SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONEIDA

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* Stefen R. Short, Esq., on behalf of JOHN FRATESCHI, DIN 11B0827; ALBERT JACKSON, DIN 18A4662; THOMAS JACKSON, DIN 20R0016; RICARDO LOPEZ, DIN 18R1196; and MICHAEL YANCY, DIN 16A4993,

Petitioners,

– against –

WILLIAM FENNESSY, Superintendent, Mid-State Correctional Facility; PATRICK REARDON, Superintendent, Marcy 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.

TO: SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF ONEIDA

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 181,900 people worldwide, including at least 44,000 people in the United States and over 15,700 in New York.[2]

7. The State of New York operates three prisons in Oneida County, New York: Mid-State Correctional Facility ("Mid-State"), Marcy Correctional Facility ("Marcy"), and Mohawk Correctional Facility ("Mohawk"). Petitioners in this case are incarcerated at either Mid-State or Marcy. Mid-State and Marcy have a collective capacity of over 3,000 people and employ hundreds more.

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.

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[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] [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 April 20, 2020].

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.

10. COVID-19 was detected in the prisons in Oneida County almost three weeks ago.[4] In spite of its relatively recent appearance, COVID-19 is already spreading exponentially in these prisons.[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 with sufficient urgency, the risk mounts.

11. Respondent William Fennessy ("Fennessy") is the superintendent of Mid-State. Respondent Patrick Reardon ("Reardon") is the superintendent of Marcy. Respondents Fennessy and Reardon 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 Mid-State and Marcy.

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.

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[3] Articles reporting the COVID-19 impact on prisons are listed in Exhibit 1.
[4] *2 Inmates at Marcy Correctional Facility In Isolation with Coronavirus, Others Quarantined*, WKTV, Mar. 30, 2020, *available at* https://www.wktv.com/content/news/2-inmates-at-Marcy-Correctional-Facility-in-isolation-with-coronavirus-others-quarantined-569222841.html [last accessed Apr. 20, 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 Apr. 23, 2020].

14. Petitioners are John Frateschi, DIN 11B0827 ("Frateschi"); Albert Jackson, DIN 18A4662 ("Albert Jackson"); Thomas Jackson, DIN 20R0016 ("Thomas Jackson"); Ricardo Lopez, DIN 18R1196 ("Lopez"); and Michael Yancy, DIN 16A4993 ("Yancy").

15. All of the Petitioners are incarcerated at either Mid-State or Marcy, and by virtue of their age and/or underlying medical condition, are particularly vulnerable to serious illness or death if infected with COVID-19. 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 and Prevention ("CDC") as putting them at higher risk of dying should they contract COVID-19.

16. As the Superintendent of Mid-State, Respondent Fennessy is the legal custodian of, and responsible for the wellbeing of, Petitioners Albert Jackson, Thomas Jackson, and Yancy.

17. As the Superintendent of Marcy, Respondent Reardon is the legal custodian of, and responsible for the wellbeing of, Petitioners Frateschi and Lopez.

18. As prisoners within Mid-State or Marcy, all Petitioners are ultimately in the charge and custody of Respondent Annucci, who is the legal custodian of all Petitioners.

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

20. 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

21. This court has subject matter jurisdiction pursuant to CPLR 7001.

22. Joinder is appropriate pursuant to CPLR 1002.

23. None of the Petitioners have made a prior application, individually or as part of a collective, for the relief requested herein.

24. 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.*

25. **Petitioner Frateschi** is incarcerated at Marcy Correctional Facility, a New York State prison in Oneida County under the control of Respondents Reardon and Annucci. Petitioner Frateschi is 72 years old and has a fifteen-year history of respiratory conditions, including COPD, severe asthma, reoccurring walking pneumonia, and bronchitis. He is therefore at high risk of serious complications or death if he contracts COVID-19.

26. Petitioner Frateschi requires the use of a CPAP machine to sleep every night and the use of a wheelchair because he cannot maintain a steady gait. He also requires weekly treatment for his other conditions, all of which are debilitating.

27. Petitioner Frateschi has served 9 years of his 12-year sentence. He has completed several programs, including Comprehensive Alcohol and Substance Abuse Treatment and Aggression Replacement Therapy, and has maintained a good disciplinary record. If he is released, he will return to Janesville, New York where he would live with his wife and children.

28. **Petitioner Albert Jackson** is incarcerated at Mid-State Correctional Facility, a New York State prison in Oneida County under the control of Respondents Fennessy and Annucci. He is 60 years old and diagnosed with heart failure, diabetes, hypertension, and seizure disorder. He is therefore at high risk of serious complications or death if he contracts COVID-19.

29. Petitioner Albert Jackson is incarcerated for an Aggravated Family Offense. He has completed nearly his minimum term of incarceration and will reappear before the parole board in July of this year. His earliest release date is in July. He cannot be incarcerated beyond October 7, 2021, his maximum expiration date.

30. **Petitioner Thomas Jackson** is incarcerated at Mid-State Correctional Facility, a New York State Prison in Oneida County under the control of Respondents Fennessy and Annucci. He is 52 years old and diagnosed with HIV and chronic asthma. He is also a cancer survivor. He is therefore at high risk of serious complications or death if he contracts COVID-19.

31. Petitioner Thomas Jackson has frequent asthma attacks and has had trouble receiving medical attention for these attacks since COVID-19 entered the prisons. He has also had trouble receiving medical attention for an open wound stemming from surgery he underwent in 2017 to remove a tumor. He requires attention for this wound approximately 2-3 times a week, and is often forced to treat the wound himself with sanitary pads.

32. Petitioner Jackson is incarcerated for Attempted Robbery in the First Degree. His earliest release date is November 3, 2021. Upon his release, he will return home to Harlem, where he would live with his wife.

33. **Petitioner Lopez** is incarcerated at Marcy Correctional Facility, a New York State prison in Oneida County under the control of Respondents Reardon and Annucci. He is 51 years old and diagnosed with asthma, which leaves him short of breath every morning when he wakes up and several times during the day. Every morning, he needs to use his quick-relief inhaler, Albuterol, in order to breathe. His asthma is aggravated by the dusty conditions at Marcy. In addition to his asthma, Petitioner Lopez is disabled and walks with a cane due to torn cartilage and meniscuses in both knees. He is unable to walk or stand for very long.

