SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: EMERGENCY PART

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PEOPLE OF THE STATE OF NEW YORK EX REL. JAMES MARTORANO, on behalf of [redacted],

WRIT OF HABEAS CORPUS

Petitioners,

INDEX NO. 400159/2020

v.

DECISION AND ORDER

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

Respondent.

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The question presented by this writ is whether the motion court's denial of defendant's application to be released from custody under CPL § 180.80 ("180.80") because the People failed to secure an indictment, or conduct a preliminary hearing, or seek a good cause extension to schedule a preliminary hearing prior to the expiration of the mandatory 180.80 release deadline has resulted in defendant's illegal detention. Here, the motion court granted the People's request for a good cause extension of their time to present the case to a grand jury. The People did not seek a ruling that good cause existed to hold the defendant in custody while they decided whether they were going to seek to have a preliminary hearing scheduled by the criminal court. They did not indicate to the motion court that they would be conducting one, or even that they planned at that time to ask the criminal court to schedule a preliminary hearing. Nonetheless, the motion court denied the defendant's release application and gave the People leave to file a request to schedule a preliminary hearing at some unspecified future date beyond the time that defendant was entitled to be released from custody as a matter of law under 180.80.

If the motion court's ruling addressed the specifics of the defendant's release application relating to their not scheduling or conducting a preliminary hearing prior to the expiration of the 180.80 deadline, and the People sought a fact-specific good cause ruling to extend their time to request that a preliminary hearing be scheduled, and the court found good cause to extend that time, that ruling would not be subject to review via a writ of habeas corpus. See People ex. Rel. Barna v. Malcom, 85 AD2d 313, 316 (1st Dept 1982). Here, none of that happened. Moreover, the People requested a good cause extension of the 180.80 deadline only until June 6, 2020, a date that has now passed, and only based upon the fact that no grand juries are empaneled. Given all this, the writ is granted.

In their arguments opposing this writ, both on the papers and during the virtual court hearing on this writ application on June 9, 2020, the People misconstrue the meaning of the terms used in 180.80 relating to release based on not prevailing at a preliminary hearing, and the meaning of what "good cause to deny an order of release" must be shown under CPL § 180.80(3) to justify denying an application for release in the absence of a sitting grand jury. They also misinterpret the letter and intent of Governor Andrew Cuomo's most recent executive order which specifically limits the denial of a 180.80 release application in the absence of grand juries to those situations where a judge finds "good cause" exists in a particular matter to immediately deny an application for an "order of release" because the People have made a fact-specific argument to justify extending their time to ask the criminal court to schedule and conduct a statutorily-required preliminary hearing. In some cases, a judge can even find

"good cause" that the People do not have to conduct a preliminary hearing at all, based on specific facts in a matter, and deny the application for an "order of release" and permit that defendant to remain in custody until it's medically safe for grand juries to return.

On March 20, 2020, Governor Cuomo issued Executive Order ("EO") 202.8. Under its sweeping language, this order suspended all deadlines for commencing, filing and conducting court and administrative matters contained in every procedural statute and regulation on the books in the State of New York. This followed the Governor's March 7, 2020 declaration that New York is under a state of emergency due to the unprecedented COVID-19 pandemic. As relevant to this matter, EO 202.8 suspended the statutory deadlines of Article 180 of the Criminal Procedure Law, including 180.80 release deadlines. Article 180 also contains procedural rules and deadlines related to preliminary hearings under CPL §§ 180.10(2) and 180.60(10), and those deadlines were suspended as well. See People ex. Rel. Mulry v. Franchi, 120 NYS3d 789 (2nd Dept. 2020); People ex. Rel. Hamilton v. Brann, 2020 NY Slip Op 050392(U), 2020 NYLJ LEXIS 800 (Sup Ct Bronx Co April 2, 2020). New York's state of emergency continues. And executive orders continue to be signed to address all aspects of New Yorker's lives that are impacted by our serious public health crisis.

