

Note to attorneys filing this writ: areas where you need to input are marked with **. Please ctrl + F and search for all ** when you are finished. Leave the blank lines (index No., SCID, etc) blank for the court to fill in.

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

PEOPLE OF THE STATE OF NEW YORK EX REL.
**lawyer, Esq., on behalf of **client

Petitioners,

v.

CYNTHIA BRANN, Commissioner, New York City
Department of Correction; and ANTHONY ANNUCCI,
Acting Commissioner, New York State Department of
Corrections and Community Supervision, [***remove if
no parole]

Respondents.

Index No. _____

SCID No. _____

B&C: **

NYSID: **

WRIT OF HABEAS CORPUS

THE PEOPLE OF THE STATE OF NEW YORK

Upon the relation of **lawyer, Esq.,

TO THE COMMISSIONER, NEW YORK CITY
DEPARTMENT OF CORRECTION and THE COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION: [***remove if no
parole]

WE COMMAND YOU, that you have and produce the body of Petitioners named in the
Verified Petition attached hereto, by you imprisoned and detained, as it is said, together with
your full return to this writ and the time and cause of such imprisonment and detention, by
whatsoever name the said Petitioners are called or charged, or show cause why the Petitioners
should not be produced, before the Justice presiding at Part ____ of the Supreme Court, **
County, at **court address, on ____ of March, 2020, at _____ to do and receive what shall

then and there be considered concerning the said Petitioners and have you then and there this writ.

WITNESS, Honorable _____, one of the Justices of the Supreme Court of the State of New York, this ___ day of March, 2020.

By the Court Clerk

The above writ allowed this _____ day of March, 2020.

Justice of the Supreme Court
of the State of New York

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

PEOPLE OF THE STATE OF NEW YORK EX REL.
**lawyer, Esq., on behalf of **client

Petitioners,

v.

CYNTHIA BRANN, Commissioner, New York City
Department of Correction; and ANTHONY ANNUCCI,
Acting Commissioner, New York State Department of
Corrections and Community Supervision, [***remove if
no parole]

Respondents.

Index No. _____

SCID No. _____

B&C: **

NYSID: **

**VERIFIED PETITION FOR
WRIT OF HABEAS CORPUS**

ATTORNEY NAME, an attorney duly admitted to practice law in the State of New York, hereby affirms the following under penalty of perjury:

INTRODUCTION

1. I, **[ATTORNEY NAME]**, am an attorney admitted to practice law in the state of New York, and am associated with JANET E. SABEL, Attorney-in-Chief of the Legal Aid Society, New York, and I am the attorney of record for **[CLIENT FULL NAME]**, the petitioner herein. I make this Petition on **Mr./Ms.** [client]'s behalf pursuant to CPLR § 7002(a) and 7002(b)(5).

2. Petitioner (herein Mr./Ms. ***client last name) is unlawfully detained and restrained of **his/her/their liberty at **[detention facility name and address].

3. **Mr./Ms. **[client] is detained on **Docket/Indictment No. **, based upon the order or action of the Honorable **[judge name] who, on **[date], 2020, **set bail at /increased

bail from ** to ** cash or insurance company bond **or partially secured bond [specify each amount and form set], causing **her/his/their illegal detention.

4. **Client, who suffers from **condition **and **is **years old, submits that **his/her/their continued pretrial detention amidst the current COVID-19 pandemic is unlawful under the Due Process Clause of the Fourteenth Amendment because the Department of Correction is deliberately indifferent to the risk of serious medical harm posed to **client, who is currently “incarcerated under conditions posing a substantial risk of serious harm.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), and unlawful under the Due Process Clause of the New York State Constitution. *Cooper v. Morin*, 49 N.Y.2d 69, 81 (1979). U.S. Const. amend. XIV; N.Y. Const., Art. I, § 6). Further, **client has been incarcerated since **date solely because he has been unable to pay the amount of monetary bail set. For all of the reasons that follow, the defense submits that, in addition to the severe health risks of continuing **client’s pretrial detention, Judge ** ___’s **increase/imposition of bail on **date amounts to an abuse of discretion and violates C.P.L. §§ 510.10, 510.30, as well as **client name**’s constitutional rights to

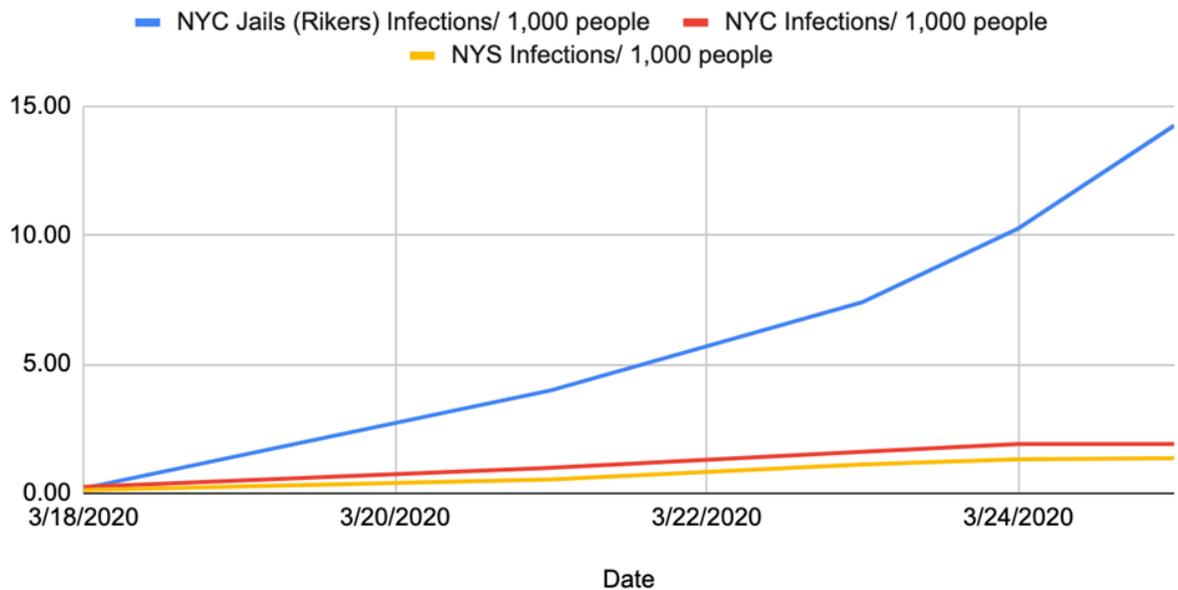
Procedural and Factual Background

5. In only a few months, more than 412,500 people worldwide have been diagnosed with COVID-19 and more than 18,482 of those people have died. As of the date of this filing, there are more than 25,665 confirmed cases of coronavirus within the New York City area, up from just 923 on March 18, 2020. There are now at least two hundred (200) COVID-19 related deaths in the New York City area alone.¹

¹ N.Y. Times, *Live Updates*, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last accessed Mar. 25, 2020).

6. The situation in New York City’s jails is rapidly deteriorating. As of the morning of March 25, 2020, there are 75 reported cases of COVID-19 in our jails,² compared to only *one* known case as of Friday, March 20, 2020.³ These numbers are growing rapidly every day. Even at current rates of infection, the virus’s “attack rate” on Rikers Island – that is, the rate at which the population is being infected – is roughly *eighty five (85) times higher* than the average in the United States of America.

