SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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PEOPLE OF THE STATE OF NEW YORK
EX REL. [[LAWYER]], Esq.
On behalf of [[DEFENDANT]],

Petitioner,

WRIT OF HABEAS CORPUS

NYSID No. _____
Case No. _____
Index No. _____

CYNTHIA BRANN, Commissioner of Corrections,
City of New York,

And
ANYONE HAVING CUSTODY OF PETITIONER,

Respondents.

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THE PEOPLE OF THE STATE OF NEW YORK

Upon the relation of [[LAWYER]], Esq.,

TO THE COMMISSIONER, NEW YORK CITY DEPARTMENT OF CORRECTION; and

ANYONE HAVING CUSTODY OF PETITIONER:

WE COMMAND YOU, that you have and produce [DEFENDANT] 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 person shall be called or charged, or show cause why the person detained should not be produced, before a Justice of the Supreme Court of the State of New York, Criminal Term, Bronx County, at 265 East 161st Street, County of Bronx, at ___ PM in Part ____ on the __th day of ___, 2020, or as soon thereafter as the matter may be heard, to do and receive what shall then and there be considered concerning the said person and have you then and there this writ.

WITNESS, Hon. _____, one of the Justices of our said Court the ___ day of _____, 2020.

By. _____
[LAWYER], Esq.
Attorney for [DEFENDANT]
The Bronx Defenders
360 East 161st Street
Bronx, NY 10451

The within writ is hereby allowed this ____ day of ___, 2020

_____
Justice of the Supreme Court, Bronx County

I, [LAWYER], Esq., attorney for Petitioner, do hereby waive the production of my client before the Supreme Court, Criminal Division, Bronx County, for the bringing and determination of this writ.

_____
[LAWYER]

Dated: _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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PEOPLE OF THE STATE OF NEW YORK
EX REL. [[LAWYER]], Esq.
On behalf of [[DEFENDANT]],
Petitioner,

VERIFIED PETITION FOR A WRIT OF HABEAS CORPUS

Case No. _____
Index No. _____

CYNTHIA BRANN, Commissioner of Corrections,
City of New York,

And
ANYONE HAVING CUSTODY OF PETITIONER,

Respondents.

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[LAWYER], ESQ., an attorney duly admitted to practice law in the State of New York, hereby affirms the following under penalty of perjury:

1. I am an attorney in the Criminal Defense Practice of The Bronx Defenders, and counsel to [DEFENDANT] in connection with this habeas proceeding, and I am fully familiar with the facts and circumstances of this matter.

2. I make this application on behalf of Petitioner, [DEFENDANT].

3. Petitioner is unlawfully detained by Respondent Department of Correction [hereinafter "DOC"] at [FACILITY] housing facility on Rikers Island.

4. Client is not detained by virtue of any judgment, decree, final order or process of mandate issued by the Court or Judge of the United States in a case where such Court or Judge had exclusive jurisdiction under the laws of the United States or has acquired exclusive jurisdiction

by the commencement of legal proceedings in such Court, nor has he been committed or detained by virtue of the final judgment or decree of a competent tribunal of Civil or Criminal jurisdiction or the final order of such tribunal made in a special proceeding instituted for any cause or by virtue of any execution or process issued upon such judgment, decree or final order.

5. A Writ of habeas corpus from this Court is the only effective means whereby the Petitioner can obtain relief from his illegal detention and gain his release.

6. No appeal has been taken from any order of commitment and no previous application has been made for this relief.

7. Petitioner requests this Court issue a writ of habeas corpus and order Petitioner's immediate release on the ground that Petitioner's continued detention violates the Due Process Clauses of the United States and New York State constitutions.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

8. On **[**DATE], petitioner was charged with violating Penal Law § _____. Petitioner was arraigned in Bronx County Criminal Court on a [felony complaint/misdemeanor complaint] and the bail-setting court set monetary bail at [CURRENT BAIL STATUS]. Petitioner remains incarcerated as of the filing of this writ because [he/she/they] is unable to post the current bail amount of bail. [INSERT INFORMATION ABOUT ANY ADDITIONAL BAIL REVIEW PROCEEDINGS.]

9. Criminal Procedure Law § 180.80 ensures that, if no indictment is returned or preliminary hearing commenced within 144 hours and the prosecution cannot show good cause for an extension or a waiver by defense, an incarcerated defendant against whom a felony complaint is pending is entitled to release on his own recognizance:

> "[u]pon application of a defendant against whom a felony complaint has been filed with a local criminal court or the youth part of a superior court, and who, since the time of his arrest or subsequent thereto, has been held in custody pending disposition of such felony complaint, and who has been confined in such custody for a period of more than one hundred twenty hours or, in the event that a Saturday, Sunday or legal holiday occurs during such custody, one hundred forty-four hours, without either a disposition of the felony complaint or commencement of a hearing thereon, the court must release him on his own recognizance" C.P.L. § 180.80.