34. Mr. Lopez was convicted of Attempted Sale Of A Controlled Substance in the Third Degree for attempting to sell a small amount of crack cocaine. During the three years he has been incarcerated, he has not committed a single disciplinary infraction. He has fully committed to recovery from his drug addiction and has been successfully participating in Residential Substance Abuse Treatment. Although he was on track to complete treatment before his upcoming release date, all programming has been cancelled due to the pandemic. Mr. Lopez has completed a number of other programs, including Aggression Replacement Treatment, and has been awarded numerous certificates while in custody, including legal, building maintenance, and OSHA training. He has also completed a course to become a certified sexual health facilitator.

35. Mr. Lopez is scheduled for release in just a few weeks on his Conditional Release Date, May 23, 2020. He plans to live with his brother and his sister-in-law. His strong family

ties also include his niece who, raised by his mother, is like a sister to him. With their support, he is well situated for a successful reentry into the community.

36. **Petitioner Yancy** is incarcerated at Mid-State Correctional Facility, a New York State prison in Oneida County under the control of Respondents Fennessy and Annucci. He is 61 years old and diagnosed with HIV, HPV, and hypertension. He is therefore at high risk of serious complications or death if he contracts COVID-19.

37. Petitioner Yancy has completed over three years of his five-year sentence for Attempted Burglary in the First Degree. While incarcerated, he has completed Comprehensive Alcohol and Substance Abuse Training, Aggression Replacement Training, and Phase Two Discharge Planning. He is in the process of securing housing with Catholic Charities in Albany or the Albany Mission. He is eligible for Conditional Release on May 11, 2020.

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 Mid-State and Marcy.*

38. As of April 23, 2020, the New York State Department of Corrections and Community Supervision ("DOCCS") the state agency that operates New York State's prisons, reports that 894 staff, 263 incarcerated people, and 35 parolees have the virus.[6] Two staff members, seven incarcerated people, and four parolees have succumbed to the virus.[7]

39. 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.

40. 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

[6] *See supra* note 5.
[7] *See id.*

and commutations, these commitments are insufficient.[8] The Commissioner and the Superintendents have put their prison populations, including Petitioners, and prison staff in the crosshairs of the COVID-19.[9]

41. 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 Mid-State and Marcy. 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."].)

42. On March 7, 2020, Governor Cuomo issued Executive Order Number 202, declaring a disaster emergency for the entire State of New York.[10] On March 20, 2020 the Governor signed the "New York State on P.A.U.S.E." Executive Order, a public health and safety policy that, *inter alia*, closed non-essential businesses and banned non-essential gatherings.[11]

43. 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.[12]

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[8] 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].
[9] 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].
[10] 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].
[11] 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].
[12] *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].

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.[13] Indeed, these studies show that people infected with COVID-19 are most contagious about one to three days *before* they begin to show symptoms.[14]

44. 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.)

45. 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.[15]

46. 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

[13] 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].
[14] *Id.*
[15] *Id.*

may face prolonged recovery periods, including extensive rehabilitation from neurological damage and loss of respiratory capacity.

47. 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.

48. 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 Mid-State and Marcy.

49. 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.

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

51. 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.)

52. COVID-19 has reached New York State prisons and is rapidly spreading. (Greifinger Aff. ¶ 17.) On March 24, 2020, there were only three confirmed cases of COVID-19

among people incarcerated in New York State prisons.[16] By April 15, 2020, state officials reported that 664 prison employees as well as 160 incarcerated people had tested positive for COVID-19.[17] By April 23, 2020, state officials reported that 894 prison employees as well as 263 incarcerated people had tested positive for COVID-19.[18] Two prison employees and seven incarcerated individuals had died of the virus.[19] Hundreds of DOCCS employees are under some form of quarantine.[20]

53. These numbers 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."[21] As of March 31, 2020, DOCCS had reported only testing 57 incarcerated people.[22] 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.[23]

54. 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

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[16] *Clinton Correctional Inmate Tests Positive for COVID-19, per NYSDOCCS*, NBC5, Mar. 24, 2020, *available at* https://www.mynbc5.com/article/clinton-correctional-inmate-tests-positive-for-covid-19-per-nydoccs/31917201# [last accessed Apr. 10, 2020].
[17] *See supra* note 5. *See also COVID-19 Numbers in the New York State Prison and Parole System Continue to Rise*, My Twin Tiers, Apr. 7, 2020, *available at* https://www.mytwintiers.com/news-cat/covid-19-numbers-in-the-ny-state-prison-and-parole-system-continue-to-rise/ [updating live; numbers expected to rise] [last accessed April 10, 2020].
[18] *See supra* note 5.
[19] *Id.*
[20] *Id.*
[21] 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."
[22] 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].
[23] 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].

carceral settings, such as New York City jails, have outpaced all other locations in the rate of COVID-19 spread.[24] 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.[25] Experts predict that "[a]ll prisons and jails should anticipate that the coronavirus will enter their facility[.]"[26]

55. 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.*)

56. 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.

57. 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

[24] *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].
[25] *See id.*
[26] Nicole Westman, Prisons and Jails are Vulnerable to COVID-19 Outbreaks, 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.)

58. 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.)

59. 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.*

60. 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.)

61. 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.

62. Petitioners report that **Mid-State** has not provided hygiene and cleaning information and supplies necessary to implement a consistent and adequate hygiene and cleaning regimen.

63. DOCCS staff has cleaned outside **Petitioner Albert Jackson's** cell door, but he is infrequently let out of his cell and is unaware of any additional measures DOCCS staff has taken to keep the housing block clean. He has access to one state bar of soap per week and has not received additional hygiene supplies. There is no hot water in his cell. He is allowed a shower only every other day.

64. Like many of the others, **Petitioner Yancy** is held in solitary confinement. Even in solitary, Petitioner Yancy has not been provided any additional cleaning or hygiene supplies. He is provided only one small bar of soap per week, and the water in his cell is either scalding hot or cold. His cell is mopped only once a week, and there is little ventilation, making it hard for Petitioner Yancy to breathe.

