective” component of an Eighth Amendment claim requires a showing that the incarcerated person suffered a “sufficiently serious” deprivation of a single, identifiable human need such as health, safety, food, warmth or exercise. (*See Wilson v Seiter*, 501 US 294, 298, 304 [1991].)

112. The “subjective” component of an Eighth Amendment claim requires a showing that “the [prison] official kn[ew] of and disregard[ed] an excessive risk to inmate health or safety.” (*Farmer*, 511 US at 837. *See also Seiter*, 501 US at 302-303; *Helling*, 509 US at 34-35; *Estelle*, 429 US at 106.) Put differently, the incarcerated person must show that the prison official was “aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed], and . . . dr[ew] th[at] inference.” *Id.* A substantial risk may be found from the very fact that it is obvious. (*Farmer*, 511 US at 840-42, n.8 [prison officials cannot “ignore obvious dangers”].) Proof of intent is not required; deliberate indifference “is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” *Id.*

113. The U.S. Supreme Court and federal courts in New York have recognized that the risk of contracting a communicable disease constitutes an “unsafe, life-threatening condition”

that threatens “reasonable safety.” (*Helling v McKinney*, 509 US 25, 33 [1993]. *See also Jolly v Coughlin*, 76 F3d 468, 477 [2d Cir 1996] [“[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease”]; *Narvaez v City of New York*, No. 16-cv-1980, 2017 WL 1535386, at *9 [SDNY Apr. 17, 2017] [denying “motion to dismiss Plaintiff’s claim that the City of New York violated Plaintiff’s rights under the Due Process Clause by repeatedly deciding to continue housing him with inmates with active-TB” during his pretrial detention]; *Bolton v Goord*, 992 F Supp 604, 628 [SDNY 1998] [acknowledging that prisoner could state claim under Section 1983 for confinement in same cell as inmate with serious contagious disease].) A failure to adopt extensive screening and control practices for tuberculosis prevention has been held to be a violation of the Eighth Amendment. (*DeGidio v Pung*, 920 F2d 525, 527 [8th Cir 1990].)

Respondents are Aware of, and have Failed to Respond to, the Serious Risk of Medical Harm that COVID-19 Poses Petitioners.

114. Respondents are well aware of the extraordinarily high risk COVID-19 poses to people during their continued incarceration, particularly to those with preexisting serious medical conditions and those of advanced age. As set forth above, all petitioners in this action all have preexisting and extremely serious medical conditions, including many of the conditions that the CDC and WHO have identified as rendering someone at heightened risk for serious complications or death from COVID-19. All of the petitioners are of advanced age. (*See* ¶¶ 27-65.) Respondents are well aware of Petitioners' medical conditions and the risks that they pose. They have been repeatedly alerted to these conditions and these risks, and they have repeatedly acknowledged the risks.

115. The Legal Aid Society has written four letters to DOCCS alerting the agency to the severity and scope of the risk. On March 4, 2020, The Legal Aid Society sent its first letter

to DOCCS describing the severity of the risks faced by people confined in DOCCS custody. In follow-up, Respondent Annucci shared DOCCS' plan to manage COVID-19 "at the 5,000 foot level," but did not address specific plans.

116. On March 18, 2020, The Legal Aid Society again wrote DOCCS, describing specific concerns about DOCCS' plans for controlling the spread of the virus, and how it intended to provide treatment to all impacted.

117. On March 30, 2020, The Legal Aid Society reported to DOCCS the alarming reports received from its clients about dangerous conditions in the facilities. Its letter noted the lack of available sanitary supplies, including soap, hand sanitizer and cleaning supplies; the lack of information and education provided to incarcerated people on how to clean areas properly; the failure by staff to supervise cleaning and distancing protocols purportedly established to address the pandemic; and people in custody's repeated and continuing inability to physically distance from others including in dayrooms and common areas.

118. On April 6, The Legal Aid Society further described the situation many Legal Aid clients face as the pathogen spreads in New York State prisons. This letter demanded the release of 105 people incarcerated in various state prisons, and recounted many of the vulnerabilities clients report. This letter described, in detail, the particular experiences of Petitioners Lawson, Martinez, Pittsley, A.A., and B.B. and their vulnerabilities to complications and even death from COVID-19. The letter demanded these Petitioners' release from custody.