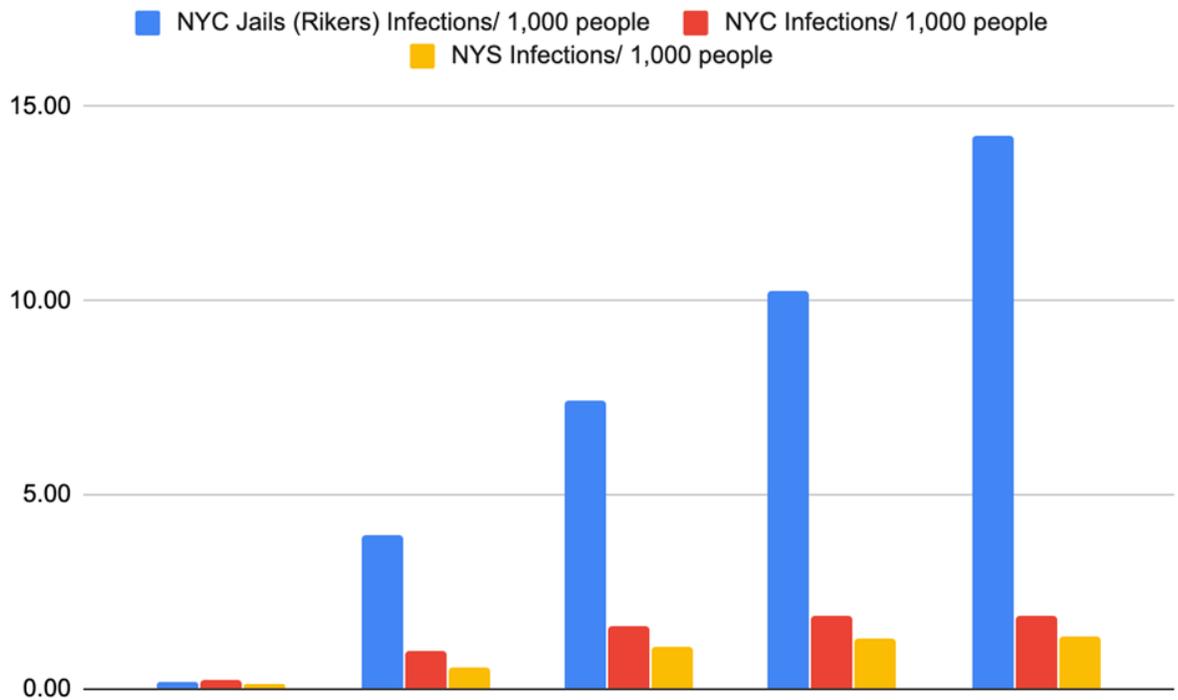
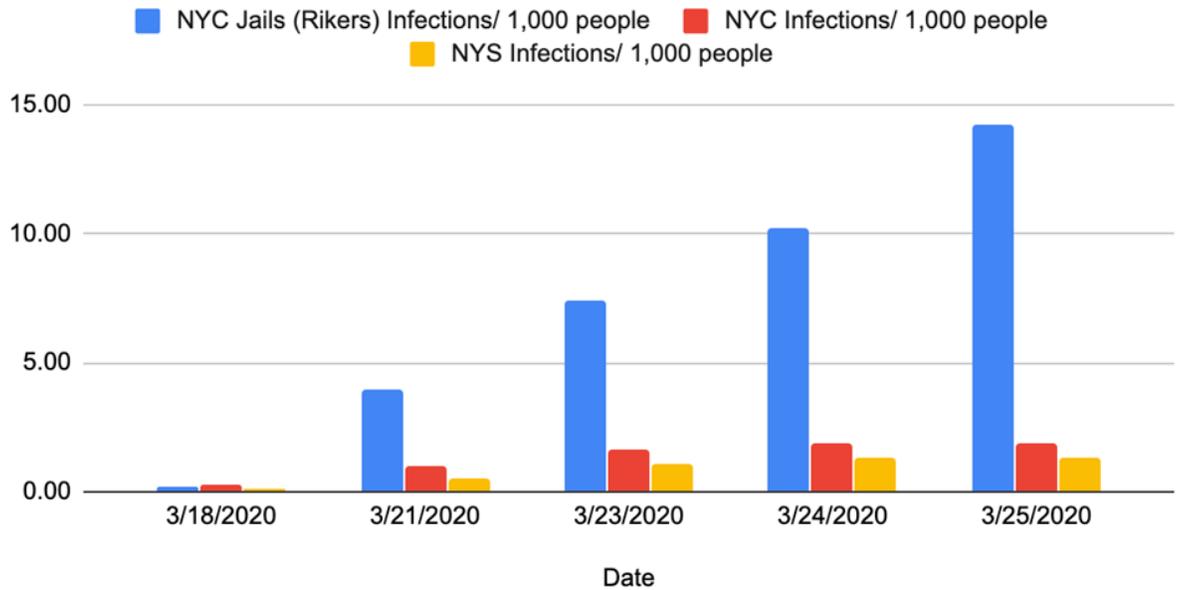
NYC Jails (Rikers) Infections/ 1,000 people, NYC Infections/ 1,000 people and NYS Infections/ 1,000 people

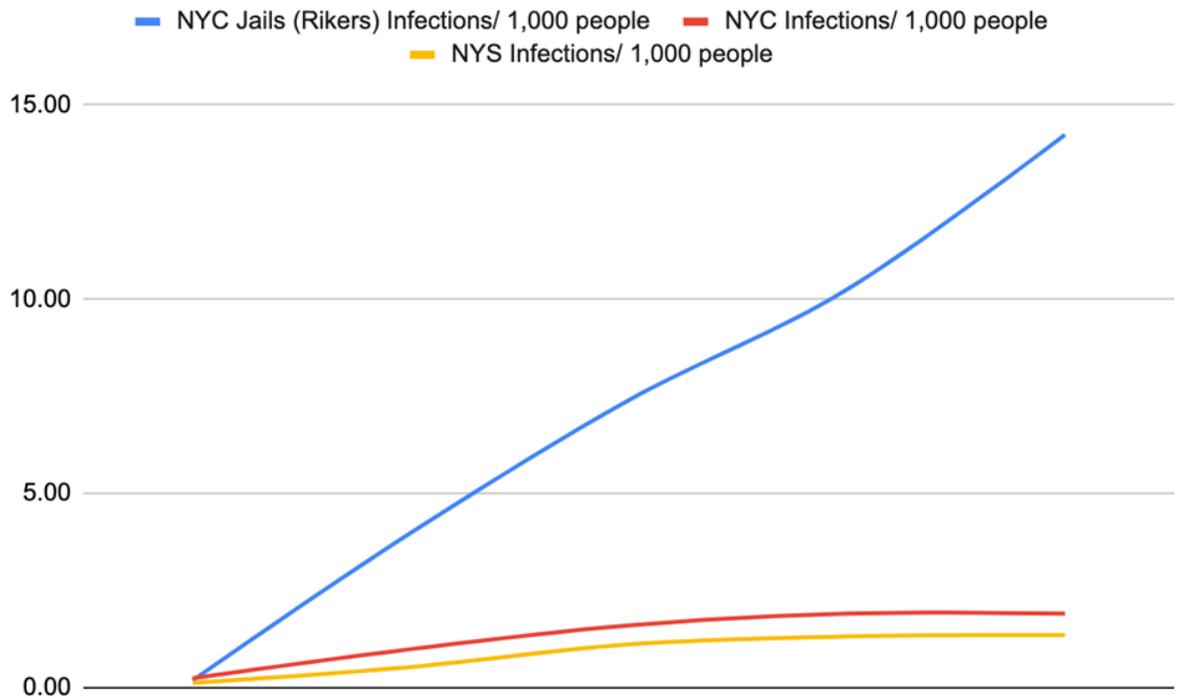


² Per the Department of Correction press office on March 25, 2020.