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

66. DOCCS staff cleans **Petitioner Frateschi's** dorm once per day, and mops the floors once per week, but does not provide incarcerated people with cleaning supplies. Marcy staff persists in its failure to provide incarcerated people with personal protective equipment, including masks and gloves.

67. Food preparation presents similar problems for Petitioners. At Mid-State and Marcy, 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.

68. 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.[27]

[27] 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].

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

69. 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.)

70. 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.

71. 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 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."[28]

[28] *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].

72. Petitioners report that they are unable to engage in social distancing at **Mid-State** due to the physical infrastructure there.

73. Because he is in keeplock, **Petitioner Albert Jackson** remains in his cell for 23 hours per day. Although he is in a confined space, the close quarters at Mid-State mean he is unable to socially distance in the manner recommended by public health agencies. His cell is so small that he can reach out and touch people who walk down the adjacent corridor. And even when he does his best to keep to himself, staff approaches his cell and he receives meal trays by hand.

74. **Petitioner Thomas Jackson** is housed in a dorm and has received no guidance on how to protect himself from COVID-19. The beds in his housing unit are three feet apart.

75. **Petitioner Yancy** is unable to engage in social distancing, even in solitary confinement. Not only does solitary confinement consist of small cells and cramped corridors, but Mr. Yancy has to visit the infirmary to receive medical treatment twice per day. His frequent interactions with escorts to and from the infirmary, and medical staff, create additional opportunities for COVID-19 transmission.

76. Petitioners report that they are unable to engage in social distancing at **Marcy** due to the physical infrastructure there.

77. **Petitioner Frateschi** lives in a dormitory with approximately 51 other incarcerated people. People held in this dormitory share four toilets and one shower. DOCCS has failed to implement any restrictions in Petitioner Frateschi's dorm - people still congregate in common areas to play cards and watch television, and no measures have been taken to institute social distancing. People who have contracted COVID-19, or are suspected of having it, are quarantined in the sections adjacent to Petitioner Frateschi's dormitory section.

78. **Petitioner Lopez** also lives in dorm housing, where he sleeps close to other men and shares a bathroom. He is also required to be nearby other people during meals, recreation, and commissary. He has heard that some of the other dorms have been quarantined.

79. 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.

80. 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."[29] These quarantining and monitoring measures are simply inadequate considering DOCCS' policy is to test incarcerated individuals only after they show symptoms.[30] Such symptom-reactive policies overlook the well-established fact that many who are infected with COVID-19 do not show signs of illness.[31]

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[29] 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].

[30] *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."].

[31] 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).

These policies are ineffective to stop the rampant asymptomatic transmission of the disease.[32] 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.*

81. Both the White House and the CDC now unequivocally recommend that when in proximity to others, everyone should wear personal protective equipment ("PPE"), including masks, whether or not they have displayed symptoms of coronavirus.[33] 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.[34]

82. 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."[35]

83. Individuals incarcerated in DOCCS facilities are given handkerchiefs, but they are not issued masks they themselves are subject to quarantine.[36] Perplexingly, incarcerated

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[32] 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].
[33] *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].
[34] *Id.* The CDC recommends that cloth face coverings worn to combat transmission of the virus should be routinely washed.
[35] 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].
[36] *See supra* note 29 [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.

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.[37]

84. 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 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.*'"[38] (Greifinger Aff. ¶¶ 33-37.)

85. 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.[39] In many cases, Courts have ordered such decarceration.

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[37] 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].

[38] 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=0a31827f48 EMAIL_CAMPAIGN_2018_08_09_04_14_COPY_01&utm_medium=email&utm_term=0_72df992d84-0a31827f48-58432543 [last visited Apr. 10, 2020].

[39] *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].

86. 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," whereas "if the current prison population is maintained, it is likely that the correctional health services will be overwhelmed."[40]

87. 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.

88. 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]

[40] 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].

[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"].)

89. Other states, including Massachusetts, Kentucky, West Virginia, California, Utah, New Jersey, and Rhode Island, are undertaking efforts to reduce prison populations.[41] 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.[42] 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"].)

[41] 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.

[42] 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.

90. 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."[43]

91. 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"].)

92. 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.

[43] 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].

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].)

93. 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"].)[44]

94. 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

[44] 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].

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 contraband, a danger to prisoners who might drink it and to guards who, because of the high alcohol content, fear that it can we used as a weapon.[45]

95. 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.[46]

96. 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

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[45] *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].

[46] 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].

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.)

97. 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.)

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.

98. 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.

99. 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].)

100. 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.*

101. 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].)

102. 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.*

103. 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.

104. 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 supra* ¶¶ 25-37.) 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.

105. 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.

106. 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.

107. 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.

108. 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 Frateschi, Lopez, and Yancy, and their vulnerabilities to complications and even death from COVID-19. The letter demanded these Petitioners' release from custody.

109. 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* ¶¶ 86-88.)

110. 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.[47]

111. 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* ¶ 90.) 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

[47] *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].

viable option to prevent the most grim of outcomes. (*See* Greifinger Aff.) Once the virus becomes prevalent, the situation will quickly turn dire.

112. 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.

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

113. 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.

114. 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].)

115. 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].)

116. 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].)

117. 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"];[48] *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

[48] 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].

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"].)

118. 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 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.

119. 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.*)

120. 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].)

121. New York's habeas jurisprudence has long recognized that habeas claims are viable if a petitioner shows that the only possible way to abate the constitutional violation is through release from custody. (*See People ex rel. Hall on Behalf of Haralambou v LeFevre*, 60 NY2d 579, 580 [1983] [explaining that while petitioner's claims that imprisoning a person with epilepsy was "the only claim in the petition that could result in release," the petition was properly dismissed for lack of proof "that the prison officials have been deliberately indifferent to relator's medical needs"]; *People ex rel. Kalikow on Behalf of Rosario v Scully*, 198 AD2d 250, 250–51 [2d Dep't 1993] ["in some special circumstances, habeas corpus is available to challenge the conditions of confinement, even where immediate discharge is not the appropriate relief," but affirming petition's dismissal for failure to prove constitutionally deficient medical treatment] [citation omitted]; *People ex rel. Smith v. LaVallee*, 29 AD2d 248, 250 [4th Dept 1968] [in habeas action, remanding to supreme court for fact-finding on adequacy of medical care provided to petitioner].)

122. 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]).