EO 202.8 has been extended, modified, and refined in subsequent executive orders. In some cases, specific deadlines in many statutes have been restored. Throughout the pandemic, and during this ongoing state of emergency, New York courts have never closed. Although the pandemic has impacted many of

the regular operations of the court system, litigants have never been deprived of access to any of our state or city courts based on directives promulgated by the Office of Court Administration ("OCA") and the administrative judges of individual courts. Writs have been calendared and argued before judges, and other emergency applications have always been heard; in the criminal terms of the courts, defendants are arraigned, pleas are taken, cases are dismissed, motions are decided, and other necessary business is regularly conducted.

Grand juries are an essential arm of the Supreme Court. However, the reality remains that requiring significant numbers of the members of the community to come into a public building to be empaneled, and then, once empaneled, to sit and hear evidence provided by live witnesses, and deliberate in close proximity to one another, remains a work in progress. Courtrooms were not built to deal with COVID, and no building can ever be pandemic proof. Moreover, attorneys do not appear in person in any courtrooms, in part due to understandable directives from indigent defender organizations that they not do so. Witnesses for hearings also do not enter court buildings. This reality made it physically impossible to conduct any in-person preliminary hearings for defendants held in custody on a felony complaint. Given this court-related aspect of the COVID emergency, EO 202.8 automatically suspended the 180.80 procedural deadlines which required an indictment be voted or a judge make a non-hearsay based probable cause finding following an in-person witness-based preliminary hearing in order to deny a defendant's application to be released from custody.

The reason that courts were, and are, able to continue hearing a variety of essential matters, and did so even at the height of the pandemic, is because of the

rapid, near miraculous and unprecedented implementation of virtual court proceedings. Attorneys, judges, court reporters, and in some cases criminal defendants appear in open courtrooms via a SKYPE for Business platform. The courtrooms themselves are staffed in-person by selfless court clerks, court officers, and IT people who are on view on the SKYPE screen dashboard. Without them, the technology is legally worthless. Diligent court administrators, hard-working court IT and clerical staff, and others at OCA facilitated the ability to have the court interface with defendants held in jails and prisons. This enables the courts to conduct certain proceedings that take place with defendants being present via SKYPE, including Sex Offender Registration Hearings (SORA) and Article 10 civil trials, bail hearings after indicted defendants have been returned to Supreme Court on a bench warrant, extradition proceedings, and many others. However, until recently, there was no legal ability to conduct virtual preliminary hearings.

Presumably in recognition of the fact that the court's implementation of this technology permitted criminal defendants, lawyers, and witnesses to appear in other virtual court proceedings, and that all courts were hearing an increasing number of matters virtually, as well as the fact that defendants were held in custody on felony complaints with no prospect of grand juries returning in the near future to vote indictments or dismissals, on May 7, 2020, Governor Cuomo signed EO 202.28. In a nutshell, in this order the Governor facilitated a legal and witness-safe way to hold the preliminary hearings mandated by CPL Article 180 in the absence of grand juries by having courts preside over those hearings virtually. EO 202.28 amends CPL § 180.60 to permit electronic court appearances by defendants and witnesses at a preliminary hearing. It allows for good cause applications to be granted under CPL § 190.80 where

the defendant is in custody after a preliminary hearing, but more than 45 days have passed since the hearing and grand juries have still not be empaneled due to the pandemic. While EO 202.28 continues to suspend most other procedural deadlines in the CPL under the sweeping language of EO202.8, it directs that all 180.80 release deadlines can be suspended only if a case-specific good cause ruling is made a judge.

The Governor thus also returned to defendants their right to seek release from custody under 180.80 absent a preliminary hearing, and absent a judicial finding of good cause as to why such a hearing should not be scheduled in a particular case, while recognizing that grand juries are not empaneled anywhere. The mere fact that grand juries are not sitting is no longer, standing alone, good cause to deny a defendant's application to be released from custody pursuant to 180.80 in every case. The perfect storm created by the COVID pandemic, the social distancing requirements, the need for in-person defendant, attorney, witness, judicial, and staff presence at most essential court proceedings, and the prudent approach of not having citizens enter court buildings to sit in close proximity to deliberate on matters in grand and petit juries, led to EO 202.8. Now, EO 202.28 creates a reasonable port in this storm, recognizing that incarcerated defendants cannot remain in custody indefinitely in the absence of grand juries by reinstating the rule requiring the People to conduct a preliminary hearing during this pandemic and providing the legal authority to do so via SKYPE, while at the same time allowing a court to issue a discretionary good cause decision under CPL § 180.80(3) denying an "order of release" and delaying the holding of a preliminary hearing or ruling that, in extreme situations involving "good cause," the People can wait in a particular case for the return of grand juries and not conduct a preliminary hearing

in a particular matter for a specific, fact-based reason.