³ Chelsia Rose Marcius, *Rikers Island inmate has contracted coronavirus: officials*, N.Y. DAILY NEWS (Mar. 18, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-rikers-island-inmate-tests-positive-20200318-gf3r7q4cefaxzmqmwmuevzz3y-story.html>.

NYC Jails (Rikers) Infections/ 1,000 people, NYC Infections/ 1,000 people and NYS Infections/ 1,000 people





7. There is no vaccine or cure for COVID-19. No one is immune.

8. COVID-19 is most likely to cause serious illness and death for older adults and those with certain underlying medical conditions. Petitioners all fall into this category of heightened vulnerability.

9. Because risk mitigation is the only known strategy to protect vulnerable groups from COVID-19 and risk mitigation is effectively impossible in jails, including those in New York City, correctional public health experts—including the New York City Board of Correction, the lead doctor of New York’s own correctional health system and several experts around the country—have recommended the release from custody of people most vulnerable to COVID-19. As these experts have explained, release is the only effective means to protect the people with the greatest vulnerability to COVID-19 from transmission of the virus and also allows for greater

risk mitigation for all people who remain held or working on Rikers Island and other New York City jails.

10. On March 21, 2020, the Board of Correction (“BOC”) issued its second advisory letter, urging judges and prosecutors to act quickly to release people, like Petitioners, who are over fifty years old and who have health conditions that make them high-risk for COVID-19.⁴ The BOC also recommended immediate release of individuals who are incarcerated for technical violations of parole and those serving city sentences.⁵ As the BOC reported – using statistics that are already out of date and thus significantly understate the numbers of diagnosed illnesses and deaths:

Over the past six days, we have learned that at least twelve DOC employees, five CHS employees, and ***twenty-one people in custody have tested positive for the virus***. There are more than 58 individuals currently being monitored in the contagious disease and quarantine units (up from 26 people on March 17). It is likely these people have been in hundreds of housing areas and common areas over recent weeks and have been in close contact with many other people in custody and staff. ***Given the nature of jails (e.g. dense housing areas and structural barriers to social distancing, hygiene, and sanitation), the number of patients diagnosed with COVID-19 is certain to rise exponentially***. The best path forward to protecting the community of people housed and working in the jails is to rapidly decrease the number of people housed and working in them.⁶

11. In other parts of the country, government officials have recognized this reality and begun releasing medically vulnerable pre-trial detainees. The Supreme Court of New Jersey mediated a process between the N.J. Office of the Public Defender, the ACLU of New Jersey, the N.J. Office of the Attorney General, and the County Prosecutors Association that resulted in a court order creating a presumption of release *all* inmates serving a county jail sentence or a

⁴ Jacqueline Sherman, Interim Chair of NYC Board of Correction, letter, Mar. 21, 2020, *available at* <https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf> (last visited Mar. 22, 2020).

⁵ *Id.*

⁶ *Id.* (emphasis added).

sentence as a condition of probation, resulting in the release of over 1,000 people. *See* Consent Order, Supreme Court of New Jersey, Docket No. 084320 (Mar. 22, 2020). Other courts have begun granting specific applications for release of pretrial detainees, with many more such applications pending around the country.⁷

12. In New York, however, as of the date of this writing the Mayor of New York reports that only 75 people *from all across the City's jails* have been released.⁸ There are more than 5,000 people on Rikers Island alone. Only a few handfuls of people have been revoked and restored in a negotiated process that remains ongoing between DOCCS and the Legal Aid Society. That process, however, is cumbersome and time consuming and it is unclear if anyone has actually been released from Rikers as a result.

13. All across New York City, extraordinary and unprecedented measures affecting every aspect of life are being taken in the name of protecting people from this pandemic. New York cannot leave people in jails behind to suffer and die.

14. Respondent Cynthia Brann is the Commissioner of the New York City Department of Correction. Respondent is a legal custodian of Petitioners.

15. Respondent Anthony J. Annucci is the Acting Commissioner of the New York State Department of Correction and Community Supervision (“DOCCS”). Respondent is a legal custodian of Petitioners who are detained pursuant to a parole warrant. **remove if no parole

JURISDICTION AND VENUE

16. This court has subject matter jurisdiction over this matter under CPLR § 7001.

17. Petitioner has made no prior application for the relief requested herein.

⁷ *See infra* paragraph 173.

⁸ The Mayor announced this statistic on a press conference on March 23, 2020.

18. **omit if no parole hold: Copies of the mandates pertaining to Petitioner are not attached hereto because the Department of Corrections and Community Supervision, which has issued and executed the parole warrant in this case, never supplies the petitioners or their attorney with a copy of the warrant.

STATEMENT OF FACTS

The COVID-19 Pandemic Presents a Grave Risk of Harm, Including Serious Illness and Death, to People Over Age 50 and Those With Certain Medical Conditions

19. COVID-19 is a coronavirus that has reached pandemic status. As of the early morning of March 25, 2020, over 412,500 people worldwide have confirmed diagnoses, including more than 53,852 people in the United States. New York City, with more than 26,665 confirmed cases, has rapidly become the epicenter of the spread of COVID-19 in the United States. Over 18,552 people have died worldwide, including more than 728 people in the United States and more than 200 in New York. Thousands of new cases are being reported each day in New York State.⁹

20. The World Health Organization has declared COVID-19 a pandemic.¹⁰ On March 7, 2020, the governor of the State of New York issued Executive Order Number 202, declaring a disaster emergency for the entire State of New York.¹¹ Subsequently, the Mayor of

⁹ N.Y. TIMES, *Live Updates*, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last accessed Mar. 25, 2020).

¹⁰ Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, WALL ST. J. (Mar. 11, 2020, 11:59 PM), <https://www.wsj.com/articles/u-s-coronavirus-cases-top-1-000-11583917794>

¹¹ Jesse McKinley & Edgar Sandoval, *Coronavirus in N.Y.: Cuomo Declares State of Emergency*, N.Y. TIMES, (Mar. 7, 2020), <https://www.nytimes.com/2020/03/07/nyregion/coronavirus-new-york-queens.html>.

New York City declared a State of Emergency for the City.¹² The President of the United States has now officially declared a national emergency.¹³

21. The transmission of COVID-19 is expected to grow exponentially. Nationally, projections by the Center for Disease Control and Prevention (“CDC”) indicate that over 200 million people in the United States could be infected with COVID-19 over the course of the pandemic without effective public health intervention, with as many as 1.5 million deaths in the most severe projections.¹⁴

22. COVID-19 is a particularly contagious disease. 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.¹⁵ Indeed, a new study of an early cluster of COVID-19 cases in Wuhan, China revealed the dangers of indirect transmission resulting from infected people contaminating common surfaces—in the study, it was a communal mall bathroom.¹⁶

23. New research also shows that controlling the spread of COVID-19 is made even more difficult because of the prominence of asymptomatic transmission—people who are

¹² *de Blasio Declares State of Emergency in N.Y.C., and Large Gatherings Are Banned*. N.Y. TIMES (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/nyregion/coronavirus-new-york-update.html>.