119. The Legal Aid Society is by no means the only entity sounding the alarm to DOCCS about its inability to keep people in its custody safe from COVID-19 and the need to release vulnerable people from custody. State legislators have repeatedly put DOCCS on notice

of the extent of the risk, calling for the release of persons such as Petitioners, who are at higher risk to COVID-19 complications-including associated illness and death. (*See supra* ¶¶ 96-97.)

120. Numerous advocacy groups, media organizations, and other defender organizations have likewise put DOCCS on notice about the extent of the risk Petitioners, and other similarly situated people, face while incarcerated.⁴⁸

121. Medical experts have made the risk abundantly clear, concluding that even if DOCCS were to do everything it could to prevent the spread of COVID-19, it is inevitable that COVID-19 will spread rapidly throughout its facilities. (*See Greifinger Aff. See also supra* ¶ 100.) Countless experts confirm that the risks from COVID-19 cannot be managed in a correctional environment. For example, the former Medical Director for the New York City jails, and Chief Medical Officer of DOCCS itself, have gone on record that release is the only viable option to prevent the most grim of outcomes. (*See Greifinger Aff.*) Once the virus becomes prevalent, the situation will quickly turn dire.

122. These medical professionals have unequivocally stated what they are uniquely qualified to conclude - whatever steps Respondents have taken to manage the risk of COVID-19 will fail because, as pleaded above, Respondents are not capable of managing that risk in a prison environment.

⁴⁸ *See e.g.* Press Release, Gov. Cuomo: Release Incarcerated People Vulnerable to COVID-19, Release Aging People in Prison Campaign, Apr. 7, 2020, *available at* <http://rappcampaign.com/cuomos-prison-health-care-plan-for-covid-19-exploit-prison-labor/> [last accessed Apr. 10, 2020]; Letter to Gov. Cuomo, Urgent Action Needed to Protect People in New York's Jails and Prisons, New York Civil Liberties Union, Mar. 23, 2020, *available at* <https://www.nyclu.org/en/publications/letter-gov-cuomo-urgent-action-needed-protect-people-new-yorks-jails-and-prisons> [last accessed Apr. 10, 2020]; Joint Defender Statement Calling for Immediate Release of Vulnerable Incarcerated New Yorkers in Response to Coronavirus, The Legal Aid Society, Brooklyn Defender Services, The Bronx Defenders, New York County Defender Services, The Neighborhood Defender Service of Harlem, Mar. 12, 2020, *available at* <http://bds.org/joint-defender-statement-calling-for-immediate-release-of-vulnerable-incarcerated-new-yorkers-in-response-to-coronavirus/> [last accessed Apr. 14, 2020].

POINT 2: Release is the Only Remedy Adequate to Cure the Constitutional Violation.

123. Respondents' refusal to release Petitioners, despite their awareness of Petitioners' high risk of illness or death from COVID-19, constitutes deliberate indifference to a known risk of harm in violation of the Eighth Amendment to the United States Constitution and Article I, Section 5 of the New York State Constitution.

124. This Court has an affirmative obligation to protect Petitioners against infectious disease, and is empowered to order release - the only remedy suitable to prevent imminent harm to Petitioners' health. (*Helling*, 509 US at 33 [“It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them”]; *Sanchez v State of New York*, 99 NY2d 247, 254 [2002] [recognizing that it is “duty of the State, as [petitioner’s] custodian, to safeguard and protect him from the harms it should reasonably foresee based on its knowledge derived from operation of a maximum security prison”]; *Jabbar v Fischer*, 683 F3d 54, 57 [2d Cir 2012] [“We have held that prisoners may not be deprived of their basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—and they may not be exposed to conditions that pose an unreasonable risk of serious damage to [their] future health”] [citation and internal quotation marks omitted].)