123. 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 those in Oneida County. (*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"].)

124. 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)].

125. 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*.

126. 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.

127. 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].)

128. 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.)

129. 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].)

130. 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].)

131. 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.

132. Three of the five Petitioners in this action were convicted of nonviolent crimes. Of the three petitioners who are incarcerated for violent crimes, Petitioner Thomas Jackson is incarcerated for Attempted Robbery and Petitioner Yancy is incarcerated for Attempted Burglary. Three of the Petitioners in this action are approaching either their release date or their earliest release date. Petitioner Lopez will be released in May, the same month Petitioner Yancy

is eligible for release. Petitioner Albert Jackson is eligible 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.

133. The same is true of Petitioners Frateschi and Thomas Jackson, who 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

134. 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.

135. 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.

<u>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</u>.

136. 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.*).

137. 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]).

138. 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"].)

139. 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].)

140. 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].)

141. 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

142. 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.

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

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

145. No prior application for the relief sought herein has been brought by any Petitioner.

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;

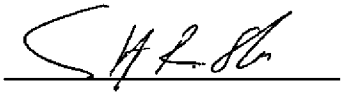
b) grant a hearing on the facts and issues presented at which Petitioners can call witnesses, should Respondents contest the facts and issues alleged;

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
April 24, 2020

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



Stefen R. Short
Dori A. Lewis
Robert M. Quackenbush
Sophia Gebreselassie
Mary Lynne Werlwas
The Legal Aid Society, Criminal Defense Practice
Prisoners' Rights Project
199 Water Street, 6th Floor
New York, New York 10038
t: (212) 577-3530
e: sshort@legal-aid.org

Elizabeth L. Isaacs
Andrea Yacka-Bible
David E. Loftis
Of Counsel
The Legal Aid Society, Criminal Defense Practice
Criminal Appeals Bureau
199 Water Street, 5th Floor
New York, New York 10038
t: (917) 922-7975
e: eisaacs@legal-aid.org

David J. Abrams
Brian S. Choi
Jill L. Forster
Jeffrey E. Intravatola
Of Counsel
Kasowitz Benson Torres LLP
1633 Broadway
New York, New York 10019
t: (212) 506-1800
e. DAbrams@kasowitz.com

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.

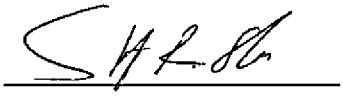
3. The contents of the foregoing verified petition are true to my knowledge, except as to matters alleged to be upon information and belief, and as to those matters, I believe them to be true.

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
April 24, 2020

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



Stefen R. Short
Dori A. Lewis
Robert M. Quackenbush
Sophia Gebreselassie
Mary Lynne Werlwas
Of Counsel
The Legal Aid Society, Criminal Defense Practice
Prisoners' Rights Project
199 Water Street, 6th Floor
New York, New York 10038
t: (212) 577-3530
e: sshort@legal-aid.org

Elizabeth L. Isaacs
Andrea Yacka-Bible
David Loftis
Of Counsel
The Legal Aid Society, Criminal Defense Practice
Criminal Appeals Bureau
199 Water Street, 5th Floor
New York, New York 10038
t: (917) 922-7975
e: eisaacs@legal-aid.org

David J. Abrams
Brian S. Choi
Jill L. Forster
Jeffrey E. Intravatola
Of Counsel
Kasowitz Benson Torres LLP
1633 Broadway
New York, New York 10019
t: (212) 506-1800
e: DAbrams@kasowitz.com

Exhibit 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONEIDA

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* Stefen R. Short, Esq., on behalf of JOHN FRATESCHI, DIN 11B0827; ALBERT JACKSON, DIN 18A4662; THOMAS JACKSON, DIN 20R0016; RICARDO LOPEZ, DIN 18R1196; and MICHAEL YANCY, DIN 16A4993,

Petitioners,

– against –

WILLIAM FENNESSY, Superintendent, Mid-State Correctional Facility; PATRICK REARDON, Superintendent, Marcy Correctional Facility; and ANTHONY J. ANNUCCI, Acting Commissioner, New York State Department of Corrections and Community Supervision,

Respondents.

AFFIRMATION OF ROBERT B. GREIFINGER, MD

Index No.

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

ROBERT GREIFINGER, M.D., under penalty of perjury, hereby states and affirms the following to be true:

1. I am a physician who has worked in correctional health care for more than 30 years. I was the Chief Medical Officer for the New York State Department of Corrections and Community Supervision ("DOCCS") from 1989 to 1995. I managed the medical care provided to people in DOCCS custody during the health care crises resulting from HIV/AIDS and from drug-resistant tuberculosis, a disease similar to COVID-19, as it is spread by respiratory droplets (airborne transmission).

2. I also managed the medical care for persons in the custody of the New York City Department of Correction, including at Rikers Island from 1987 to 1989.

3. I have authored more than 80 scholarly publications, many of which are about

public health and communicable disease. I am the editor of *Public Health Behind Bars: from Prisons to Communities,* a book published by Springer (a second edition is due to be published in early 2021); and co-author of a scholarly paper on outbreak control in correctional facilities.[1]

4. I have been an independent consultant on prison and jail health care since 1995. My clients have included the U.S. Department of Justice, Civil Rights Division (for 23 years) and the U.S. Department of Homeland Security, Section for Civil Rights and Civil Liberties (for six years).

5. I am familiar with prisons, having toured and evaluated the medical care in several hundred correctional facilities and immigration detention. I currently monitor the medical care in three large county jails for Federal Courts. From my work in New York State, I have knowledge of DOCCS prisons including their physical structure, age, and overall health care delivery systems. My resume is attached as Exhibit A.