¹³ Derek Hawkins et al., *Trump Declares Coronavirus Outbreak a National Emergency*, WASH. POST (Mar. 13, 2020, 10:46 AM), <https://www.washingtonpost.com/world/2020/03/13/coronavirus-latest-news/>.

¹⁴ Chas Danner, *CDC’s Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead*, N.Y. MAG. (Mar. 13, 2020), <https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html>.

¹⁵ *Novel Coronavirus Can Live on Some Surfaces for Up to 3 Days, New Tests Show*. TIME (<https://time.com/5801278/coronavirus-stays-on-surfaces-days-tests/>) (last visited Mar. 19, 2020).

¹⁶ Cai J, Sun W, Huang J, Gamber M, Wu J, He G. Indirect virus transmission in cluster of COVID-19 cases, Wenzhou, China, 2020. *Emerg Infect Dis.* 2020 Jun. (<https://doi.org/10.3201/eid2606.200412>) (last visited Mar. 18, 2020).

contagious but who exhibit limited or no symptoms, rendering ineffective any screening tools dependent on identifying symptomatic behavior.¹⁷

24. There is no vaccine for COVID-19. No one is immune.

25. Older adults and those with certain medical conditions face greater chances of serious illness or death from COVID-19.¹⁸

26. 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.

27. 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.¹⁹

28. COVID-19 can cause severe damage to lung tissue, sometimes leading to a permanent loss of respiratory capacity, and can damage 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.

¹⁷ *Coronavirus: Are People Who Are Asymptomatic Still Capable of Spreading COVID-19?* Independent. Available at <https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html> (last visited Mar. 18, 2020).

¹⁸Medical information in this and the petition paragraphs that follow are drawn from the expert testimony of two medical professionals filed in a recent filed federal case in Washington State, as well the website of the Harvard Medical School. See Expert Declaration of Dr. Marc Stern: <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern>; Expert Declaration of Dr. Robert Greifinger: <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-robert-greifinger>; Expert Declaration of Dr. Jonathan Golob <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-jonathan-golob?redirect=dawson-v-asher-expert-declaration-dr-jonathan-golob>; HARVARD MEDICAL SCHOOL, CORONAVIRUS RESOURCE CENTER, *As coronavirus spreads, many questions and some answers*, <https://www.health.harvard.edu/diseases-and-conditions/coronavirus-resource-center>, (last visited Mar. 19, 2020).

¹⁹ *Id.*

Patients who do not die from serious cases of COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurological damage and loss of respiratory capacity.

29. 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.

30. Emerging evidence suggests that COVID-19 can also trigger an over-response of the immune system, further damaging tissues in a cytokine release syndrome that can result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury.

31. These complications can manifest at an alarming pace. Patients can show the first symptoms of infection in as little as two days after exposure, and their condition can seriously deteriorate in as little as five days or sooner.

32. Most people in higher risk categories who develop serious disease will need advanced supportive care requiring highly 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 can quickly exceed local health care resources. Patients in high-risk categories should expect a prolonged recovery, including the need for extensive rehabilitation for profound reconditioning, loss of digits, neurologic damage, and the loss of respiratory capacity.

33. The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 than from influenza. 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. According to preliminary data from China, 20 percent of people in high-risk categories who contracted COVID-19 there died.²⁰

34. There is no cure for COVID-19 nor is there any known medication to prevent or treat infection.

35. The only known methods to reduce the risk for vulnerable people of 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.

Petitioner Faces Elevated Risk of COVID-19 Transmission Due to Incarceration In New York City Jails

36. COVID-19 has now reached Rikers Island and is rapidly spreading. On March 20, 2020, there was only one confirmed case of a detainee with a positive COVID-19 diagnosis.²¹ Just one day later, on March 21, 2020, the New York City Board of Correction reported that at least 21 detainees in New York City DOC jails had tested positive for the virus, along with

²⁰ *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 28, 2020), at 12, <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> (finding fatality rates for patients with COVID-19 and co-morbid conditions to be: “13.2% for those with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer”); Wei-jie Guan et al., *Comorbidity and its impact on 1,590 patients with COVID-19 in China: A Nationwide Analysis*, medRxiv (Feb. 27, 2020), at 5, <https://www.medrxiv.org/content/10.1101/2020.02.25.20027664v1.full.pdf> (finding that even after adjusting for age and smoking status, patients with COVID-19 and comorbidities of chronic obstructive pulmonary disease, diabetes, hypertension, and malignancy were 1.79 times more likely to be admitted to an ICU, require invasive ventilation, or die, the number for two comorbidities was 2.59); Fei Zhou et al., *Clinical course and risk factors for mortality of adult inpatients with COVID-19 in Wuhan, China: a retrospective cohort study*, *Lancet* (March 11, 2020), tb. 1, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30566-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext) (finding that among hospital patients, who tended to be older, of those who had COVID-19 and died, 48% had hypertension, 31% had diabetes, and 24% had coronary heart disease).

²¹ Chelsia Rose Marcius, *Rikers Island inmate has contracted coronavirus: officials*, N.Y. DAILY NEWS (Mar. 18, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-rikers-island-inmate-tests-positive-20200318-gf3r7q4cefaxzmqmwrmuevzz3y-story.html>.

twelve DOC employees, and five Correctional Health Services (CHS) employees.²² As of this filing on March 25, 2020, there are at least 75 people in are in DOC jails have tested positive. There are now at least 39 inmates diagnosed with the virus, indicating transmission is now passing at an alarming rate and will only continue to spread rapidly.

37. One DOC staff member, a 56-year-old Investigation Division staffer, whose position entailed interviewing detainees in several facilities as part of investigations, died on March 15, 2020.²³ He reportedly had underlying health conditions, **just as petitioner does**.²⁴

38. Infectious diseases that are communicated by air or touch are more likely to spread in congregate environments such as jails – places where people live, eat, and sleep in close proximity.

39. The highest known person-to-person transmission rate for COVID-19 to date took place in a skilled nursing home facility in Kirkland, Washington, and on afflicted cruise ships in Japan and off the coast of California.

40. The conditions of New York City jails pose even a higher risk of the spread of COVID-19 than in non-carceral locations like a nursing home or cruise ship. Jails have a greater risk because of closer quarters, the proportion of vulnerable people detained, and scant medical care resources.

41. Severe outbreaks of contagious illness regularly occur in jails. For example, during the H1N1 epidemic in 2009, many jails and prisons saw a particularly high number of

²² Jacqueline Sherman, Interim Chair of NYC Board of Correction, letter, Mar. 21, 2020, *available at* <https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf> (last visited Mar. 22, 2020).

²³ Chelsia Rose Marcius, *Coronavirus kills NYC Correction Department official*, N.Y. DAILY NEWS (Mar. 18, 2020) <https://www.nydailynews.com/coronavirus/ny-coronavirus-department-correction-employee-dies-from-coronavirus-20200316-akeai6gop5alledhzhi7u3pivm-story.html>.

²⁴ *Id.*

cases.²⁵ H1N1 is far less contagious than COVID-19. Not surprisingly, Chinese prison officials report that over five-hundred (500) COVID-19 cases in the current outbreak stemmed from the Hubei province prisons.²⁶ The rate of incarceration in China is far lower than in the United States, suggesting the problem here will be much worse. Experts predict that “[a]ll prisons and jails should anticipate that the coronavirus will enter their facility[.]”²⁷

42. Even at current rates of infection, which are rapidly growing, the virus’s “attack rate” on Rikers Island – that is, the rate at which the population is being infected – is roughly *fifty times higher* than the average and five times higher than anywhere else in the entire country.