125. This Court is empowered to order Respondents to remove incarcerated people from unconstitutionally dangerous conditions. In fact, removal may be *required* where there exists an excessive risk of exposure to illness. In *Plata v Brown*, 2013 WL 3200587, *14-15 (ND Cal, June 24, 2013), the Court directed that prisoners with an elevated risk of contracting the potentially disabling or fatal disease Valley Fever be removed from those prisons where the disease is prevalent. Courts have directed the removal of prisoners from facilities where they

could not receive required medical care to places where that care was available. (*See, e.g., Reaves v Dep't of Correction*, 392 F Supp 3d 195, 209-10 [D Mass 2019] [directing removal of a quadriplegic prisoner from a prison “neither able nor willing” to provide him necessary medical care to a “non-DOC” [*i.e.* civilian] facility with staff having appropriate training to treat patients with spinal cord injuries], *stay denied*, 404 F Supp 3d 520 [D Mass 2019], *appeal filed*, No. 19-2089 [1st Cir Nov. 4, 2019]; *United States v Wallen*, 177 F Supp 2d 455, 459 [D Md 2001] [ordering defendant pre-trial detainee transferred from jail to a hospital or infirmary in response to Defendants' dangerous failures to administer necessary medications properly]; *Arnold on behalf of H.B. v Lewis*, 803 F Supp 246, 257-58 [D Ariz 1992] [ordering Defendants to transfer Plaintiff with serious mental illness from prison to the Arizona State Hospital for necessary mental health care, and never transfer him back to any Department of Correction facility].)

126. Courts have also entered such orders when necessary to protect prisoners in danger of serious harm from staff members or from other prisoners. (*Walker v Lockhart*, 713 F2d 1378, 1383 [8th Cir 1983] [directing that plaintiff be transferred to another state because of danger to him from the Arkansas prison population]; *Streeter v Hopper*, 618 F2d 1178, 1182 [5th Cir 1980] [affirming order requiring transfer of prisoners found to be in danger from staff and other prisoners]; *Hoskins v Dilday*, 2017 WL 951410, *7 [SD Ill, Mar. 10, 2017] [granting preliminary injunction transferring plaintiff away from prison where he was in danger from staff members]; *Mitchell v Baker*, 2015 WL 278852, *1, 7-8 [SD Ill, Jan. 21, 2015] [granting preliminary injunction requiring transfer of plaintiff away from the prison where an officer whom he had sued was harassing and threatening him].)

127. The foregoing decisions mostly involve transfers between prisons or from a prison to a medical facility. However, outright release of prisoners has been required in cases

where courts have found unconstitutional levels of crowding that could not be remedied in any other way. (*See Duran v Elrod*, 713 F2d 292, 298 [7th Cir 1983] [affirming order to release prisoners to comply with population cap in consent decree]; *Palmigiano v DiPrete*, 737 F Supp 1257, 1262-63 [DRI 1990] [ordering award of additional good time to all sentenced prisoners in a jail until all sentenced prisoners were out of the jail]; *Fambro v Fulton Cty., Ga.*, 713 F Supp 1426, 1432-33 [ND Ga 1989] [entering order requiring release of prisoners to alleviate unconstitutional crowding]; *Benjamin v Malcolm*, 564 F Supp 668, 688 [SDNY 1983] [holding allowing increased population in a Rikers Island jail would be unconstitutional, and that finding “does not depend on a determination that alternatives exist either to the proposed population increases or to releasing inmates, and the law does not require such a determination”];⁴⁹ *Inmates of Allegheny Cty. Jail v Wecht*, 573 F Supp 454, 456 [WD Pa 1983] [directing release of prisoners upon failure to comply with a population limit].) The power to enter “prisoner release orders” to relieve crowding has subsequently been regulated by statute to require specific procedures and findings as a prerequisite, but the power of courts to enter such orders has been effectively upheld by the Supreme Court in affirming an order requiring massive reductions in California’s prison population. (*Brown v Plata*, 563 US 493, 544 [2011] [“Even with an extension of time to construct new facilities and implement other reforms, it may become necessary to release prisoners to comply with the court's order. To do so safely, the State should devise systems to select those prisoners least likely to jeopardize public safety”].)