[IF YOU ASKED FOR A PRELIMINARY HEARING PLEASE INSERT SPECIFICS]

[IF APPLICABLE INSTEAD: Criminal Procedure Law § 170.70 ensures that, if no misdemeanor information is filed within five days and the prosecution cannot show good cause for extension or a waiver by defense, an incarcerated defendant against whom a misdemeanor complaint is pending is entitled to release on his own recognizance:

> Upon application of a defendant against whom a misdemeanor complaint is pending in a local criminal court, and who, either at the time of his arraignment thereon or subsequent thereto, has been committed to the custody of the sheriff pending disposition of the action, and who has been confined in such custody for a period of more than five days, not including Sunday, without any information having been filed in replacement of such misdemeanor complaint, the criminal court must release the defendant on his own recognizance." C.P.L. § 170.70.]

[IF APPLICABLE INSTEAD: C.P.L. § 30.30(2) ensures that an incarcerated defendant must be released if the prosecution is not ready for trial within a period of 90 days in a felony case, C.P.L. § 30.30(2)(a) or 30 days for a misdemeanor case, § 30.30(2)(b):

> Except as provided in subdivision three of this section, where a defendant has been committed to the custody of the sheriff or the office of children and family services in a criminal action he or she must be released on bail or on his or her own recognizance, upon such conditions as may be just and reasonable, if the people are not ready for trial in that criminal action within: (a) ninety days from the commencement of his or her commitment to the custody of the sheriff or the office of children and family services in a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a felony [OR OTHER APPLICABLE SUBSECTION] N.Y. Crim. Proc. Law § 30.30(2)]

10. [INSERT PROCEDURAL HISTORY, i.e., [C.P.L. 180.80: Petitioner was arraigned on [DATE AND TIME] on a felony complaint. Pursuant to C.P.L. § 180.80, the prosecution would have been required to file an indictment by [DATE AND TIME]. The prosecution did not file an indictment or begin a preliminary hearing by that time. There has been no good cause application to extend the time. The case was called in [PART] on [DATE] and Petitioner argued for release based on C.P.L. § 180.80. [COURT'S RULINGS/REASONING].] [C.P.L. § 170.70: Petitioner was arraigned on [DATE] on a misdemeanor complaint. Pursuant to C.P.L. § 170.70, the prosecution would have been required to convert the misdemeanor complaint into an information by [DATE]. The prosecution did not file an information by that time. There has been no good cause application to extend the time. The case was called in [PART] on [DATE] and Petitioner argued for release based on C.P.L. § 170.70. [COURT'S RULING/REASONING].] [C.P.L. § 30.30(2): Petitioner was arraigned on [DATE]. Pursuant to C.P.L. § 30.30(2), the prosecution would have been required to state ready within [# OF DAYS]. The prosecution did not state ready within that allotted time [INCLUDE DETAILS RE: INCLUDABLE/EXCLUDABLE DATES]. The case was called in [PART] on [DATE] AND Petitioner argued for release based on C.P.L. § 30.30(2). [COURT'S RULING/REASONING].] [IF MAKING A PROBABLE CAUSE ARGUMENT: Outline facts in complaint, arguments made at arraignment and fact that judge denied application for release/dismissal on this basis]

11. On March 20, 2020, in response to the COVID-19 health crisis, the governor of New York issued Executive Order 202.8, suspending until April 19, 2020 "any specific time limit for the commencement, filing, or service of any legal action, notice, motion or any process or proceeding" prescribed in the criminal procedure law. The criminal court in this matter has interpreted Executive Order 202.8 to toll the time limitations prescribed in C.P.L. §§ 180.80, C.P.L. 170.70, and C.P.L. 30.30(2).

12. As a direct result of the criminal court's interpretation of Executive Order 202.8 to suspend the time limitations prescribed in [C.P.L. § 180.80/C.P.L. § 170.70/C.P.L. § 30.30(2)], Petitioner was not released on [DATE] despite no [indictment/ information/ statement of readiness] having been filed.