43. In New York City jails, jail design and operations make it impossible for Petitioner to engage in the necessary social distancing required to mitigate the risk of transmission. Many people live in dormitory-like sleeping arrangements. They have limited freedom of movement and no control over the movements of others with whom they are required to congregate on a daily basis. They are unable to maintain anything close to the recommended distance of 6 feet from others.

44. Petitioner also cannot maintain adequate levels of preventive hygiene. They are required to share or touch objects used by others. Toilets, sinks and showers are shared, without disinfection between each use.

²⁵ Nicole Westman, The Verge, *Prisons and jails are vulnerable to COVID-19 outbreaks*, available at <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap> (Mar. 12 2020). See also David M. Reutter, Swine Flu Widespread in Prisons and Jails, but Deaths are Few, PRISON LEGAL NEWS, (Feb. 15, 2020) at <https://www.prisonlegalnews.org/news/2010/feb/15/swine-flu-widespread-in-prisons-and-jails-butdeaths-are-few/>.

²⁶ Evelyn Cheng and Huileng Tan, China Says More than 500 Cases of the New Coronavirus Stemmed from Prisons, CNBC, Feb. 20, 2020, available at <https://www.cnbc.com/2020/02/21/coronavirus-china-says-two-prisons-reportednearly-250-cases.html>.

²⁷ *Id.* (quoting Tyler Winkelman, co-director of the Health, Homelessness, and Criminal Justice Lab at the Hennepin Healthcare Research Institute in Minneapolis).

45. Food preparation and service is communal, served by other incarcerated workers drawn from many different housing areas within the jail, with little opportunity for surface disinfection.

46. There have been shortages of basic cleaning supplies to disinfect housing areas in New York City jails, including housing areas where people with respiratory illnesses are currently confined.

47. DOC cleaning protocols for common spaces are often not followed. On Monday, March 23, 2020, a Legal Aid lawyer spoke to her client who reported that six people had been removed from his dormitory over the weekend after testing positive for COVID-19, but his dormitory still had not been cleaned. Later that day, the Legal Aid Society informed DOC in a letter of this and other complaints, but to date have not had a response.

48. Petitioner lacks ready access to soap and water for washing hands. If a sink in a housing area is broken, they do not have a choice to walk to an area with a working sink. Soap and paper towels are not provided by the jail. Often, the only means to access soap is by purchasing it in commissary—which is not an option for many detainees who lack access to funds. There is no recourse if another person takes a vulnerable person's bar of soap.

49. As recently as the day before this filing, clients of the Legal Aid Society were reporting to their attorneys that they had no access to soap or hand sanitizer despite DOC's public pledges that it was ensuring such access.

50. Hand sanitizer capable of killing COVID-19 contains alcohol, which has been treated as contraband in jails. Indeed, on March 20, 2020, a representative for Respondent Brann confirmed in a court proceeding that detainees still do not have access to hand sanitizer because of its' purported dangerousness.

51. New York City jails lack adequate infrastructure to address the spread of infectious disease and the treatment of people most vulnerable to illness.

52. ****Client reports** (if you spoke with your client include details) ****if applicable,** include requests to go to CHS because of specific symptoms, e.g. vomiting, coughing, etc.. Additionally, add specific facts: e.g. many of the other individuals in his unit are coughing and complaining of flu-like symptoms. He and others are being told by correctional officers that there are not any escorts to bring sick individuals to the CHS clinic. He has requested to be housed in a unit where he may socially distance himself from staff/other people in custody who are displaying symptoms, but [he remains in a dorm setting/a person in a neighboring cell is coughing, exposing him to airborne viral particles on an hourly basis]. His housing unit does not have access to soap, hand sanitizer, an adequate number of working sinks, or the cleaning supplies and protective gear necessary to disinfect common and personal areas. In violation of stated Department protocol²⁸ for cleaning and sanitizing during the COVID-19 pandemic, ****his/her/their housing unit has not been cleaned in X days/his shower area has not been cleaned in X days.**

53. Neither DOC nor Correctional Health Services (“CHS”), the medical services provider in New York City jails, has implemented protocols sufficient to screen, detect or identify incarcerated people or staff who have been infected.

54. On March 10, 2020, DOC officials testified at a Board of Correction meeting that the Communicable Disease Unit (“CDU”) has only 88 respiratory isolation beds available for people who become infected. Officials did not identify how many of these beds are already

²⁸ NYC DOC STATEMENT ON RESPONSE TO CORONAVIRUS, March 3, 2020. Available at <https://www1.nyc.gov/site/doc/media/coronavirus.page> (last visited Mar. 13, 2020).

occupied by other ill people or what actions would be taken by the Department in the event that CDU and hospital ward capacity is exhausted.²⁹

55. The procedures outlined in the DOC’s “COVID19 Preparation & Action Plan” issued on March 5, 2020 are not sufficient to mitigate the risk of serious harm. According to this plan, newly admitted detainees will only be separated from other detainees if they exhibit “flu-like” symptoms upon admission.³⁰ This initial screening process overlooks the fact that COVID-19 may present with a slower onset of symptoms than the flu — meaning that many who are infected with COVID-19 do not show signs of illness.³¹ The dangers of asymptomatic transmission continue within DOC facilities. DOC and CHS have revealed only symptom-reactive policies—that staff will be sent home and incarcerated people will be separated and treated *if they display symptoms*³²—which are ineffective to stop the rampant asymptomatic transmission of the disease.³³

56. DOC plans to warehouse all of its “sick” detainees together, in communal living spaces, where they will “sleep head to toe thereby increasing breathable space between inmates,”³⁴ a measure that will do little to avoid transmission among detainees.

57. Even if all of these problems could be resolved, however, they would not sufficiently address the risk of serious medical harm to Petitioner. As Dr. Homer Venters, former

²⁹ Testimony of Dept. of Corr. Official, N.Y.C. Bd. of Corr. Mtg., Mar. 10, 2020 at 17:40, <https://www1.nyc.gov/site/boc/meetings/mar-10-2020.page>.

³⁰ See N.Y.C. Dept. of Corr., *COVID19 Preparation & Action Plan*, <https://www1.nyc.gov/site/doc/media/coronavirus-news.page> (last visited Mar. 19, 2020).

³¹ CDC, *Coronavirus Disease 2019 (COVID-19) Symptoms*, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last visited Mar. 19, 2020); see also Yale New Haven Health, *Coronavirus (COVID-19) vs. Influenza (Flu)*, <https://www.ynhhs.org/patient-care/urgent-care/flu-or-coronavirus> (last visited Mar. 19, 2020).

³² New York City Department of Correction: COVID19 Preparation & Action Plan, *available at* <https://www1.nyc.gov/site/doc/media/coronavirus-news.page> (last visited Mar. 18, 2020).

³³ *Coronavirus: Are People Who Are Asymptomatic Still Capable of Spreading COVID-19?* Independent. Available at <https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html>.

³⁴ *Id.*

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.*’”³⁵

58. Likewise, Correctional Health Services (“CHS”), which administers medical care in New York City jails, has acknowledged their limited capacity to manage the risk of the virus and has requested that courts reconsider the necessity of pretrial detention for high risk patients until the current state of emergency is resolved.