The People take a decidedly different view of EO 202.28, as well as what constitutes good cause under 180.80 to justify denying a defendant's application for an "order of release" when that defendant is only held on an undisposed-of felony complaint. This view may be based not only on their misapprehending the letter and intent of EO 202.28, but also because "180.80 day" does not in local practice implicate preliminary hearing requirements.

In Bronx County, when there is not a pandemic, five separate panels of 23-member grand juries sit each court-term, year-round. They are empaneled prior to the dates that defendants have been arrested and charged via a felony complaint in cases that they will hear. With the availability of so many grand juries, and the reality that there are far fewer felony prosecutions today to fill all the time these grand jurors give to the court system on these five separate panels, prosecutors are easily able to file "a written certification that an indictment has been voted" prior to the 180.80 release deadline, pursuant to CPL § 180.80(2)(a). In this scenario, defendants are not entitled to be released under 180.80, and no preliminary hearing is needed. Most, if not all, "good cause" applications made in New York City deal with extending the time to complete a grand jury presentation, and not to extend the time to conduct a preliminary hearing.

Based on this misapprehension, the People incorrectly argue that EO 202.28 merely affords them an opportunity to conduct a preliminary hearing if they choose to do so. They base this conclusion on the language in this executive order that says the inability to empanel a grand jury "may" constitute good cause to deny a 180.80 release application. That inability does not, as the People argued to the motion court and

continue to argue here, automatically constitute good cause to deny a 180.80 "order of release." If that was Governor Cuomo's intent, he could have just continued to extend EO 202.8 as is in terms of all CPL deadlines, as he did when he extended that order's initial expiration date from April 19, 2020 to May 7, 2020 in EO 202.14. In terms of 180.80, in EO 202.28, the Governor chose to specifically exclude 180.80 deadlines from EO 202.8's automatic suspension mandate, and reinstated the 180.80 statutory requirement that there must be a fact-specific reason to support a good cause application to preclude an "order of release" beyond the mere inability to empanel a grand jury; the good cause application must also be geared to the People's inability, for a specific reason in a specific case, to safely conduct a virtual preliminary hearing.

Administrative guidelines provided by the New York City Criminal Court created a centralized city-wide procedure for the People to apply to schedule a preliminary hearing and for that court to coordinate such scheduling with the lawyers, the defendants, and the witnesses. The guidelines provide that good cause applications be made prior to the 180.80 deadline. If there is no good cause application to extend 180.80 in terms of scheduling a preliminary hearing, then the request to schedule the preliminary hearing must be made prior to the expiration of the statutory 180.80 period. In this case, that deadline expired on June 3, 2002. The People made no good cause application to deny an "order of release" and extend their time to schedule a preliminary hearing in their motion to the lower court. And there is no evidence in this record that they made any application to schedule a preliminary hearing before the time came for defendant's statutory right to release under 180.80. The People argue that they do not need to make an application to schedule a preliminary hearing until they have received

a decision on their application to deny a defendant's request for an "order of release," which they argued was justified based solely on the unavailability of grand juries. That is not what the statute, the executive order, or the administrative guidelines require. More important, there is no authority to hold a defendant in custody and seek to schedule a preliminary hearing after the 180.80 deadline has passed absent a granted good cause application allowing that to happen.