128. In this case, as in the unconstitutional overcrowding cases, transfer will not remedy the danger to health and life of Petitioners. The danger is inherent in the circumstances of incarceration, with large numbers of prisoners held in close quarters, often in large open

⁴⁹ Ultimately several hundred incarcerated people were released as a result of this decision. Philip Shenon, *Jail Release: Why?* N.Y. Times, Nov. 5, 1983, available at <https://www.nytimes.com/1983/11/05/nyregion/jail-release-why.html?searchResultPosition=18%20> [last accessed Mar. 22, 2020].

dormitory units, and thus unable to observe the public health measures directed by the WHO, the federal government and all 50 state governments as an essential first line of defense against the spread of the virus. Similarly, the nature of the prison setting guarantees that Petitioners cannot achieve the level of personal hygiene and sanitation that every credible authority recommends as an essential preventive measure.

129. The foregoing principles are as applicable in our state court system as in the federal courts. Immediate release pursuant to a writ of habeas corpus is available to address constitutional violations arising from circumstances or conditions of confinement. (*People ex rel. Brown v Johnston*, 9 NY2d 482, 485 [1961] [a habeas petition may be used to address "restraint in excess of that permitted by . . . constitutional guarantees]; *Kaufman v Henderson*, 64 AD2d 849, 850 [4th Dept 1978] ["[W]hen appellant claims that he has been deprived of a fundamental constitutional right, habeas corpus is an appropriate remedy to challenge his imprisonment"].) A person is "not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society" by virtue of incarceration. (*Brown*, 9 NY2d at 485.) Hence, the "right to detain a prisoner is entitled to no greater application than its correlative duty to protect him from unlawful and onerous treatment[,] mental or physical." (*Id.*)

130. The Court of Appeals has explained that the State has a duty "to protect [incarcerated people] from unlawful and onerous treatment, mental or physical." (*Id.* at 485 [citations omitted].) The vehicle for such protection is *habeas*, which provides relief for "any further restraint in excess of that permitted by the judgment or constitutional guarantees," provided it does not collaterally attach a judgment of conviction. (*People ex rel. Brown v Johnston*, 9 N.Y.2d 482, 485 [1961].) Indeed, in situations such as those presented by this

petition, *habeas* relief is the *only* remedy available. (*Preiser v Rodriguez*, 411 U.S. 475, 489 [1973].)

131. In keeping with this well-settled law, several New York courts have reached the merits of habeas petitions brought during the COVID-19 pandemic. Supreme Court justices have granted *habeas* petitions seeking release in light of the COVID-19 pandemic. (*See, e.g., People of the State of New York ex rel. Gregor v Reynolds*, 2020 NY Slip Op 20086 [Sup Ct, Essex County, April 20, 2020]; *People of the State of New York ex rel. Stoughton v. Brann*, 2020 NY Slip Op 20081 [Sup Ct, NY County 2020]).

132. In *Gregor*, the court granted release for a petitioner suffering from severe medical conditions who was incarcerated in the Essex County Jail on an alleged parole violation. The court held that the county sheriff has failed to protect the petitioner from a risk of infection with COVID-19, and that failure constitutes a violation of his constitutional rights to due process. The court explained, “due to the risk to [petitioner] in that jail because of his own medical conditions and the lack of the full complement of preventive measures employed at the jail, his due process rights are violated under the extraordinary circumstances present.” *Gregor, supra*, 2020 NY Slip Op 20086, at *6. Although the jail had taken several measures in an effort to reduce the risk of viral spread, the court’s decision turned on the failure to enforce social distancing, a rampant problem in every DOCCS facility, including the Westchester Prisons. (*See id.* at *3-4 [“The Sheriff has not taken...the most important, scientifically-based, best practices recommended by the United States Center for Disease Control (CDC) to reduce the risk that the jail will be infiltrated by the virus and contracted by the inmates and staff, namely, social distancing”].)