Release Is Required to Address the Risk of Serious Medical Harm

59. Because risk mitigation is the only known strategy to protect vulnerable groups from COVID-19, correctional public health experts, including the New York City Board of Correction, have recommended the release from custody of people most vulnerable to COVID-19. On March 17, 2020, they called on New York City to “immediately remove from jail all people at higher risk from COVID-19 infection” and to “drastically reduce the number of people in jail right now and limit new admissions to exceptional circumstances.”³⁶ The Board reasons that “[t]he City’s jails have particular challenges to preventing disease transmission on a normal day and even more so during a public health crisis.”³⁷ Accordingly, the Board recommends that DOC prioritize the release of “[p]eople who are over 50; [and] [p]eople who have underlying

³⁵ Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, MOTHER JONES (Mar. 12, 2020), 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.

³⁶ Press Release, N.Y.C. Bd. of Corr., New York City Board of Correction Calls for City to Begin Releasing People from Jail as Part of Public Health Response to COVID-19 (Mar. 17, 2020), <https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17%20-%20Board%20of%20Correction%20Statement%20re%20Release.pdf>.

³⁷ *Id.*

health conditions, including lung disease, heart disease, diabetes, cancer, or a weakened immune system[.]”³⁸

60. Ross McDonald, the Chief Medical Officer of CHS, publicly called for the release from Rikers Island of “as many [people] as possible” on Twitter on March 18, 2020:³⁹

³⁸ *Id.*

³⁹ <https://twitter.com/RossMacDonaldMD/status/1240455796946800641>



Ross MacDonald
@RossMacDonaldMD



A message from the Chief Physician of Rikers Island for the judges and prosecutors of New York: We who care for those you detain noticed how swiftly you closed your courts in response to [#COVID19](#) 1/x

9:51 PM · Mar 18, 2020 · [Twitter for iPhone](#)

5.7K Retweets 16.8K Likes



Ross MacDonald @RossMacDonaldMD · 15h



Replying to @RossMacDonaldMD

This was fundamentally an act of social distancing, a sound strategy in public health. But the luxury that allows you to protect yourselves, carries with it an obligation to those you detain. 2/x

3

475

4.1K



Ross MacDonald @RossMacDonaldMD · 15h



You must not leave them in harm's way 3/x

2

341

3.6K



Ross MacDonald @RossMacDonaldMD · 15h



To be clear, the public servants who care for those in your jails have been planning for this storm for weeks and months. We will muster every tool of public health, science and medicine to try to keep our patients safe. We will apply every novel treatment and scarce test. 4/x

3

349

3.5K



Ross MacDonald @RossMacDonaldMD · 15h



We will put ourselves at personal risk and ask little in return. But we cannot change the fundamental nature of jail. We cannot socially distance dozens of elderly men living in a dorm, sharing a bathroom. Think of a cruise ship recklessly boarding more passengers each day. 5/x

4

547

3.8K



Ross MacDonald @RossMacDonaldMD · 15h



A storm is coming and I know what I'll be doing when it claims my first patient. What will you be doing? What will you have done? We have told you who is at risk. Please let as many out as you possibly can. end.

37

947

6.1K



61. Similarly, Dr. Rachel Bedard, a geriatrician who works on Rikers Island providing medical care for elderly and ill detainees, explained why effective preventative measures in a jail setting are nearly impossible.

You cannot implement effective social distancing in a room that sleeps forty men. You cannot implement effective social distancing when those forty men are using two or three sinks and one of them may be broken. You cannot implement effective social distancing when the staff interacts with all of them and has to touch all of them in the course of a day. . . . [Detainees] don't have our own cleaning supplies. They can't wipe down their own surfaces. They have to wait for someone to come in and do that for them.⁴⁰

62. Dr. Bedard stated that Rikers' physicians' public cry for immediate release of large numbers of detainees is unprecedented but necessary because "the moral calculus has changed and our voices needed to be heard on this issue."⁴¹ Dr. Bedard noted that, to be effective, the DOC must release "hundreds of people . . . so that the jail population is decreased enough that you don't just benefit the people who are released but you also benefit those who are left behind—and the staff who take care of them and the officers who take care of them."⁴²

63. Likewise, the District Attorneys of New York and Kings County have endorsed a plan to identify and release people who are "elderly" or other "[p]opulations that the CDC has classified as vulnerable (those with asthma, cancer, heart disease, lung disease, and diabetes)."⁴³

64. Courts and public officials in other jurisdictions, including in Los Angeles, California and parts of Ohio and Texas, have already responded by taking steps to facilitate the

⁴⁰ Jennifer Gonnerman, A Rikers Island Doctor Speaks Out to Save Her Elderly Patients from the Coronavirus, *New Yorker Magazine*, available at <https://www.newyorker.com/news/news-desk/a-rikers-island-doctor-speaks-out-to-save-her-elderly-patients-from-the-coronavirus> (last visited Mar. 22, 2020).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of those in Custody (Mar. 18, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>.

release of elderly and sick prisoners, and to reduce jail populations by refusing the admission to jails of individuals arrested on certain charges.⁴⁴ In Iran, one of the first countries to see the outbreak of COVID-19, 85,000 inmates were temporarily released back to their communities amid virus concerns.⁴⁵ The State of New Jersey just announced plans to temporarily release up to 1,000 people held in county jails.⁴⁶

65. Courts across the country have also begun granting specific applications for release of pretrial detainees, with many more such applications pending. *See, e.g., United States v. Raihan*, No. 20-cr-68 (BMC) (JO), Dkt. No. 20 at 10:12–19 (E.D.N.Y. Mar. 12, 2020) (ordering the continued release of a pre-trial detainee on the grounds that “[t]he more people we crowd into that facility [the Manhattan Detention Center], the more we’re increasing the risk to the community”); *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*, 2020 WL 1307109, (N.D. Cal. March 19, 2020) (ordering pre-trial detainee’s release on bond despite finding the person was a flight risk and despite the fact

⁴⁴*See, e.g.,* Alene Tchekmedyan et al, *L.A. County releasing some inmates from jail to combat coronavirus*, L.A. Times, (Mar. 16, 2020, 7:25 PM), <https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus>; Cory Shaffer, *Cuyahoga County official will hold mass plea, bond hearings to reduce jail population over coronavirus concerns*, CLEVELAND.COM (Mar. 12, 2020), <https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html>; WKBN Staff, *Local county jails making changes due to coronavirus outbreak*, WKBN (Mar. 12, 2020) (“The Mahoning County [Ohio] Sheriff’s Office is refusing all non-violent misdemeanor arrests at the county jail”), <https://www.wkbn.com/news/coronavirus/mahoning-county-jail-refusing-some-inmates-due-to-coronavirus-outbreak/>; *see also* Charles Scudder, *Facing coronavirus concerns, Collin County [Texas] Sheriff asks police not to bring petty criminals to jail*, DALLAS MORNING NEWS (Mar. 12, 2020 5:57 PM), <https://www.dallasnews.com/news/public-health/2020/03/12/facing-coronavirus-concerns-collin-county-sheriff-asks-police-not-to-bring-petty-criminals-to-jail/>.

⁴⁵ *Hard-hit Iran frees more prisoners amid coronavirus outbreak*, AL JAZEERA (Mar. 17, 2020), <https://www.aljazeera.com/news/2020/03/hard-hit-iran-frees-prisoners-coronavirus-outbreak-200317110516495.html>.