To further support their argument, the People also seem to conflate the part of EO 202.28 addressing a CPL § 190.80 good cause application with the 180.80 good cause application requirements. CPL§190.80 prescribes that the People have 45 days to secure an indictment after the defendant is held for grand jury action following a preliminary hearing. If that does not happen, the defendant is released from custody at that time, unless the People have demonstrated good cause for why there has not been "grand jury action." EO 202.28 justifies a decision extending that statute's deadline for good cause based on the fact that no grand jury has yet been empaneled and the People cannot meet that statute's indictment requirement, provided they have prevailed at a preliminary hearing. This has nothing to do with the separate EO 202.28 mandate that the People must seek a ruling based on good cause to deny an "order of release." By the terms of 180.80, an order of release is required when there is no indictment, no probable cause finding following a timely preliminary hearing, and no consent to waive the 180.80 period to dispose of the case via a plea. Only a court can deny an "order of release," and the court can only do so based on a finding of good cause to extend or excuse all the 180.80 release criteria, not just one of them. This statute does not limit the good cause application needed to support denying a defendant's application for an

"order of release" from custody solely to the inability to have "grand jury action," as does CPL §190.80(2). The statutes are worded differently because the procedural requirements are different, and EO 202.28 recognizes that the factual realities are now also different. Therefore, the good cause showing that must be made in these different scenarios under these statutes cannot be the same.

The People also misapprehend the significance of the long-standing statutory 180.80 preliminary hearing requirements in the absence of a grand jury. Where no grand jury is empaneled, Article 180 states the time required to conclude a preliminary hearing, (CPL § 180.10(2), a "reasonable" period), sets out the procedural rules for conducting a preliminary hearing (CPL § 180.60), and delineates the procedures which follow a judge's ruling on whether the People met their burden at that hearing (CPL §180.70). In terms of this case,180.80 provides that a defendant is entitled to be released from custody when held on an undisposed-of felony compliant where there has not been a preliminary hearing or grand jury action. EO 202.28 did not suspend the People's obligation to prevail at a preliminary hearing in order to justify holding a defendant in custody for future grand jury action; to the contrary, it adapted the preliminary hearing procedures to our present normal of conducting needed court proceedings virtually.

Put simply, contrary to the People's position and consistent with defendant's arguments, the Governor reinstated all the procedural limitations and protections of 180.80, including those requiring preliminary hearings in EO 202.28. This order reinstates the law that the People's obligation to conduct a preliminary hearing can only be excused where "[t]he court is satisfied that the people have shown good cause why

such order of release should not be issued. Such good cause must consist of some compelling fact or circumstance which precluded disposition of the felony complaint within the prescribed period or rendered such action against the interest of justice." CPL §180.80 (3). Thus, under the statute, and under EO 202.28, in the absence of an indictment, a release order is mandatory unless there is a showing of good cause why a virtual preliminary hearing has not been scheduled or commenced prior to the end of the 180.80 period, or why grand jury action is necessary for a specific fact-based reason in a particular matter. It is also not in the "interest of justice" to find good cause to deny a 180.80 release application solely based on the unavailability of grand juries where virtual preliminary hearings are authorized and now conducted daily throughout the city.

Moreover, this is the long-standing and correct legal interpretation of Article 180. This Court recognizes that a defendant has "no constitutional or statutory right to a preliminary hearing" when the People choose instead to present the case to a grand jury. People v. Bensching, 117 AD2d 971, 971-72 (4th Dept 1986). However, "[w]hile the People may preempt a preliminary hearing by quickly presenting a case to the grand jury, there is no statutory allowance for either prosecutorial or judicial 'waiver' of the hearing." People v. Hogan, 5 Misc. 3d 151, 159 (Rochester City Court 2004). "The District Attorney's right to present evidence to the Grand Jury is independent of defendant's right to a felony hearing and failure to afford such hearing does not vitiate an indictment (People ex rel. Hirschberg v Close, 1 NY2d 258 (1956); People v Edwards, 19 Misc. 2d 412 (Court of General Sessions, NY County, 1959); CPL 190.55, subd 2, par [c]). Nevertheless, short of the indictment, defendant's right to a prompt felony hearing is certain (CPL 180.10, subds 2, 4)." People v. McDaniel, 86

Misc. 2d 1077, 1078 (Long Beach City Court 1976).