13. No proceeding has been held or scheduled to hear and examine evidence and [C.P.L. § 180.80: determine whether there is legally sufficient evidence to establish that Petitioner committed such offense, and whether competent and admissible evidence provides reasonable cause to believe Petitioner committed the offense of which [he/she/they] is accused. *See* C.P.L. § 190.65(2). No grand jury has voted an indictment nor has any preliminary hearing been commenced pursuant to C.P.L. § 180.10.]; [C.P.L. § 170.70: determine whether the prosecution can file a valid misdemeanor information on which they can proceed to trial]; [C.P.L. § 30.30(2): determine whether the prosecution has exceeded the time allotted to be ready for trial]. No process of any kind has been granted to Petitioner to determine whether [his/her/their] continued detention [on a felony complaint/ misdemeanor complaint/ where the prosecution has not been ready for trial for _____ days] is legal.

14. Petitioner remains incarcerated at [DOC FACILITY -Rikers Island] as of the filing of this writ, at immense risk of harm to Petitioner's physical health given the rapid spread of coronavirus within Department of Correction facilities.[1] [INSERT SPECIFICS ANY MEDICAL CONDITIONS THAT PUT CLIENT AT HIGH RISK]. Experts predict that restrictions on

[1] *See* Bates, Josiah, "'We Feel Like All of Us Are Gonna Get Corona.' Anticipating COVID-19 Outbreaks, Rikers Island Offers Warning for U.S. Jails, Prisons," TIME Magazine, March 24, 2020. Available at https://time.com/5808020/rikers-island-coronavirus/. NEW YORK CITY BOARD OF CORRECTIONS CALLS FOR CITY TO BEGIN RELEASING PEOPLE FROM JAIL AS PART OF PUBLIC HEALTH RESPONSE TO COVID-19, available at https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17%20-%20Board%20of%20Correction%20Statement%20re%20Release.pdf; Rezendes, Michael and Robin McDowell, "38 Positive for coronavirus at Rikers, NYC jails," AP News, March 21, 2020. Available at https://apnews.com/54dbc9d47f62cf0c0240314310cfe909.

gatherings will be required for months or longer,[2] delaying a return to routine court operations and increasing the likelihood that Petitioner's detention will continue indefinitely.

ARGUMENT

A detained person may seek habeas corpus review when a statutory or constitutional violation causes Petitioner's incarceration. *See* C.P.L.R. §§ 7001, 7002(a) and (b)(1); *People ex rel. Kaplan v. Commissioner of Correction*, 60 N.Y.2d 648 (1983). In this case, Petitioner's continued incarceration [on a felony complaint/ misdemeanor complaint/ where the prosecution does not stand ready] without any lawful process is in violation of the [Fourth,] Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and state constitutional right to due process and right to a grand jury under Article I, Section 6 of New York's Constitution. Accordingly, Petitioner is entitled to the relief of discharge from custody under a writ of habeas corpus.

I. Executive Order 202.8 Did Not Suspend C.P.L § 170.70, 180.180, or 30.30(2)

Petitioner's continued incarceration is unlawful because it is in violation of C.P.L. § [170.70/ 180.80/ 30.30(2)]. This provision remains in effect even with Executive Order 202.8 in place. By its own terms, Executive Order 202.8 does not apply to the limitations on incarceration found in C.P.L. § [170.70, 180.80, or 30.30(2)]. The Order does not suspend the entire criminal procedure law. It suspends "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state." Plainly, the Order only applies to "time limit[s]" for the "commencement, filing, or service" of legal processes.

[2] See, e.g., "'Very Difficult to Predict How Long 'Stay-At-Home' Orders Will Last' Says Dr. Fauci," CBS News, March 20, 2020. Available at https://www.cbsnews.com/news/coronavirus-very-difficult-to-predict-how-long-stay-at-home-orders-will-last-dr-anthony-fauci/.

C.P.L. § [170.70, 180.80, or 30.30(2)] is not a "time limit" for the "commencement, filing, or service" of anything. Merriam-Webster's Dictionary defines a "limit" as something that bounds, restrains, or confines. Limits, Merriam-Webster.com Dictionary.[3] C.P.L. § [170.70, 180.80, or 30.30(2)] does not bound, restrain, or confine the commencement, filing, or service of anything. Indeed, anything that could be commenced, filed, or served before [170.70, 180.80, or 30.30(2)] can be commenced, filed, or served after it. For instance, after the C.P.L. § 180.80 date, a Supreme Court proceeding can still be commenced, an indictment can still be filed, and a notice of readiness can still be served. Instead, C.P.L. § [170.70, 180.80, or 30.30(2)] is a "time limit" on *incarceration*. By contrast, other limits found in the criminal procedure law are, in fact, time limits on the "commencement, service, or filing" of legal process. For instance, C.P.L. § 30.10 imposes a time limit on the commencement of prosecutions, and C.P.L. § 255.20 imposes a time limit on the filing of motions. Further, continued incarceration is not even a right or benefit granted to the prosecution, as release under C.P.L. § [170.70, 180.80, or 30.30(2)] does not limit the prosecution's ability to commence a preliminary hearing or an indictment, or to continue to prosecute a case. In sum, the plain text of the Governor's order does not apply to C.P.L. § [170.70, 180.80, or 30.30(2)].