Inevitable Spread of COVID-19 in New York State Prisons

6. COVID-19 is a coronavirus disease that has reached pandemic status. As of today, according to the World Health Organization, more than 2.4 million people have been diagnosed with COVID-19 around the world and 163,000 have died.[2] In the United States, about 805,000 people have been diagnosed and 40,000 people have died thus far.[3] These numbers have

[1] Farah M. Parvez, Mark N. Lobato, and Robert B Greifinger, *Tuberculosis Control: Lessons for Outbreak Preparedness in Correctional Facilities*, 16(3) Journal of Correctional Health Care 239, May 12, 2010, *available at* https://journals.sagepub.com/doi/pdf/10.1177/1078345810367593 [last accessed Apr. 22, 2020].
[2] *Coronavirus Disease 2019 (COVID-19) Situation Report-92*, World Health Organization, Apr. 21, 2020, *available at* https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200421-sitrep-92-covid-19.pdf?sfvrsn=38e6b06d_4 [last accessed Apr. 22, 2020]; *Coronavirus in the U.S.: Latest Map and Case Count*, NY Times, Apr. 22, 2020, *available at* https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?searchResultPosition=1 [last accessed April 22, 2020].
[3] *Coronavirus in the U.S.: Latest Map and Case Count*, NY Times, Apr. 22, 2020, *available at* https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?searchResultPosition=1 [last accessed April 22, 2020].

risen exponentially: doubling in the past two weeks.[4] These numbers are likely a severe underestimate, due to the continuing lack of availability of testing.

7. COVID-19 is a serious disease, ranging from no symptoms or mild ones for most people at low risk, to respiratory failure and death particularly in older patients and patients with chronic underlying conditions.

8. COVID-19 spreads through droplets that can pass from person to person through the air as well as by touching contaminated surfaces. Part of what is so pernicious about the virus is that, apparently, it can remain on surfaces for days. As a result, mitigating the spread of COVID-19 also requires that common areas in congregate settings are regularly cleaned and disinfected and that eating and bathroom areas are disinfected between each use.

9. There is no vaccine to prevent COVID-19 and there is unlikely to be a vaccine for at least a year. There is no known cure or anti-viral treatment for COVID-19 at this time. The only way to mitigate COVID-19 is to use scrupulous hand hygiene and social distancing.

10. People in the high-risk category for COVID-19, *i.e.*, the elderly or those with underlying disease, are likely to suffer serious illness and death. According to preliminary data from China, 20% of people in high-risk categories who contract COVID-19 have died.

11. Mortality is high among those with COVID-19 who become severely affected. Those who do not die have prolonged serious illness, for the most part requiring expensive hospital care, including ventilators that have been in very short supply and scarce kidney dialysis machines. Even when people recover, they are at risk for long term and serious complications as a result of the disease.

12. The Centers for Disease Control and Prevention ("CDC") has identified

[4] *Coronavirus Disease 2019 (COVID-19) Situation Report-78, World Health Organization*, Apr. 7, 2020, *available at* https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200407-sitrep-78-covid-19.pdf?sfvrsn=bc43e1b_2 [last accessed Apr. 22, 2020].

underlying medical conditions that may increase the risk of serious COVID-19 for individuals of any age: blood disorders, chronic kidney or liver disease, compromised immune system including HIV infection, endocrine disorders, including diabetes, metabolic disorders, hypertension, heart and lung disease, neurological and neurologic and neurodevelopmental conditions, severe obesity, and current or recent pregnancy.

13. In shared airspace, social distancing—that is maintaining distance of at least six feet between individuals so as not to unintentionally spread the virus to others—and hand hygiene are the only known ways to prevent the rapid spread of COVID-19. The CDC describes social distancing as "critical" in preventing transmission of COVID-19 in detention facilities.[5] For that reason, public health officials have recommended extraordinary measures to combat the spread of COVID-19. Schools, courts, collegiate and professional sports, theater and other congregate settings have been closed as part of risk mitigation strategy.

14. Jails and detention centers are congregate environments where the risks of infection and transmission of infection are extraordinarily high.

15. There are increasing reports of COVID-19 infections in correctional and detention sites around the country. Once COVID-19 is introduced into these facilities, it spreads like wildfire.

16. New York State has been hit the hardest of any state in the United States by the coronavirus and remains the epicenter of the largest national outbreak at this time. Therefore, it is not surprising that the New York City jails and the New York State prison system are showing strikingly rapid spreads of cases.

17. On March 24, 2020, DOCCS reported three confirmed cases across the DOCCS

[5] *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* at 8, Centers for Disease Control and Prevention, *available at* https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf [last accessed Apr. 22, 2020) [hereinafter "CDC Guidance"].

system.[6] Approximately two weeks later, DOCCS reported 520 staff members and 188 incarcerated individuals were confirmed positive; one staff member and two incarcerated individuals had died. Today, the numbers of confirmed individuals among staff and the incarcerated have risen to 813 and 219, respectively, and an additional two staff and five incarcerated individuals have died.[7]

18. In mid-March the jail at Rikers Island in New York City had not had a single confirmed COVID-19 case. Rikers now has a rate of infection that is far higher than the infection rates of the most infected regions of the world. By April 22, 367 currently incarcerated inmates and 956 correction staff and health workers, cumulatively, tested positive for COVID-19; two inmates have died and multiple inmates have been hospitalized.[8] The Chief Medical Officer of Rikers has described a "public health disaster unfolding before our eyes." In his view, following CDC guidelines has not been enough to stem the crisis: "infections in our jails are growing quickly despite these efforts."[9]

19. The conditions of DOCCS prisons pose a heightened public health risk to the spread of COVID-19. DOCCS prisons, including the two at issue in this petition, are enclosed environments, much like the nursing homes that have been the site of the other largest

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[6] Ben Watson, *One Confirmed Case of Inmate with COVID-19 at Clinton Correctional, NYSDOCCS Says*, Adirondack Daily Enterprise, Mar, 24, 2020, *available at* https://www.adirondackdailyenterprise.com/news/local-news/2020/03/one-confirmed-case-of-inmate-with-covid-19-at-clinton-correctional-nysdoccs-says/ [last accessed Apr. 22, 2020].

[7] *DOCCS COVID-19 Report*, New York State Department of Corrections and Community Supervision, Apr. 22, 2020, *available at* https://doccs.ny.gov/doccs-covid-19-report [last accessed Apr. 22, 2020].

[8] *Board of Correction Daily COVID-19 Update*, New York City Board of Correction, Apr. 21, 2020, *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Public_Reports/Board%20of%20Correction%20Daily%20Public%20Report_4_21_2020.pdf [last accessed Apr. 22, 2020].