⁴⁶ In the Matter of the request to Commute or Suspend County Jail Sentences, https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf?utm_source=The+Appeal&utm_campaign=738080af0c-EMAIL_CAMPAIGN_2018_08_09_04_14_COPY_01&utm_medium=email&utm_term=0_72df992d84-738080af0c-58432543

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”); *U.S. v. Stephens*, 19cr95, 2020 WL 1295155, (AJN) (S.D.N.Y. 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 (PAE), Dkt. No. 62 (March 19, 2020) (ordering the release of a detainee held on sex crime charges with “serious progressive lung diseases after finding “compelling reasons exist for temporary release of the defendant from custody during the current public health crisis”).

66. In a recent court filing seeking the release of federal immigration detainees, Dr. Marc Stern, a correctional health expert, has 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.”⁴⁷

67. Another correctional health expert in that same court case, Dr. Robert Greifinger, concluded that “even with the best-laid plans to address the spread of COVID-19 in detention facilities, the release of high-risk individuals is a key part of a risk mitigation strategy.” Accordingly, in his opinion, “the public health recommendation is to release high-risk people

⁴⁷Decl. of Dr. Marc Stern ¶¶ 9, 11, *Dawson v. Asher*, (No. 2:20-CV-409-JLR-MAT) (Mar. 16, 2020), <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern>.

from detention, 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.”⁴⁸

68. Release protects the people with the greatest vulnerability to COVID-19 from transmission of the virus and also allows for greater risk mitigation for all people held or working in prisons and jails.

69. Release of the most vulnerable people also reduces the burden on New York’s limited health care infrastructure, as it lessens the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time.

Failure to Release Petitioner Constitutes Deliberate Indifference to Serious Medical Harm

70. Continuing to incarcerate people who have been deemed by the CDC to be especially vulnerable to a deadly pandemic, in conditions where taking the only known steps to prevent transmission are virtually impossible, constitutes deliberate indifference to serious medical harm in violation of the United States and New York State constitutions.

71. The Due Process clause of the Fourteenth Amendment proscribes deliberate indifference to the serious medical needs of people held in pre-trial confinement. *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). To establish a federal constitutional claim, Petitioner must prove that Respondents (1) acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though (2) they knew, or should have known, that the condition posed an excessive risk to health or safety. *Id.* at 35. The same standard applies those held on parole warrants. *Benjamin v. Malcolm*, 646 F. Supp. 1550, 1556 (S.D.N.Y. 1986) (“[A]lleged parole violators ought not to be treated differently from other detainees, since the charges of parole

⁴⁸ Decl. of Dr. Robert Greifinger ¶ 13, *Dawson v. Asher*, (No. 2:20-CV-409-JLR-MAT) (Mar. 16, 2020), <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-robert-greifinger>

violation standing against them are unproven, and in many instances, involve the same charges as those for which they are substantively detained.”); *Hamilton v. Lyons*, 74 F.3d 99, 106 (5th Cir. 1996) (“[We] apply *Bell*’s standard to detained parolees only to the extent that we recognize that a parolee arrested for a subsequent crime has a due process right to be free from punishment for the subsequent crime until convicted of the subsequent crime.”).

72. There is an even stronger due process right to be free from unconstitutional conditions of confinement under the New York State Constitution. In *Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979), the Court of Appeals concluded that the state due process clause accords even greater protection for pretrial detainees than the federal constitution, holding that “what is required is a balancing of the harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement.” For the government to prevail, it must prove a “compelling governmental necessity” for any restrictions on pretrial detainees’ liberty interests. *People ex rel. Schipski v. Flood*, 88 A.D.2d 197 (2nd Dep’t 1982). This is an “exacting standard.” *Id.* The state’s interests are limited to those arising from the “only legitimate purpose for pretrial detention . . . to assure the presence of the detainee for trial.” *Id.* at 81; *see also Schipski*, 88 A.D.2d at 199-200 (holding county jail’s blanket policy of 22-hour lock-in for a certain category of pretrial detainees violates the state’s due process guarantee); *Powlowski v. Wullich*, 102 A.D.2d 575, 587 (1984) (holding that because a jail’s practice of depriving pretrial detainees of recreation and exercise “violates the federal standard, it, a fortiori, must fail the more stringent standard balancing test prescribed for violations of our state due process clause”).

73. The U.S. Supreme Court and courts throughout 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 U.S. 25, 33 (1993). *See also Jolly v.*

Coughlin, 76 F.3d 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 (GBD), 2017 WL 1535386, at *9 (S.D.N.Y. 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 (S.D.N.Y. 1998) (acknowledging that prisoner could state claim under § 1983 for confinement in same cell as inmate with serious contagious disease).

74. Respondents are well aware of the extraordinary risk COVID-19 poses to people in New York City jails. As pleaded above, they have alerted to this risk by the Board of Correction, their own correctional health service, and at least two of New York’s elected District Attorneys.

75. On March 13, 2020, the Legal Aid Society sent a letter to Respondent the New York City Department of Correction (“DOC”) noting multiple complaints from incarcerated clients about the lack of basic sanitation raising concerns about the ability to manage the risk of COVID-19 in New York City jails.⁴⁹

76. Since at least March 15, 2020, attorneys in the Legal Aid Society’s Parole Revocation Defense Unit have sent lists of medically vulnerable people held on parole warrants to Respondent Department of Correction and Community Supervision (“DOCCS”), asking for their urgent release.

⁴⁹ Letter from Justine Luongo, Attorney-in-Charge, Legal Aid Society Criminal Defense Practice, to Commissioner Cynthia Brann, N.Y.C. Department of Corrections, and Elizabeth Glazer, Mayor’s Office of Criminal Justice (Mar. 13, 2020), <https://legalaidnyc.org/wp-content/uploads/2020/03/LAS-Letter-to-NYC-re-COVID-19-Preparedness-in-City-Jails.pdf>.

77. DOCCS has not responded to these requests other than to send an email confirming receipt.

78. 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 jail environment.

79. Respondents' intentional failure to release Petitioner while actually aware of the substantial risk of COVID-19 plainly constitutes deliberate indifference.

The Remedy of Immediate Release is Necessary and Appropriate Under the Circumstances

80. The affirmative obligation to protect against infectious disease empowers Courts to provide remedies designed to prevent imminent harm to future health. *Helling*, 509 U.S. 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 N.Y.2d 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 F.3d 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).

81. 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 N.Y.2d 482, 485 (1961) (habeas petition may be used to address "restraint in excess of that permitted by...constitutional guarantees); *Kaufman v. Henderson*, 64 A.D.2d

849, 850 (4th Dep't 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 N.Y.2d 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.* Thus, courts have addressed whether the failure to address medical needs has risen to the level of a constitutional violation, requiring immediate release. See, e.g., *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 250–51 (2d Dep't 1993) (habeas petition addressing whether failure to provide adequate medical care constituted cruel and unusual punishment or deliberate indifference).

82. 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). Indeed, habeas relief is the *only* remedy available in such circumstances. *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973).

83. While there is limited precedent on this issue, New York’s habeas jurisprudence in general has long contemplated the possibility that habeas claims for release based on conditions could be entertained *if* a petitioner could establish that the appropriate remedy was release. See *People ex rel. Sandson v Duncan*, 306 A.D.2d 716, 716–17 (3d Dept. 2003) (upholding denial of the writ because, “[w]hile success on the instant motion might entitle petitioner to the medication he seeks, it would not excuse him from serving the remainder of his sentence” and reasoning that “[h]abeas corpus will be granted only in cases where success would entitle the petitioner to immediate release”); *People ex rel. Barnes v. Allard*, 807 N.Y.S.2d 688, 689 (3d Dept. 2006) (“As for petitioner’s complaint regarding the correctional facility’s alleged

deliberate indifference to his medical needs, . . . it would not entitle him to immediate release, thus making habeas corpus relief unavailable”).