This plain textual understanding of Executive Order 202.8 accords with prior courts' interpretation of prior executive orders. For instance, after the September 11 attacks, then-Governor Pataki issued Executive Order 113. That order contained a clause remarkably similar to the one at issue here in Executive Order 202.8: it suspended all "limitations of time for the filing or service of any legal action, notice or other process or proceeding that the courts lack

[3] As the Court of Appeals instructs, "[i]n the absence of a statutory definition, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase." *Yaniveth R. ex rel. Ramona S. v. LTD Realty Co.*, 27 N.Y. 3d 186, 192 (2016) (internal quotation marks omitted).

authority to extend through the exercise of discretion." Significantly, courts did not even think to apply this provision to argue that the clause applied to C.P.L. § 30.30(2). *See, e.g.*, *People v. Aquino*, 189 Misc. 2d 572 (Crim. Ct., N.Y. Cty. 2001) (refusing to apply Executive Order 113 to C.P.L. § 30.30(2)).

A historical analysis of Governor Cuomo's past suspensions of CPL § 180.80 confirms the plain textual analysis of Executive Order 202.8. Each time that Governor Cuomo has suspended C.P.L. § 180.80 — which he has done five times — he has done so specifically and explicitly. *See* Executive Order 8.174 (Jan. 4, 2018); Executive Order 8.164 (Mar. 13, 2017); Executive Order 8.142 (Jan. 27, 2015); Executive Order 8.53 (Nov. 2, 2012); Executive Order 8.61 (Nov. 5, 2012). In addition, Governor Cuomo has *never* suspended C.P.L. § 180.80 using language about the "commencement, filing, or serving" of legal process. Instead, each time Governor Cuomo suspended C.P.L. § 180.80, his order has described it as a "limit" on the "time" that a "defendant . . . may be held in custody." *See* Executive Order 8.174 (Jan. 4, 2018); Executive Order 8.164 (Mar. 13, 2017); Executive Order 8.142 (Jan. 27, 2015); Executive Order 8.53 (Nov. 2, 2012); Executive Order 8.61 (Nov. 5, 2012).

Under the plain text of Executive Order 202.8, especially when read against prior executive orders, C.P.L. § [170.70, 180.180, or 30.30(2)] has not been suspended. Therefore, Petitioner's continued incarceration is plainly unlawful and the Court must grant this writ.

II. Petitioner's Continued and Indefinite Detention is Unconstitutional Under the Due Process Clause of the United States Constitution

The United States Constitution guarantees that no state shall "deprive any person of . . . liberty . . . without due process of law." U.S. Const. Amend. 14. The federal Due Process Clause grants the right to due process of law for individuals incarcerated prior to trial. *See Bell v. Wolfish*, 441 U.S. 520 (1979); *Benjamin v. Fraser*, 264 F.3d 175, 188 (2d Cir. 2001).

Although the federal constitution does not prescribe specific forms of pretrial due process, once a state has created a statutory or constitutional liberty interest, such a liberty interest is entitled to the procedural protection of the Fourteenth Amendment's Due Process Clause. Such state-created rights may not be "arbitrarily abrogated." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (noting that "a person's liberty is equally protected, even when the liberty itself is a statutory creation of the state") *See also Vitek v. Jones*, 445 U.S. 480, 488–89 (1980) ("Once a State has granted prisoners a liberty interest, we held that due process protections are necessary to insure that the state-created right is not arbitrarily abrogated."); *Mirrer v. Smyley*, 703 F. Supp. 10, 12 (S.D.N.Y.), *aff'd*, 876 F.2d 890 (2d Cir. 1989) (though there is no federal constitutional right to a grand jury in a state criminal proceeding, state cannot deny right arbitrarily once it has created it); *Saldana v. New York*, 665 F.Supp. 271, 275 (S.D.N.Y.1987) (once a state creates a right for a defendant to testify before a grand jury, "it cannot cause that right to be forfeited in a manner which is arbitrary or fundamentally unfair"), *rev'd on other grounds*, 850 F.2d 117 (2d Cir.1988).