[9] Ross MacDonald (@RossMacDonaldMD), Twitter [Mar. 30, 2020, 8:03 PM], https://twitter.com/rossmacdonaldmd/status/1244822686280437765?s=12 ["I can assure you we were following the CDC guidelines before they were issued."].

concentrated outbreaks of COVID-19.[10]

20. New York State prisons have even greater risk of infectious spread because of conditions of the numbers of people that prisoners have to interact with on a daily basis, the proportion of vulnerable people detained, and often scant medical care resources.

21. The medical consensus is that social distancing of less than six feet is not an adequate means of mitigating transmission. To mitigate the spread of the virus, six feet of distance must be maintained when prisoners are sleeping, eating, showering, using common areas and generally at all times.

22. Additionally, there is a nationwide shortage of tests for COVID-19. It is my understanding that New York State correctional facilities do not have sufficient access to these tests. As people may be asymptomatic or have no fever, COVID-19 may be spread in prisons and infect many prisoners and staff without warning.

23. In prisons, people live in close quarters and cannot achieve the "social distancing" needed to effectively prevent the spread of COVID-19. People are often required to live in dormitories where beds are close together. Similarly, those in double cells sleep and can spend as many as 22 hours a day locked into a small space with another person often less than three feet away. In my professional opinion, it is not possible to achieve adequate social distancing—that is, more than six feet between prisoners—if more than one person is held in a cell, or if bunks in a dormitory are placed within less than 8-10 feet of each other.

24. Even people in single cells, like those in other settings, cannot fully shelter in place: they too share common spaces. In most congregate settings, it is impossible for those detained to

[10] In his April 28, 2020 briefing on the state's response to the COVID-19 pandemic, New York Governor Andrew Cuomo called out nursing homes and prisons as priorities and as congregate settings of particular concern. *See* https://www.c-span.org/video/?471336-1/york-governor-cuomo-coronavirus-news-conference [last accessed April 22, 2020].

maintain a six-foot distance from others or to avoid groups and queues. All share some combination of communal toilets, sinks, and showers, without adequate disinfection between use. Food preparation and food service is communal, with little opportunity for surface disinfection. Walkways outside of cell areas are narrow with people crowding. Recreation areas including yards, gyms and dayrooms can often be congested.

25. Staff arrives and leaves on a shift basis; there is little to no ability to adequately screen staff for new, asymptomatic infection, yet people in custody interact frequently with them.

26. There is no change in procedure that can alleviate these concerns. Approaches like isolation, solitary confinement or keeping individuals locked into their cell more hours of the day will make the problem worse. These approaches are extremely psychologically damaging to detained people and lead to a spike in severe depression, attempted and completed suicides, and medical emergencies. The problems this will cause in the facility are even worse in the context of the outbreak of a pandemic, when onsite medical staff is operating at or over their capacity. Moreover, detained people who are isolated are monitored less frequently. If they develop COVID-19 symptoms, or their symptoms escalate, they may not be able to get the medical attention they desperately need in a timely fashion. Isolation also increases the amount of physical contact between staff and detained people—in the form of increased handcuffing, escorting individuals to and from the showers, and increased use of force due to the increased psychological stress of isolation. My expert opinion is that the use of isolation or lockdown for asymptomatic but vulnerable people is not a medically appropriate method for abating the substantial risks of COVID-19.

Correctional Facilities' Unpreparedness to Prevent and Treat COVID-19 Threatens the Wellbeing of Individuals Both Within Prisons and in Surrounding Communities.

27. A primary concern of medical and public health experts and public officials is the

effect that the pandemic is having and will have on health systems. Because severe COVID-19 cases require extended hospitalization and intensive medical care, a significant number of COVID-19 cases can quickly overwhelm a health system. This is true in urban areas but is particularly true in rural areas where health care facilities have far more limited intensive care resources.

28. DOCCS prisons, like all our prisons and jails, are populated with people who disproportionately have serious underlying medical conditions, such as chronic heart and lung disease and other conditions that render them immunocompromised - the very conditions that put people at a markedly increased risk of becoming severely ill or dying from COVID-19. As such, not only is the virus more likely to spread within DOCCS prisons, but the outcomes are more likely to be particularly severe and even deadly in a subset of people at higher risk due to their age or underlying conditions.

29. Many DOCCS prisons lack adequate medical care infrastructure to address the spread of infectious disease. As examples, appropriate areas for isolating persons who have either been exposed to the virus or have tested positive are not sufficient to deal adequately with the spread of the virus among the prisoner population and DOCCS has functioned for years with a large number of staffing vacancies, which can only worsen as the impact of the virus increases. DOCCS has already had to transfer persons in custody from one prison to another due to staff shortages. Staff shortages will intensify with increased intramural transmission of the virus that causes COVID-19.

30. The effects of COVID-19 are very serious, especially for those who are most vulnerable. People in this category may experience severe respiratory illness as well as damage to other major organs including their kidneys. Treatment for serious cases of COVID-19

requires significant advanced support, including ventilator assistance for respiration, hemodialysis, and intensive care support. As such, an outbreak of COVID-19 could put significant pressure on, or exceed the capacity of, local health infrastructure.

31. Many DOCCS prisons also lack adequate medical care infrastructure to address the treatment of high-risk people in detention. To the degree DOCCS prisons rely on local health departments or hospitals, these hospitals are themselves overwhelmed in the face of the COVID-19 pandemic. Indeed on March 31, 2020, health care providers at a hospital serving the town of Malone, New York, home to three DOCCS prisons, sent an open letter to DOCCS expressing their concern due to that their hospital "neither have the facilities, the staff, nor the transport capability to deal with a major outbreak of the virus in the prisons which appears inevitable."[11]

32. I monitor a correctional facility for the Federal Court that has already had an outbreak of COVID-19 that began among vulnerable people living on a medical housing unit. Sixty-nine staff members and 97 inmates have tested positive as of April 21, 2020. Several other inmates have pending tests. As such, I have firsthand knowledge of the serious effects of this virus in correctional facilities and the lack of preparedness in these institutions. Correctional facilities are not equipped to manage and treat an onslaught of this disease. It is a dangerous and rapidly evolving situation.

The Only Viable Public Health Strategy Available is Risk Mitigation Which in the Prison Context Requires the Release of High-Risk Individuals.