Here, defendant's release application was specific to the need for the People to state a good cause reason about their inability to conduct a preliminary hearing in this case in order to justify denying his demand to be released from custody. He argued, "The Court should grant release as the prosecution failed to set forth a good cause basis to continue to incarcerate the defendant without a timely preliminary hearing on whether there is an evidentiary basis [to hold him] for the action of the grand jury as set forth under C.P.L. § § 180.10 and 180.60. and the New York and US Constitutions." (Defendant's Reply for Release, dated June 1, 2020). The People's motion, which sought the remedy they themselves labelled as a "good cause extension" of the 180.80 release deadline, and was made under EO 202.28 and CPL §180.80(3), states: "While Executive Order 202.28 requires a showing within 144 hours of May 8, 2020, or subsequent arrest dates thereafter, that there is good cause to detain defendants currently in custody on felony complaints within the meaning of CPL §180.80(3), a showing that no grand jury can be convened and hear cases in the county due to the COVID-19 pandemic is sufficient to constitute good cause under this provision. That condition has been satisfied here." (Affirmation in Support of People's Good Cause Application dated June 1, 2020).

As noted, that is not "good cause" to deny a defendant's release application under CPL § 180.80(3) based on the failure to have scheduled a preliminary hearing in normal times, and is not independent good cause now given the Governor's authorization to conduct virtual preliminary hearings, as all addressed and contemplated by EO 202.28. Despite the fact that the Governor included witness-identity safeguards

that allow for the blurring of the faces of civilian witnesses who would testify via video at a preliminary hearing in that same order, the People's position in this case is that they have no legal obligation to conduct a virtual preliminary hearing or argue for a good cause extension to excuse or delay this statutory requirement to justify keeping defendant in custody absent an indictment:

> That a "virtual" preliminary hearing may be legally, technologically, and otherwise practically possible is unavailing to any claim of a lack of good cause. The order states that an inability to impanel grand juries because of the COVID-19 pandemic may constitute good cause. It states nothing about a contemporaneous inability to conduct a preliminary hearing. If the governor had intended that the latter be a requirement for a good cause extension, the order clearly could have and would have said so. It does not. Indeed, the order contemplates the holding of preliminary hearings on cases where good cause extensions have already been granted, which is inconsistent with a requirement that the prosecution be unable to conduct a preliminary hearing in order to get an extension. Prior to the pandemic and the executive orders in question, courts consistently found good cause under CPL Section 180.80(3) without the need for any inquiry into the feasibility of holding a preliminary hearing. The order's use of the word "may" is permissive, not restrictive, and clearly consistent with the granting of a good-cause extension on the sole ground of the present inability to impanel grand juries in this county because of the pandemic.

Id. This Court rejects that argument.

The People never reference any "pre-pandemic" case holding that the absence of a grand jury is good cause to hold a defendant in custody when there has also been no preliminary hearing. Moreover, in their motion, in which the People requested a good cause ruling to deny the order of release based solely on the unavailability of grand juries, they asked that the order be denied for this reason only until June 6, 2020, the date EO 202.28 was set to expire, which was a Saturday (People's Application Dated June 1, 2020 at ¶ 1). The general selection of that date has no specific temporal or factual relevance to a good cause application. Nor did granting that application

accomplish anything other than keeping this defendant in jail until that date. No grand jury had been empaneled to hear this, or any other case, nor could one have been empaneled by June 6, 2020. As the People correctly note, county clerks have not even issued summonses to potential grand jurors to appear for selection, a process which only initiates the ability to empanel a grand jury at a future date. Even though New York City initiated a Phase 1 reopening on June 8, 2020, grand jurors will not appear in a courthouse by magic. The motion court granted this application on June 2, 2020, prior to even the Phase 1 reopening of the city. By the time Phase One reopening began, the period requested by the People to justify denying defendant's request for an immediate order of release had long ended. Predictably, there are still no grand juries.The People still have not conducted a preliminary hearing. And defendant remains in custody, held only on an undisposed of felony complaint. Thus, even if the limited date-specific extension to delay issuing an order of release requested by the People was based on case-specific good cause, defendant would have been entitled to be released from custody four days before this writ was even calendared for oral argument.