As of the effective date of Executive Order 202.8, Petitioner has been denied critical constitutional and statutory protections granted by the state of New York against arbitrary and indefinite detention: [IF APPLICABLE the state constitutional right to a grand jury; and] the statutory rights provided by [C.P.L. § 180.80/C.P.L. § 170.70/C.P.L. § 30.30(2)] ensuring that if the prosecution cannot satisfy a threshold evaluation of its case beyond the mere filing of a complaint, the defendant is entitled to release. The [constitutional right to a grand jury proceeding and the] statutory rights conferred by [C.P.L. § 180.80/C.P.L. § 170.70/C.P.L. § 30.30(2)] constitute the legal process by which the state is required to demonstrate, through competent evidence and inquiry by a fact-finder, the viability of continued prosecution of its case. Even if Executive Order 202.8 is interpreted to suspend the time periods specified in the

Criminal Procedure Law, the underlying statutory right to a determination of reasonable cause prior to a defendant's continuing detention still applies, and may not be arbitrarily abrogated. Petitioner has effectively had all legal processes that might result in [his/her/their] release suspended, and remains incarcerated. Without habeas corpus relief this elimination of process will result in indefinite detention for Petitioner.

Federal constitutional protections similarly ensure that individuals are not detained based on a prosecutor's assessment of probable cause alone, and that probable cause determinations are made promptly to avoid prolonged unnecessary restraint on a defendant's liberty. *Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention); *see also Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 55 (1991). As the *County of Riverside* court stated, "A State has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause." In addition to the Fourth Amendment guarantees against warrantless pretrial detention outlined in *Gerstein* and *County of Riverside*, New York's constitutional and statutory scheme ensure that there are strict limits on an individual's detention after arraignment [on a felony complaint/misdemeanor complaint/where the prosecution is not ready for trial]. In New York, [the constitutional right to a grand jury in felony cases, and] the statutory right to release under [C.P.L. § 180.80/C.P.L. § 170.70/C.P.L. § 30.30(2)] where the prosecution cannot meet evidentiary requirements, have provided a crucial backstop to ensure that individuals are not detained pretrial without probable cause.

[WHERE COMPLAINT FAILS TO MAKE OUT PROBABLE CAUSE:] The suspension of grand jury proceedings and of all mechanisms for assessing the legality of Petitioner's continued detention hollows out the federal constitutional requirement of a prompt, reliable probable cause determination. The U.S. Supreme Court held in *Gerstein v. Pugh* that

"Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty." 420 U.S. at 124-25. *See Fitzpatrick v. Rosenthal*, 29 A.D.3d 24, 29 (4th Dept. 2006) (upholding dismissal of felony complaints at arraignment for failure to establish reasonable cause that defendant committed a crime). [INSERT SPECIFICS OF COMPLAINT THAT FAIL TO MAKE OUT PROBABLE CAUSE] Petitioner's continued detention on an accusatory instrument that does not establish probable cause, and [his/her/their] deprivation of any subsequent evaluation of [his/her/their] continued detention on such an insufficient accusatory instrument, is in violation of Petitioner's constitutional rights.]

The federal due process clause also applies where a significant pretrial or pre-indictment delay substantially prejudices a defendant's right to a fair trial. *See Barker v. Wingo* (407 U.S. 514 (1972); *United States v. Marion*, 404 U.S. 307 (1971) ("Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense.") For Petitioner, an indefinite delay between arrest and indictment has caused and will continue to cause prejudice to [his/her/their] ability to communicate with [his/her/their] attorney, aid in early investigation, and locate critical witnesses.

III. Petitioner's Continued and Indefinite Detention is Unconstitutional Under the Due Process Guarantees of the New York State Constitution

The New York Constitution provides even more explicit guarantees of due process than the federal constitution for individuals detained pretrial. *See Cooper v. Morin*, 49 N.Y.2d 69 (1979). In addition to ensuring that "[n]o person shall be deprived of life, liberty or property without due process of law," Article I, Section 6 of the New York Constitution provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury . . . ." The constitutional guarantee of a grand jury proceeding is just

one way in which New York has enshrined protections against unchecked pretrial detention. New York's statutory scheme, through the release mechanisms codified in C.P.L. §§ 180.80, 170.70, and 30.30(2), is designed to ensure that no individual remains detained [on a felony complaint/misdemeanor complaint/where the prosecution has not stated ready for trial after a significant period of time].