133. The *Gregor* court rightly recognized that, in light of the petitioners' heightened risk, it was not enough that *some* risk reduction measures had been put in place. "Policies that are generally justifiable may still amount to deliberate indifference to the specific and unique medical needs of particular individuals." (*Id.* at *4 [quoting *Johnson v. Wright*, 412 F.3d 398, 404 (2d Cir. 2005) (quotations and internal redactions omitted)]).

134. Likewise, the New York County Supreme Court decision in *Stoughton*, which released 16 people serving parole sentences on Rikers Island, emphasizes the extreme challenge corrections officials face to *adequately* protect vulnerable people given the highly contagious and dangerous nature of the coronavirus:

'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....Prisoners with dangerous conditions are dramatically at risk. For some of them, only release can offer protection.

Stoughton, 2020 NY Slip Op 20081, *supra*.

135. Though brought on behalf of state prisoners, rather than parole violators, petitioners' deliberate indifference claim asserts the same failure on the part of corrections officials litigated in *Stoughton* and *Gregor*: the failure to protect these highly vulnerable individuals against infection. Given the grave danger to petitioners should they contract COVID-19, and the extreme difficulty, if not impossibility, of implementing adequate safeguards in the prison environment, their continued confinement violates their rights under the Eighth Amendment of the federal constitution and Article I, § 5 of the New York State Constitution. They should be immediately released.

POINT 3: Petitioners' Ongoing Exposure to COVID-19, in Light of their Unique Vulnerability to the Virus, Constitutes Excessive Punishment in Violation of the Eighth Amendment to the United States Constitution and Article I, Sec. 5 of the New York State Constitution.

136. Both the Eighth Amendment of the United States Constitution and Article I, Sec. 5 of the New York State Constitution prohibit the imposition of grossly excessive or grossly disproportionate punishment. (*Weems v United States*, 217 US 349 [1910]; *People v Broadie*, 37 NY2d 100 [1978].) These provisions flow from the basic precept that punishment for a crime should be graduated and proportionate to the offense. (*Kennedy v Louisiana*, 555 US 407 [2008], *as modified* [Oct. 1, 2008] *and opinion modified on other grounds on denial of reh'g*, 554 US 945 [2008].)

137. In *Broadie*, the Court of Appeals recognized that punishment constitutes cruel and unusual punishment when it is "cruelly" excessive, that is, grossly disproportionate to the crime for which [it is] exacted. (*People v Thompson*, 83 NY2d 477, 479–80 [1994] [quoting *Broadie*, 37 NY2d at 125]; *see also Harmelin v Michigan*, 501 US 957, 1001 [1991] [Eighth Amendment prohibits punishments "that are 'grossly disproportionate' to the crime"] [Kennedy, J., concurring] [quoting *Solem v Helm*, 463 US 277, 288 [1983].) Punishments are also cruel and usual if they "shock the sensibilities of men." (*Weems*, 217 US at 375.)

138. In considering whether a punishment is cruelly excessive, courts weigh a variety of factors, including "the crime charged, the particular circumstances of the individual before the court and the purpose of the penal sanction." (*People v Farrar*, 52 NY2d 302, 305 [1981] [citations omitted]. *See, e.g., People v Hampton*, 113 AD3d 1131, 1133 [4th Dept 2014] [finding 24-year sentence of a "second felony offender" for first degree robbery to be grossly excessive because "defendant had no prior history of violent crime and is relatively young"].) Even

punishments that fall within statutory parameters can amount to cruel and usual punishment in “extraordinary circumstances.” (*People v Lanfair*, 18 AD3d 1032, 1034 [3rd Dept 2005].)

139. Unlike the Eighth Amendment, Article I, § 5 of the New York State Constitution requires courts to read the proportionality standard in a manner friendlier to the party being punished, commanding a broader, real-world view of “punishment.” That is, collateral consequences of a conviction—not merely the carceral sentence imposed by the sentencing court—are considered “punishment” for state constitutional purposes. (*Contrast People v Rodriguez*, 66 Misc3d 189, 197 [City Court, City of Hudson, 2019] [deeming deportation 15 years after a misdemeanor conviction to be “de facto punishment” subject to proportionality analysis], *with I.N.S. v Lopez-Mendoza*, 468 US 1032, 1039 [1984] [“immigration removal is not considered a punishment for [federal] constitutional purposes”].) If the practical consequences of a sentence are cruelly excessive or otherwise disproportionate to the crime, the punishment is cruel and unusual under the New York State Constitution. (*See id.* [vacating 15-year old misdemeanor conviction as cruel and unusual where it would result in deportation, reasoning that in 2002 when the conviction occurred, deportation for the offense was “unforeseeable” in light of federal immigration practices at the time].)