The expiration date for EO 202.28 was in fact extended intact by EO 202.38, and this new order will expire on July 6, 2020. Given the People's argument, and the motion court's ruling, if this Court sua sponte found for some reason that this new executive order automatically provides good cause to deny an order of release based solely on the unavailability of a grand jury, defendant could remain incarcerated until the new order expires, and probably much later, because there will still be no sitting grand juries by July 6, 2020; no notices for citizens to come to court and serve on a grand jury have been sent out, as the People acknowledge. That further extension based on the mere

inability to empanel a grand jury for another month is not legally justifiable based on this record.

Although the People made no argument that addressed the issue framed by the defense that they were required to seek a fact-based good cause ruling to delay the holding of a preliminary hearing, the motion court not only denied the defense application for an order of release based on the argument that the People had not applied to the Court to schedule a preliminary hearing before the 180.80 deadline; it gave the People leave to file such a scheduling request in the future. In its decision, the motion court wrote, “Either party is permitted to make further application under Criminal Procedure Law Article 180 as per the procedure established by the Chief Clerk of the Court in his revised May 8, 2020 ‘EO 202.28 CPL 180.80 Application and Virtual Preliminary Hearing Process.’” The problem is, the defense had already argued and tacitly demanded that such a hearing be conducted and questioned whether the People had witnesses who would be available to testify at a preliminary hearing. However, as noted, the administrative procedures require the People submit their application to seek good cause to delay scheduling or holding a preliminary hearing prior to the expiration of the 180.80 deadline.

Moreover, the motion court held that the defendant could independently apply to schedule a preliminary hearing.The administrative procedures referred to contain no provision for a defense application to schedule a preliminary hearing after the defendant is held in custody on a felony complaint. The procedures state exactly the opposite; they also clearly state when the People are required to initiate the process: “Simultaneously to the submission of the CPL 180.80 applications [to release a defendant], the Court will

work with the District Attorney's offices to begin the scheduling of matters in which they will, even prior to a Court ruling, conduct a preliminary hearing or offer a plea bargain. To initiate this process, the District Attorney's office should email the attached [form] to the chief clerk." Although defendant, through his release application, demanded that a virtual preliminary hearing be held pursuant to CPL Article 180 in order to justify denying his application to be released, it is not the defense that tells the court to schedule preliminary hearings under that statute, and the administrative guidelines acknowledge this.

Thus, under the motion court's ruling, good cause was found to deny release based merely on the unavailability of grand juries, and the People were given an open-ended extension of time to decide whether to apply to schedule a preliminary hearing. By its terms, this decision permitted the People to hold the defendant in custody beyond the 180.80 deadline in order to evaluate their case and determine whether they should comply with administrative guidelines required for scheduling preliminary hearings, and did so without any fact-based good faith argument for delaying the defendant's release on this basis. A judge has the power to grant an extension of time to present the case to a grand jury or to conduct a preliminary hearing pursuant to CPL§ 180.80(3). See People ex. Rel Hubert v. Kaiser, 206 NY 46, 52-54 (1912); see also Malcom, 85 AD2d at 316. No good cause was argued by the People that there was a reason to extend their time to schedule a preliminary hearing; by their argument, they need never conduct a preliminary hearing in any case because the only good cause needed to keep all defendants in custody absent one is the continuing unavailability of grand juries.

This Court's ruling does not hold that the criminal court must conduct and complete all virtual preliminary hearings before the 180.80 deadline as a prerequisite to

denying a 180.80 release application. Criminal court cannot, for completely valid reasons, calendar all the preliminary hearings that need to be conducted throughout the city within the statutory 180.80 period. Virtual courts have limitations. Defense attorneys must be able to consult with their clients. Arrangements must be made for the appearance of all necessary parties and witnesses via SKYPE. Defendants being held in the same city jails must use the same facilities to arrange for different SKYPE inmate appearances in all five counties, and that leads to overlapping needs for virtual production. Thus, temporal extensions will likely be necessary well-beyond the 180.80 period, due to the backlog of unindicted individuals held in custody under EO 202.8, and defendants held in custody after EO 202.28 took effect. Such extensions would likely be found reasonable and justify denying habeas corpus petitions where the delay is due to virtual court scheduling and SKYPE congestion, and not the People's failure to ask the criminal court to schedule the preliminary hearing prior to the expiration of the 180.80 period. See People ex rel. Stoughton(Harris) v. Shea, Index No 100446/2020, June 5, 2020 (Sup Ct. NY County).