A. [WHERE APPLICABLE: Petitioner's Continued Detention on a Felony Complaint Violates [His/Her/Their] Due Process Rights]

Petitioner has been held for grand jury action on a felony complaint and there has been no felony hearing, prompt or otherwise, nor has there been an indictment to replace the felony complaint, within 144 hours.

The guarantee of a grand jury proceeding in any felony case is a right deemed so paramount that it is codified in the New York Constitution. The grand jury "historically has acted as a buffer between the State and its citizens, protecting the latter from unfounded and arbitrary accusations," *People v. Calbud, Inc.*, 49 N.Y.2d 389, 395–96 (1980), and has been deemed "a fundamental [right] which ordinarily may not be waived by a defendant, since it not only accrues to the benefit of the individual defendant, but also serves to preserve a significant societal interest." *People v. Iannone*, 45 N.Y.2d 589, 593(1978). In addition to the statutory rights conferred by the Criminal Procedure Law, the constitutional entitlement to a grand jury proceeding is at risk of indefinite suspension given the likely extension of the COVID-19 related state emergency beyond April 19.[4] In all likelihood, Petitioner will not be able to exercise [his/her/their] right to have [his/her/their] case considered by a grand jury, nor the corresponding

[4] See, e.g., Wan, William, "How Long Will Social Distancing for Coronavirus Have to Last? Depends on These Factors," The Washington Post, March 16, 2020; Mettler, Katie et al., "CDC Urges Halting Gatherings of 50 People or More," The Washington Post, March 15, 2020 (CDC guidelines require halt to gatherings of more than 50 people for at least eight weeks); Nierenberg, Amelia, "How Long Will The Coronavirus Outbreak and Shutdown Last?" The New York Times, March 16, 2020 ("prevailing optimistic guess among experts when the virus will abate is about two months")

right to testify before a grand jury, for months. Without any grand jury proceeding or interim preliminary hearing, Petitioner faces weeks if not months of incarceration with no protection whatsoever against "unfounded and arbitrary accusations," *Calbud*, 49 N.Y.2d at 396 .

New York law contemplates a situation where a grand jury is not immediately available. In this event, it is the state's burden to demonstrate that continuing detention is merited by way of an evidentiary showing at an early stage of pre-trial proceedings. Where a grand jury has not been convened within the time limitations of C.P.L.§ 180.80, the prosecution is required to commence a preliminary hearing in order to continue to detain a defendant. *See* C.P.L. 180.10(2); *People v. Allan*, 21 Misc.3d 1109(A)(Westchester Cty. Just. Ct. 2008) (holding that, where a grand jury was not scheduled to convene for several weeks, a defendant does not have to request a preliminary hearing and it is the prosecution's burden to hold such a hearing to justify continued detention beyond the C.P.L.§ 180.80 date). In Petitioner's case, not even this interim form of process has been granted. Suspension of any such check on pretrial detention is arbitrary and in violation of Petitioner's due process rights.

Because Petitioner is held solely on a felony complaint he languishes in a legal limbo that violates both constitutional due process and right to a grand jury and the statutory right to a preliminary hearing. A felony complaint is a limited-purpose, transitional accusatory instrument "which serves to commence a criminal action but not as a basis for prosecution." *See* C.P.L. § 1.20(8). "No pre-trial motions can be made on a felony complaint and there is nothing a person can do to move the case while a felony complaint is pending." *People v. Marcus*, 151 Misc.2d 190, 192 (Crim Ct, Bronx Co1991). A person cannot even plead guilty to a felony complaint. *People v. Wiltshire*, 23 A.D.3d 86 (1st Dep't 2005). Stuck in legal limbo without an indictment or a preliminary hearing, the suspension of a prosecution on a mere felony complaint — particularly while Petitioner is incarcerated — is "fundamentally unfair" to Petitioner "since

[they] can take no affirmative action . . . against the pending charges." *People v. Marcus*, 151 Misc.2d 190, 192 (Bronx Cty. Crim. Ct. 1991). Such a suspension "infringes upon a defendant's due process rights which [this Court] must . . . take such affirmative action as is necessary to protect." *Id.* at 192.

Due process under New York's constitution requires a prompt evaluation of reasonable cause where a defendant is incarcerated. Indeed, "[d]ue process would seem to require [a hearing as a] limitation[] on a temporary detention pending grand jury action." *People v. Klaff*, 35 Misc. 2d 859 (Dist. Ct., Nassau Cty. 1962). After all, "[t]he Preliminary Hearing is, in every way, both historically and legally . . . a temporary procedural substitute for a Grand Jury." *People v. Searles*, 135 Misc. 2d 881, 886 (Rochester City Ct. 1987). Indeed, under the criminal procedure law, "[b]eing 'held' for the action of a Grand Jury involves the filing of a felony complaint on which defendant has been arraigned and a finding after a preliminary hearing (unless waived by defendant) that reasonable cause exists to believe that defendant committed a felony." *People v. Barber*, 280 A.D.2d 691, 692 (3d Dep't 2001).