84. Given the life-threatening nature of COVID-19 to **client and the DOC’s failure to protect petitioner’s life and safety—despite the DOC’s actual knowledge of and the clear foreseeability of the grave risk to petitioner—**client’s continued pre-trial detention is unconstitutional and immediate release is the only adequate remedy.

Petitioner’s Detention is Unlawful Because The Bail is Excessive and Violates Various Provisions of the Criminal Procedure Law

85. In addition to the claims raised above, the current securing order, **insert bail amount** violates C.P.L. § 510.10 and § 510.30(1) because the court imposed bail without a sufficient demonstration that **client poses a risk of flight to evade prosecution, the court failed to adequately consider less restrictive alternatives that would ensure client**’s return to court, and the court improperly applied **/inadequately considered the relevant § 510.30(1) factors.

86. **Insert case specific argument that insufficient demonstration of ROFTAP.

87. Additionally, Judge ** abused his/her/their discretion in failing to “select the least restrictive alternative . . . that will reasonably assure the principal’s return to court.” *See* C.P.L. § 510.10(1); *see also* C.P.L. § 510.30(1) (“With respect to any principal, the court *in all cases* . . . *must impose the least restrictive kind and degree of control or restriction* that is necessary to secure the principal’s return to court when required.”) (emphasis added). The monetary bail imposed here contravenes this statutory directive because the Court neglected to consider available, less-restrictive means that would sufficiently assure **client’s return. Indeed, the fact that petitioner is still detained on bail that is unaffordable, and thus overly restrictive, means that the securing order is not the “least restrictive” means to assure his return.

88. Moreover, the bail-setting Judge’s order is unlawful and amounts to an abuse of discretion because the court failed to adequately consider all relevant factors under C.P.L. § 510.30(1), including **client’s ability to obtain an unsecured, or partially secured bond without posing undue hardship, C.P.L. § 510.30(1)(f). The Legislature is clear that bail need not, and must not, be set in every case charging the principal with a “qualifying” offense, as defined in C.P.L. § 510.10(4). Rather, bail may *only* be set on qualifying offenses if the principal is deemed to be a risk of flight to evade prosecution and if the bail imposed is the least restrictive means to assure the principal’s return to court. *See* C.P.L. § 510.10(1); C.P.L. § 510.30(1). Bail that restricts liberty beyond what would guarantee a return to court, like the bail imposed here, violates the statute.

89. The fundamental and exclusive purpose of bail in New York is to assure that people return to court to face the prosecution against them. In the present case, **insert bail amount** is functioning as a remand, rather than a means to ensure **Mr./Ms. **name return to court. **[Insert what you’re asking for: **A partially secured bond in the amount of \$*** OR release with XYZ programming **, is a less restrictive degree of control that would sufficiently ensure **client’s appearance at each and every court date moving forward. For these reasons, Judge **name** abused **his/her/their discretion in setting bail in an amount that is not only an undue hardship, but clearly out of reach for **client and his/her/their loved ones.

The Current Bail is Unconstitutionally Excessive Under the United States and New York Constitutions, and Petitioner’s Incarceration Violates the Equal Protection and Due Process Clauses

90. **Client alleges not only that the current bail is an abuse of discretion, but also that it deprives him/her/them** of his/her/their** constitutional rights to due process and equal protection. Those questions of constitutional law are properly reviewable by this court sitting in review of **client’s** writ of habeas corpus. *People ex rel. Klein v. Krueger*, 25 N.Y.2d 497,

499 (1969) (“The habeas corpus court, for constitutional reasons at the very least, may not escape the responsibility of reviewing the action of the bail-fixing court. To this extent, but only to this extent, its review is plenary.”).

91. “In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987). The bail decision in this case violates this cornerstone of our criminal justice system—that a presumptively innocent person should not be deprived of the fundamental right to liberty simply because they cannot pay bail that a wealthier person could afford to pay. U.S. Const. amends. V, VIII, XIV; N.Y. Const. art 1, § 5.

92. In this case, the Court was fully aware that **[client] is indigent when it set bail at **[bail amount]—an amount so high that it would clearly act as a remand order. **[Summarize again main arguments and evidence below that indicated to court that client cannot afford current bail; note other less restrictive alternatives that were available to Court other than bail]. In setting that *de facto* remand order, the court never complied with the procedural due process standards required by statute and by the federal and New York constitutions to subject **[client] to indefinite pretrial detention. *See Salerno*, 481 U.S. 739.

93. In sum, not only did Judge ** abuse **his/her/their discretion in imposing a securing order that violated the C.P.L., but also in imposing an unconstitutionally excessive amount of bail. For all of these reasons, this Court should **[release **client **on recognizance/under supervision **insert what you’re asking for.]

Relief Requested

94. This Court should remedy the federal and state due process violation caused by petitioner’s continued confinement by granting this writ of habeas corpus and ordering

Petitioner's immediate release, with appropriate precautionary public health measures. In the alternative, this court should find that the current securing order is unlawfully excessive and order client to be [**alternative remedy of reduced bail / release with non-monetary conditions]. **This condition will sufficiently ensure **Mr./Ms. [client]'s return to court, will not result in impermissible detention based on poverty.

95. Petitioner has not been committed and is not detained by virtue of any judgment, decree, final order or process of mandate issued by a Court or Judge of the United States in a case where such Court or Judge has exclusive jurisdiction to order him released.

96. Petitioner is not detained by virtue of any final judgment or decree of a competent tribunal or civil or criminal jurisdiction. Petitioner has no other holds.

97. Petitioner has made no prior application for the relief requested herein and has not filed an appeal.

98. Part **[leave blank if you do not know] has been designated by the Presiding Justice of the Supreme Court, ** County, Criminal Division, as the return court for writs of habeas corpus, and the clerk in that part has stated that the Court is available to hear this Writ on _____, 2020, at _____.

WHEREFORE, Petitioner requests that this Court issue a writ of habeas corpus and order Petitioner's immediate release, with appropriate precautionary public health measures, on the ground that their continued detention violates the Due Process Clause of the United States and New York State constitutions.

Respectfully Submitted,

Dated: New York, New York

_____, 2020

To:

Supreme Court Clerk

**[County] County

**[Supreme Court address]

**[name of DA]

**[County] County

**[DA's office address]

Attn: ADA **[assigned ADA]

JANET E. SABEL

Attorney-in-Charge

Criminal Defense Practice

Legal Aid Society

Attorney for Defendant

**[office address]

**[city], NY **[zip]

**[your name]

Of Counsel

**[your phone]

**[your email]

VERIFICATION

[ATTORNEY NAME], an attorney admitted to practice law in the State of New York, states that he/she/they is/are** the relator, that he/she/they** has read the foregoing petition and that same is true to his/her/their** own knowledge, except for those portions stated on information and belief, which are based on police records and court records which he/she/they** believes to be true.

Dated: **[date], 2020
 **[COUNTY], NEW YORK

JANET E. SABEL
Attorney in Charge
The Legal Aid Society
[**] COUNTY
Criminal Defense Practice

**[ATTORNEY NAME]