140. Here, Petitioners do not contend that their carceral sentences announced by the sentencing court were cruelly excessive within the meaning of Article I, § 5 of the New York State Constitution. Rather, Petitioners contend that they are being exposed to the “de facto punishment” of exposure to COVID-19, a situation that was “unforeseeable” at the time that the sentences were imposed. (*See Rodriguez*, 66 Misc3d at 198.) Under New York law, this “de facto punishment” is subject to proportionality analysis. *Id.* Only release can remedy this de-facto punishment.

141. Three of the seven Petitioners in this action were convicted of nonviolent crimes. Two of the seven Petitioners in this action have already been granted parole or earned their conditional release dates due to their positive behavior. Petitioners A.A. and Pittsley are scheduled for release in July. It would not only violate the New York State Constitution, but it would constitute the height of injustice and cruelty, to expose these fully rehabilitated New Yorkers to a deadly virus when they can already taste freedom.

142. The same is true of Petitioners Lawson, Martinez, and B.B., all of whom are convicted of non-violent offenses, eligible for release in short order, and have demonstrated their rehabilitation by accomplishing so much while serving their criminal sentences. These community members are ready for reentry. But no crime of conviction and no arbitrary release date renders someone deserving of exposure to a deadly pathogen.

POINT 4: Habeas Corpus Is the Remedy For Petitioners' Continued Unconstitutional Imprisonment

143. Habeas corpus relief is proper and warranted for persons “illegally imprisoned or otherwise restrained in [their] liberty” (CPLR 7002 [a]). Whether Petitioners are incarcerated unconstitutionally is a question of law properly resolved through habeas corpus. If Petitioners are incarcerated unconstitutionally, they are entitled to immediate release.

144. Because Petitioners are challenging the constitutionality of their confinement, habeas corpus is the proper proceeding to adjudicate this matter. “The purpose of habeas corpus is to test the legality of the incarceration of the person who is subject to the writ.” (*People ex rel. Robertson v NYS Division of Parole*, 67 NYS2d 197, 201 [1986].) “That the evidentiary hearing concerning the legality of incarceration is to be before the habeas court rather than the incarcerating agency is . . . pellucidly clear” (*id.*). Thus, this Court is the appropriate forum for

the bringing and hearing of a habeas corpus petition challenging the constitutionality of Petitioners' continued incarceration.

If the Court Determines that Petitioners are not Entitled to Release, it Should Convert this Action to an Article 78 Proceeding or to Individual Motions to Set Aside Petitioners' Sentences Under Criminal Procedure Law § 440.20.

145. Even if this Court finds that habeas corpus is not the proper vehicle for Petitioners to challenge the constitutionality of their continued incarceration, this Court should not dismiss this action. Where a court has obtained jurisdiction, the court shall not dismiss the action “solely because it is not brought in the proper form” (CPLR 103 [c]) but instead may convert the action to a special proceeding or motion if it “finds it appropriate in the interests of justice” (*id.*).

146. Unquestionably, it is appropriate for the Court to convert this action to an Article 78 proceeding in the interest of justice if it finds a habeas corpus remedy to be improper. Petitioners are medically vulnerable, in danger of serious complications or death from COVID-19, and incarcerated in an environment susceptible to the rapid spread of the virus. If they are forced to remain in these conditions, Petitioners will not receive adequate hygiene and cleaning supplies, and will not be afforded the ability to socially distance. Justice dictates that if Petitioners are not afforded immediate release from incarceration, they must be afforded relief from their current conditions of confinement. Petitioners should not be denied relief solely for the form in which they have sought it (*see* CPLR 103 [c]).