Moreover, as the judge who arraigned defendant on the felony complaint made a probable cause finding in this matter, even if based on hearsay, to support holding defendant for 180.80 purposes, the delay in conducting a preliminary hearing based on court scheduling would not implicate due process. Cf. People v. Small, 26 NY3d 253, 258-59 (2015); see CPL §140.45; See People. Hernandez, 98 NY2d 8, 10 (2002); People v. Machado, 182 Misc. 2d 194, 194-95 (Crim Ct Bronx County 1999). Nonetheless, unless the People initiate the process to allow the Court to schedule the preliminary hearing prior to the expiration of the 180.80 period, they are affording

themselves a de facto good cause extension to decide to whether to conduct one in every matter.

During the virtual court hearing on this writ, the Court repeatedly asked the People whether they had made an application to the criminal court to conduct a preliminary hearing in this matter before the 180.80 deadline.[1] They agreed that they had not done so prior to the motion court's ruling but made no record about when they sent in their application requesting that a preliminary hearing be scheduled. They just did not know. They also provided no documentary proof about when they had done so. Thus, there is no reason for this Court to remand this matter back to the motion court to make a record and have that court issue a written decision addressing the specifics of the defense 180.80 release argument as it pertained to the issue defendant raised about 180.80 release based on preliminary hearing criteria. See People v. Brann, 2020 N.Y. App Div. LEXIS 3010, May 18, 2020 (1st Dept).

For all the reasons stated above, and based on the record before it, this Court finds defendant is being held in custody in violation of 180.80, based only on a flawed good cause application to deny the application for an "order of release" where the defense specifically argued that the People had to timely apply to the criminal court to

[1] Following the virtual court appearance on this writ application, the People submitted transcripts from two hearings on writs in which defendants argued for release under 180.80 based on the People's failure to conduct a preliminary hearing, and Justice Steven Barret denied both applications. They People argued that those transcript rulings provided legal support for denying this writ. In one case, People ex. Rel. Hough v. Brann, Index No. 400119/2020, the writ was heard after the People had conducted a preliminary hearing and Criminal Court Judge Margaret Martin found good cause to hold that defendant for grand jury action. In this Court's opinion, that made the writ remedy of release based on the failure to have a finding following a preliminary hearing to be moot. See People ex. Rel. Miller v. Knowlton, 239 AD2d 655, 656 (3rd Dept. 1997). In the second case, People ex. Rel. Simmons v. Brann, 400111/2020, the People filed the requisite paperwork with the criminal court to schedule a preliminary hearing prior to the expiration of the 180.80 period. The records before Judge Barrett in both cases does not at all resemble the record in this matter. Although Justice Barrett denied the applications based on a different interpretation of EO 202.28 and CPL Article 180 than that made by this Court, this Court agrees that the records in those cases supported the denial of those writs.

schedule a preliminary hearing prior to the expiration of the 180.80 period. The People were required to state a fact-specific good cause reason to deny that application; referencing the fact that they are unable to obtain an indictment because of the unavailability of grand juries anywhere in the state during the COVID- 19 pandemic is not sufficient. Defendant's continued confinement past the 180.80 period is in contravention of the letter of 180.80, the letter and intent of EO 202.28, and the Administrative Guidelines on the New York City Criminal Court enacted to facilitate compliance with 180.80 and EO 202.28 and conduct virtual preliminary hearings for as long as needed during this pandemic. Accordingly, the writ is granted, and the defendant is ordered to be immediately released from custody in this matter.

This constitutes the Decision and Order of the Court.

Dated: June 12, 2020
Bronx, New York

Hon. Ralph Fabrizio, JSC.