33. The only viable public health strategy available is risk mitigation. Prisons should take proactive measures to reduce the severity of impact that COVID-19 will have within these facilities and generally within the public. Most important among these measures is to downsize

[11] *Spread of COVID-19 into Prisons a Concern*, The 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. 22, 2020].

the prison population, immediately. For an airborne disease, the most effective mitigation strategy to limit the spread of the virus is to reduce crowding, as this increases the opportunity for social distancing. Immediate downsizing is the most effective way to reduce crowding. In prison, even if everyone is isolated in a single cell, there is still an increased risk of transmission among prisoners and staff because the institutional setting requires the delivery of food, cleaning supplies, documents, and other items, in addition to shared airspace. However, in most prisons, individuals are not isolated in a single cell, or housed in an environment where social distancing is an option. This further increases the risks of transmission and an outbreak within the prisons.

34. Even with the best-laid plans to address the spread of COVID-19 in New York State's prisons, the release of high-risk individuals is a key part of a risk mitigation strategy. Moreover, immediate downsizing that prioritizes release of residents who are particularly vulnerable to exposure to COVID-19—people who are elderly and those with underlying health conditions—reduces the likelihood that this group of individuals will contract the virus. Individuals in this category are at the highest risk of developing severe complications from COVID-19, and, as noted above, when they develop severe complications, they will be transported to community hospitals, using scarce community resources, including emergency room beds, general hospital beds, ventilators, dialysis machines and intensive care unit ("ICU") beds. Accordingly, taking steps to prevent their getting infected is an important contribution to community health.

35. While releasing individuals, prioritizing the most vulnerable, reduces the burden on local health care resources, as it reduces the risk of transmission of the disease to a large number of people living in close proximity for an extended period of time, it also reduces the risk of transmission to staff.

36. If not released, those who are most medically vulnerable to severe effects of COVID-

19 will have a poor prognosis if infected while in prison. Moreover, care for those who become sick with COVID-19 will overburden the limited health care resources of the prison.

37. In sum, the heightened risk of infectious disease transmission in prisons threatens the health of prisoners, staff and the broader population. Releasing vulnerable patients reduces the risk of widespread intramural outbreak, and thereby reduces the risk to staff who return to their homes on a daily basis.

Petitioners are at High Risk of Serious Illness and Death from COVID-19.

38. Based upon my review of the petition, and upon information and belief, each of the petitioners suffer from conditions that place them at such severe risk.

- Upon information and belief, Petitioner John Frateschi is 72 years old and has a fifteen-year history of respiratory conditions, including COPD, severe asthma, reoccurring pneumonia, and bronchitis. As a result, he is at higher risk for serious complications or death from COVID-19. Petitioner Frateschi also uses a CPAP machine every night to sleep and is a wheelchair user.

- Upon information and belief, Petitioner Albert Jackson is 60 years old and diagnosed with heart failure, diabetes, hypertension, and seizure disorder. As a result, he is at higher risk for serious complications or death from COVID-19.

- Upon information and belief, Petitioner Thomas Jackson is 52 years old and diagnosed with HIV and asthma. He is also a cancer survivor. As a result, he is at higher risk for serious complications or death from COVID-19. Petitioner Thomas Jackson receives medical care multiple times a week to treat an open wound stemming from surgery in 2017.

- Upon information and belief, Petitioner Ricardo Lopez is 51 years old and diagnosed with asthma. As a result, he is at higher risk for serious complications or death from COVID-19. Petitioner Lopez is also disabled and walks with a cane due to torn cartilage and meniscuses in both knees.

- Upon information and belief, Petitioner Michael Yancy is 61 years old and diagnosed with HIV, HPV, and hypertension. As a result, he is at higher risk for serious complications or death from COVID-19.

39. In my opinion, the public health recommendation is to release people who are at especially high risk of severe illness and death due to their age and/or their underlying conditions. These include the five Petitioners, given the heightened risks to their health and safety, especially given the lack of a viable vaccine for prevention or effective treatment at this stage.

40. I recommend releasing these Petitioners to a place where they can maintain the social distance required by prudent public health practice. Fourteen days of self-quarantine following release is appropriate since Petitioners may have had contact with people infected with the virus that causes COVID-19

Dated: New York, New York
April 24, 2020

Robert B. Greifinger, M.D.

EXHIBIT A

ROBERT B. GREIFINGER, M.D.

380 Riverside Drive, Apt 4F
New York, New York 10025

(646) 559-5279
bob@rgreifinger.com

Physician consultant with extensive experience in development and management of complex community and institutional health care programs. Demonstrated strength in leadership, program development, negotiation, communication, operations and the bridging of clinical and public policy interests. Teacher of health and criminal justice.

SUMMARY OF EXPERIENCE

MEDICAL MANAGEMENT AND QUALITY IMPROVEMENT SERVICES 1995-Present

Consultant on the design, management, operations, quality improvement, and utilization management for correctional health care systems.

- Recent clients include (among others) the U.S. Department of Justice Civil Rights Division, monitoring multiple correctional systems and the U.S. Department of Homeland Security Office of Civil Rights and Civil Liberties. Federal court monitor for the Metropolitan Detention Center, Albuquerque, New Mexico, Orleans Parish Sheriff's Office, New Orleans, Louisiana, and Miami-Dade Corrections and Rehabilitation Department.
- National Commission on Correctional Health Care. Principal Investigator for an NIJ funded project to make recommendations to Congress on identifying public health opportunities in soon-to-be-released inmates.
- Associate Editor, Puisis M (ed), Clinical Practice in Correctional Medicine, Second Edition, St. Louis. Mosby 2006.
- Editor, Greifinger, RB (ed), Public Health Behind Bars: From Prisons to Communities, New York. Springer 2007.
- John Jay College of Criminal Justice. Professor (adjunct) of Health and Criminal Justice and Distinguished Research Fellow 2005 – 2016.
- Co-Editor, International Journal of Prison Health 2010 – 2016.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES 1989 - 1995

Operating budget of $1.4 Billion. Responsible for inmate safety, program, and security. Sixty-nine facilities housing over 68,000 inmates with 30,000 employees.