147. If, in the interests of justice, this Court converts this action to an Article 78 proceeding, Petitioners will seek to compel Respondents to release Petitioners temporarily on medical parole, leave of absence, or some other form of temporary release, and in the interim provide them with adequate hygiene and cleaning supplies and the ability to socially distance and engage in the other mitigating measures recommended by public health agencies. (*See* CPLR

7803 [1] [question may be raised as to “whether the body or officer failed to perform a duty enjoined upon it by law”].)

148. If the Court converts the action to a petition pursuant to Article 78 of the Civil Practice Law and Rules, it should waive the ordinary requirement to exhaust administrative remedies on grounds of futility. (*See e.g., Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52 [1978]; *People ex rel. Hicks v James*, 571 NYS2d 367 [Sup Ct, Erie County 1991].)

149. Alternatively, the Court may convert this action to individual motions to set aside Petitioners’ sentences under Criminal Procedure Law § 440.20. (*See* CPLR 103[c] [courts “may convert *a motion* into a special proceeding, *or vice-versa*”] [emphasis added]; *cf. People v Gaston*, 127 Misc2d 1007, 1009 [Bronx Cnty Sup Ct 1985]) [stating that the court “would not hesitate” to convert a § 440.20 motion to an Article 78 proceeding if the underlying substantive claim had merit] [internal citation omitted].)

150. If the Court were to convert this action to individual motions under Criminal Procedure Law § 440.20, it “shall make whatever order is required for [their] proper prosecution.” (CPLR 103[c]; *see Gaston*, 127 Misc2d at 1009 [noting that if the court did convert a § 440.20 motion to an Article 78 action, it would also “direct the impleading of the New York State Department of Correctional Services”].) Such an order would sever this action into individual motions under § 440.20, modify the captions to reflect the appropriate courts and criminal proceedings, and transfer the motions to the appropriate sentencing courts for adjudication and resentencing. (*See* CPLR 440.20[4] [“An order setting aside a sentence pursuant to this section does not affect the validity or status of the underlying conviction, and after entering such an order the court must resentence the defendant in accordance with the law.”].)

CONCLUSION

151. For all the foregoing reasons, Petitioners' continued incarceration is unconstitutional. Respondents lack constitutional authority to continue to incarcerate Petitioners. Petitioners are entitled to immediate release from incarceration.

152. A court or judge of the United States does not have exclusive jurisdiction to order Petitioners' release.

153. No appeal has been taken of any order by virtue of which Petitioners are incarcerated.

RELIEF REQUESTED

WHEREFORE, Petitioners respectfully prays that this Court:

- a) issue an Order to Show Cause, without delay, directed to the Respondents, for the purpose of inquiring into the constitutionality of their continued confinement;
- b) grant a hearing on the facts and issues presented at which Petitioners can call witnesses, should Respondents contest the facts and issues alleged;
- c) direct Petitioners' immediate release from incarceration; and
- d) grant Petitioners such other and further relief as is just and proper.

Dated: New York, New York
May 6, 2020

JUSTINE LUONGO
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The Legal Aid Society, Criminal Defense Practice



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VERIFICATION

STEFEN R. SHORT, an attorney duly admitted to practice before the courts of this state, does hereby affirm under penalty of perjury that the following statements are true:

1. I am a Staff Attorney at the Prisoners' Rights Project of The Legal Aid Society and one of the attorneys of record herein.
2. I have written the foregoing verified petition and know its contents.
3. The contents of the foregoing verified petition are true to my knowledge, except as to matters alleged to be upon information and belief, and as to those matters, I believe them to be true.
4. The sources of the aforesaid information and beliefs are conversations had with Petitioners, conversations had with Respondent Annucci, and documents prepared by the New York State Department of Corrections and Community Supervision.
5. I make this verification on Petitioner's behalf because he is presently incarcerated outside the county in which my office is located.

Dated: New York, New York
May 6, 2020

JUSTINE LUONGO
Attorney for the Petitioner
The Legal Aid Society, Criminal Defense Practice



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