Here, Petitioner has been held for grand jury action on a felony complaint and there has been no felony hearing, prompt or otherwise, nor has there been an indictment to replace the felony complaint. Executive Order 202.8 cannot suspend the constitutional due process requirements that bar indefinite detention on a transitional felony complaint. The Executive Order also does not suspend the substantive right to a preliminary hearing when a person is detained on a felony complaint. To protect these rights—both constitutional and statutory—this Court must grant this writ.

[WHERE APPLICABLE: **Petitioner's Continued Detention on a Misdemeanor Complaint Violates [His/Her/Their] Due Process Rights]**

Petitioner has been held in custody on a misdemeanor complaint and there has been no misdemeanor information filed to replace the misdemeanor complaint within five days. Executive Order 202.8 cannot suspend the constitutional due process requirements that bar indefinite detention on a transitional misdemeanor complaint. A misdemeanor complaint is a which "serves to commence a criminal action but which may not, except upon the defendant's consent, serve as a basis for prosecution of the offenses charged therein." C.P.L. § 1.20(7). A person cannot be detained for longer than five days on an unconverted misdemeanor complaint. *See People ex rel. Ortiz v. Comm'r, New York City Dep't of Correction*, 253 A.D.2d 688, 689, 678 N.Y.S.2d 91, 92 (1998), *aff'd sub nom. People ex rel. Ortiz v. Comm'r of New York City Dep't of Correction*, 93 N.Y.2d 959, 716 N.E.2d 175 (1999) (nonhearsay corroboration of misdemeanor complaint required to warrant detention.) New York's due process clause and C.P.L. § 170.70 require conversion as a limitation on indefinite detention pending trial. To protect these rights—both constitutional and statutory—this Court must grant this writ.

[WHERE APPLICABLE: **Petitioner's Continued Detention In Violation of C.P.L. Section 30.30(2) Violates [His/Her/Their] Due Process Rights]**

Petitioner has been detained for longer than [90 days/30 days] where the prosecution has not stated "ready" for trial. Executive Order 202.8 cannot suspend the constitutional due process requirements that bar indefinite detention where the prosecution fails to state ready for trial. C.P.L. § 30.30(2) guarantees an individual's release where the prosecution is not ready for trial within certain periods. See *People ex rel. Chakwin on Behalf of Ford v. Warden, New York City Corr. Facility, Rikers Island*, 63 N.Y.2d 120, 125 (1984) ("the plain meaning of CPL 30.30 (subd. 2) is that a defendant's showing of a violation of that section will result in the defendant's release, either by a fixing of bail at an amount which the defendant can post or by a release of the defendant on his own recognizance.") Petitioner's continued detention without any inquiry into

the prosecution's readiness violates [his/her/their] constitutional and statutory rights. To protect these rights, this Court must grant this writ.

B. Petitioner's Continued Unlawful Detention Places [Him/Her/Them] at Grave Risk of Harm

The substantive liberty interest in avoiding arbitrary and prolonged pretrial detention has been recognized by New York courts. Upholding a grant of a writ challenging unnecessary extensions of pre-arraignment detention under C.P.L. § 140.20(1), the Appellate Division, First Department observed that the fundamental right to be "free of unwarranted deprivations of liberty" was at issue. *People ex rel. Maxian on Behalf of Roundtree v. Brown*, 164 A.D.2d 56, 67 (1st Dept. 1990), *aff'd*, 77 N.Y.2d 422 (1991). The court went on to link the deprivation of rights to the particularly dangerous conditions of prearraignment confinement: "[e]xtended deprivations of liberty, unilaterally imposed and bearing no conceivably just relation to any crime which might be charged, would be profoundly troubling under any circumstances; they are, however, unconscionable under the circumstances of prearraignment detention which are notoriously harsh." *Id* at 64. *See also Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979); *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 686–87 (1976) ("We agree with the conclusion at Special Term that any pretrial detention impinges on the right to liberty, a fundamental right that is recognized in the constitutional sense as carrying a preferred status and so is entitled to special protection.").