Deputy Commissioner/Chief Medical Officer, 1989 - 1995

- Operating budget of $140 million; health services staff of 1,100. Accountable for inmate health services and public health. Directed major initiatives in policy and program development, quality and utilization management.
- Developed and implemented comprehensive program for HIV prevention, surveillance, education, and treatment in nation's largest AIDS medical practice.
- Managed the rapid implementation of an infection control program responding to a major outbreak of multidrug-resistant tuberculosis. Helped bring the nation's tuberculosis epidemic to public attention.
- Developed $360 million five-year capital plan for inmate health services. Opened the first of five regional medical units for multispecialty ambulatory and long-term care.
- Implemented a centralized and regional pharmacy system, improving quality, service and cost management.

ROBERT B. GREIFINGER, M.D.

MONTEFIORE MEDICAL CENTER, Bronx, NY 1985 - 1989

A major academic medical center with 8,000 employees and annual revenue of $500 million.

Vice President, Health Care Systems, 1986 - 1989

Director, Alternative Delivery Systems, 1985 - 1986

Operating budget of $60 million with 1,100 employees. Managed a multi-specialty group, a home health agency, and prison health programs.

- Negotiated contracts, including bundled service, risk capitation, fee-for-service arrangements, and major service contracts. Developed a high technology home care joint venture.
- Taught epidemiology and health care organization at Albert Einstein College of Medicine. Lectured nationally on health care delivery and managed care.
- Conceived and collaborated in development of a consortium of six academic medical centers, leading to a metropolitan area-wide, joint venture HMO. Organized a network of physicians to contract with HMO's preparing for cost-containment.

WESTCHESTER COMMUNITY HEALTH PLAN, White Plains, NY 1980 - 1985

Independent, not-for-profit, staff-model HMO, acquired by Kaiser-Permanente in 1985. Operating revenue $17 million with 200 employees and 27,000 members.

Vice President and Medical Director

Chief medical officer and COO. Managed the delivery of comprehensive medical services. Accountable to the Board of Directors for quality assurance and utilization management. Practiced pediatrics.

- Accomplished turnaround with automated utilization management, improved service, sound personnel management principles, and quality management programs.
- Implemented performance based compensation program.

COMMUNITY HEALTH PLAN OF SUFFOLK, INC. 1977 - 1980

Community based, not-for-profit, staff model HMO, with enrollment of 18,000.

Medical Director

- Developed and operated clinical services. Accountable for quality of care. Practiced clinical pediatrics, and taught community health and medical ethics at SUNY Stony Brook School of Medicine.

MONTEFIORE MEDICAL CENTER, Bronx, NY 1976 - 1977

Residency Program in Social Medicine, Deputy Director, 1976-1977

Unique clinical training program focused on community health and change agentry. Developed curriculum and supervised 40 residents in internal medicine, pediatrics and family medicine.

UNITED STATES PUBLIC HEALTH SERVICE 1972 - 1974

Commissioned officer in the National Health Service Corps. Functioned as medical director and family physician in a federally funded neighborhood health center in Rock Island, Illinois. Honorable Discharge.

ROBERT B. GREIFINGER, M.D.

FACULTY APPOINTMENTS

1976 - 2002
Assistant Professor of Epidemiology and Social Medicine, Albert Einstein College of Medicine

2005 - 2016
Professor (adjunct) of Health and Criminal Justice and Distinguished Research Fellow, John Jay College of Criminal Justice

NATIONAL COMMITTEE FOR QUALITY ASSURANCE

Worked with NCQA since its inception in 1980. Began training surveyors in 1989, and continued as faculty for NCQA sponsored educational sessions. Served for six years as a charter member of the Review Oversight (accreditation) Committee. Served on the Reconsideration (appeals) Committee for six years. Surveyed dozens of managed care organizations, and reviewed several hundred quality management programs.

OTHER PROFESSIONAL ACTIVITIES

2012 – present	Member, Board of Directors, National Health Law Program
2011 – 2015	Member, Board of Directors, Academic Consortium of Criminal Justice Health
2010 - 2016	Co-editor, International Journal of Prisoner Health
2009	Recipient, B. Jaye Anno Award for Lifetime Achievement in Communication
2007-2015	Member, National Advisory Group on Academic Correctional Health Care
2007	Recipient, Armond Start Award, Society of Correctional Physicians
2005 - 2011	Member, Advisory Board to the Prisoner Reentry Institute, John Jay College
2002 - present	Member, Editorial Board, Journal of Correctional Health Care
2002 - present	Peer reviewer for multiple journals, including Journal of Correctional Health Care, International Journal of Prison Health, Journal of Urban Health, Journal of Public Health Policy, Annals of Internal Medicine, American Journal of Public Health, Health Affairs, and American Journal of Drug and Alcohol Abuse.
2001 - 2003	Member, Advisory Board to CDC on Prevention of Viral Hepatitis in Correctional Facilities
1999 - 2003	Member, Advisory Board to CDC on Prevention and Control of Tuberculosis in Jails
1997 - 2003	Member, Reconsideration Committee, NCQA
1997 - 2001	Moderator, Optimal Management of HIV in Correctional Systems, World Health Communications
1997 - 2000	Member, Reproductive Health Guidelines Task Force, CDC
1993 - 1995	Co-chair, AIDS Clinical Trial Community Advisory Board, Albany Medical Center
1992 - Present	Society of Correctional Physicians
1991 - 1997	Member, Review Oversight (accreditation) Committee, NCQA

ROBERT B. GREIFINGER, M.D.

1983 - 1985 Executive Committee, Medical Directors' Division, Group Health Association of America (Secretary, 1984-1985)

EDUCATION

University of Pennsylvania, College of Arts and Sciences, Philadelphia; B.A., 1967 (Amer. Civilization)

University of Maryland, School of Medicine, Baltimore; M.D., 1971

Residency Program in Social Medicine (Pediatrics), Montefiore Medical Center, Bronx, NY; 1971-1972, 1974-1976, Chief Resident 1975-1976

CERTIFICATION

Diplomate, National Board of Medical Examiners, 1971

Diplomate, American Board of Pediatrics, 1976

Fellow, American Academy of Pediatrics, 1977

Fellow, American College of Physician Executives, 1983

Fellow, American College of Correctional Physicians (formerly Society of Correctional Physicians), 2000

License: New York, Pennsylvania (inactive)

ROBERT B. GREIFINGER, M.D.

Updated February 2018

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