The New York Court of Appeals has held that due process mandates "a balancing of the harm to the individual resulting from the condition imposed against the benefit sought by the government through its enforcement." *Cooper v. Morin*, 49 N.Y.2d 69, 79 (1979). State due process requires that the Court consider the increased potential harm to Petitioner based on the potential that he could contract COVID-19, as well as the potential harm to the public and the

government that would come from crowded jails, including the harm to DOC employees. Further, detention conditions that are unconstitutional for convicted individuals under the Eighth Amendment prohibition against cruel and unusual punishment violate state as well as federal due process guarantees afforded to pretrial detainees. *See Smith v. Conway Cty., Ark.*, 759 F.3d 853, 858 (8th Cir. 2014) ("Conduct constituting 'cruel and unusual punishment' a fortiori constitutes punishment. And the Due Process Clause prohibits any punishment of a pretrial detainee, be that punishment cruel-and-unusual or not.").

For Petitioner, the extended deprivation of liberty caused by the suspension of [his/her/their] right to [a grand jury proceeding and/or release under C.P.L. 180.80/170.70/30.30(2)] poses inordinate risk of harm given the circumstances under which [he/she/they] are being held. The number of cases of COVID-19 in the New York City jail population has grown rapidly over the past week, and despite the best efforts of Correctional Health Services, its continued spread is inevitable.[5] New York City jails lack adequate medical infrastructure to address the spread of infectious disease and the treatment of people most vulnerable to illness.[6] According to Dr. Homer Venters, a physician and epidemiologist and the former chief medical officer of Rikers Island, the design and operation of jails — which involves shared dormitories and lack of protective hygiene — "is basically a system designed to spread communicable disease."[7] As New York City continues to enforce shutdowns of public and private gatherings with the understanding that proximity to other individuals increases the risk of

[5] Bates, Josiah, "'We Feel Like All of Us Are Gonna Get Corona.' Anticipating COVID-19 Outbreaks, Rikers Island Offers Warning for U.S. Jails, Prisons," TIME Magazine, March 24, 2020. Available at https://time.com/5808020/rikers-island-coronavirus/.

[6] *See* Video of DOC Testimony at New York City Board of Correction Meeting, March 10, 2020, starting at 17:50, *at* https://www1.nyc.gov/site/boc/meetings/mar-10-2020.page

[7] Jennifer Gonnerman, *How Prisons and Jails Can Respond to the Coronavirus*, The New Yorker, March 14, 2020, *at* https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus

community transmission of COVID-19[8], the impossibility of implementing effective "social distancing" measures in jail has become increasingly stark.

[FOR CLIENTS WITH SPECIFIC MEDICAL ISSUES: For Petitioner, the risk of infection with COVID-19 is particularly grave. SPECIFICS ABOUT CLIENT'S MEDICAL CONDITION AND CONNECTION TO COVID-19. Correctional health experts have recommended release from detention as a critically important tool to mitigate risk for those who, like Petitioner, are at high risk of serious illness or death if they contract COVID-19.[9] Petitioner's pretrial detention under these conditions is unlawful based on the DOC's present failure and apparent unwillingness to protect Petitioner from imminent, potentially deadly harm that may befall him should he contract COVID-19.]

Under such conditions, the indefinite deprivation of liberty contemplated by the suspension of [C.P.L. 180.80/170.70/30.30(2)] carries the risk of a deprivation of life as well. Weighed against the government's interest in securing Petitioner's appearance for trial, the balance clearly militates against continued pretrial detention.

For the reasons stated above, Petitioner's continued and indefinite detention after the time period provided for in [CPL 180.80/170.70/30.30(2)] violates [his/her/their] right to due process and [he/she/they] has no remedy at this time besides this writ of habeas corpus.

WHEREFORE, Petitioner respectfully asks this Court to discharge [DEFENDANT] from custody immediately.

Dated: Bronx, New York

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[8] Reuters, "New York Governor Orders All Non-Essential Businesses Closed, Says Everyone Must Stay Home," New York Times, March 20, 2020. Available at https://www.nytimes.com/reuters/2020/03/20/us/20reuters-health-coronavirus-usa-new-york.html.

[9] *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

[MONTH] ___, 2020

Respectfully Submitted,

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[LAWYER]

VERIFICATION

[LAWYER], an attorney admitted to practice law before the courts of this state, affirms that she is the relator, that she has read the foregoing Petition and that the same is true to her knowledge, except for those portions stated on information and belief, which are based on police records, conversations with other parties to these matters, and court records which she believes to be true.

Dated: Bronx, New York
[MONTH] _____, 2020

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[LAWYER]