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

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THE PEOPLE OF THE STATE OF NEW YORK
EX REL. ELON HARPAZ, ESQ.,
ON BEHALF OF BRUCIE MICKENS, BASSIANA LAWRENCE, MICHAEL MANCUSI, EDWARD PEMBERTON, MIGUEL ROMAN, et. al,

Petitioners,

Writ of Habeas Corpus
FINAL DECISION AND ORDER

-against-

CYNTHIA BRANN, Commissioner of the New York City Department of Corrections, and ANTHONY ANNUCCI, Acting Commissioner, New York State Department of Corrections and Community Supervision,

Index No.400011/2020

Respondents.

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On April 20, 2020, 27 detainees, all parolees, filed this joint petition for a writ of habeas corpus. Prior to the litigants virtual appearance the next morning in this Emergency Part in Bronx County Supreme Court, Criminal Division, the Court learned that two petitioners, Jeffrey Joseph and Abdul Flynn, had been transferred to State prison after being ordered to serve lengthy time assessments following final adjudications that they violated conditions of their parole. Those petitions were withdrawn during the SKYPE court appearance. Each of the remaining 25 petitioners were in City custody on the date this joint petition was filed; they each were committed to custody to serve time assessments of varying lengths following their own final parole adjudications.

In this petition, they each ask this Court to not only release them from custody; they want the Court to terminate their parole violation sentences. The State argues that this Court has no power to alter these sentences. No petitioner claims that the time assessments ordered were illegal or arbitrary. They argue that the conditions of their confinement at Rikers' Island violates

the 8th amendment due to the COVID-19 pandemic, and the increased medical risks they argue they face based on their ages and a variety of underlying medical conditions. The legal conundrum facing the Court is that this is a writ seeking the petitioners' immediate release from their confinement after being legally sentenced, as well as an application to have this Court terminate, alter and/or interrupt these sentences.

Thus, the question arises whether all the remedies sought are proper when the legal remedy sought is habeas corpus. Complicating matters is that some petitioners will conclude the time assessed sentences in a matter of days, or a few weeks. Some petitioners were ordered committed to City custody based on time assessments that would conclude when they will "max out" on their parole and/ or post-release supervision. The Court asked the State if they were willing to negotiate and, on their own, terminate some petitioner's confinement where there is a very short time remaining to serve based on their assessments Petitioners argue that the State not only has the power to do this, but that they have released parole detainees found to have violated parole conditions and who were assessed to serve incarceratory terms based on administrative criteria created after the COVID-19 pandemic. The State does not dispute that they have such power. No one has provided this Court with these so-called "Corrections COVID Release Guidelines." The State just flat out refuses to negotiate and release any of these petitioners for any reason. Thus, once again it is left to the courts, with little to no appellate guidance, and certainly no reported case that addresses this situation, to decide whether the legal remedies requested may be granted.

The easiest petition to decide involves Gerard Moreno. Mr. Moreno is 27 years old. He is under parole supervision. On January 3, 2020, he was given a time assessment representing a hold to his maximum expiration date. That date is April 22, 2020, the day after the virtual court

hearing. By the time the Court finishes typing this "emergency application" decision, he will have been released by operation of law. Accordingly, his petition is dismissed as moot.

In terms of the remaining petitioners' legal claims, they all argue that this Court should grant in full this writ application, including an order terminating their time assessments, based on their allegations that the City and State have acted with "deliberate indifference" to their medical particular medical situations. These are familiar arguments to this Court. In many rulings going back several weeks, this Court has consistently held that the City of New York has not acted with any indifference, deliberate or otherwise, to detainees being held in custody at Rikers' Island. See e.g. People ex. rel. Moulter (Crockett) v. Brann, 2020 NY Slip Op 50436 U, April 16, 2020 (Sup. Ct. Bronx County). Tragically, there have been two reported inmate deaths at Rikers' Island, and there is no judge who can ignore that reality when making any legal ruling in which an inmate asks a Court to order his or her release during the COVID pandemic. This Court, as most others, has ordered the release of many parole detainees who have not yet had their parole violation detainers adjudicated, and has done so without finding any deliberate existence.

The basic premise in all these writs is that the City cannot do anything to address the COVID-19 pandemic to satisfy due process because of the size of the population and the realities of all jail facility. Based on factors outside City's direct control there has been a significant depopulation of Rikers' Island since New York City itself became the unenviable epicenter of the COVID-19 pandemic. Outside the jail facilities, the City and State have implemented aggressive testing programs. Hospitals admissions grew and medical personnel worked and continue to work heroically and past the point of exhaustion. The State and City governments secured more medical and personal protection equipment, and added capacity to City hospitals to isolate and treat people infected with and suspected of being infected with COVID-19. State and

City officials speak hopefully about how these aggressive steps, and many others, have made them cautiously optimistic that we are past the peak, but warn that we are hardly out of the woods. The aggressive steps prudently continue, in the face of mounting societal counter-arguments

The State and City took equally aggressive steps to address the COVID-19 pandemic in their jails. It was their efforts that led mainly to the direct release of prisoners without court intervention; they also facilitated the release of many other detainees held at Rikers' Island by consent of the City's prosecutors. As of April 19, 2020, two days before the virtual court proceedings, the Rikers' inmate population stood at 4,103 detainees, down from 5, 447 detainees on March 16, 2020. In a little more than one month, more than 26% of Rikers' detainees were released from City custody. The news articles cited in the petition reference crowded dormitories and inability to separate of sick and symptomatic detainees. Many of these articles are a month old.

As the City has correctly points out, the decrease in population has led to an increase in its ability to have inmates socially distance themselves from each other, albeit in the confines of a facility meant for penal and pre-trial confinement. Moreover, the number of new detainee admissions have dropped; there are fewer arrests made by our overworked and medically depleted law enforcement departments. Our law enforcement community has its own outbreak of COVID-19 infected employees, and the newspapers report far too many tragic deaths of uniformed officers who work to keep the public safe, as they themselves adopt to all the new rules, regulations, and realities of policing a plagued population. In short, the jails are not what has been referred to as the "petri dish" for infection, as it has been called in most court filings, simply because there are significantly fewer detainees.

The City has also prudently and aggressively addressed the serious health problems presented to the remaining large population of detainees in its jails during this unprecedented public health crisis. In her affidavit submitted along with the People's response in this matter, Dr. Patricia Yang, Senior Vice President of Correctional Health Services ("CHS") outlines all of the public health-related measures enacted and implemented by the City to address the COVID-19 pandemic in its correctional facilities. Dr. Yang notes that when the COVID-19 pandemic first erupted and to the present day, CHS has "followed and continues to follow the evolving federal, state and city public health guidelines." The City screens all incoming admissions for possible COVID-19 infection. When the 88 bed communicable disease unit at Rikers, already unique in its size prior to the pandemic, became burdened by suspected COVID-19 infected detainees, the City reopened the Eric M. Taylor Center ("EMTC") and converted it to a full-service therapeutic facility where male detainees who test positive are housed and treated in separate areas from those suspected of having been infected with COVID-19. The City has a similar unit for female detainees at the Rose M. Singer Center. All these detainees are separated from the general population in other Rikers' jails. Detainees are returned from the EMTC to other jails only when their COVID-19 infection has subsided, and they are viewed as being no longer infected or contagious under CDC guidelines.

In fact, of the petitioners in this matter, Jorge David, is a detainee who contracted COVID-19. He is 26 years old and has no reported underlying health conditions. He is on parole following his release from state prison after a plea-bargained conviction for Conspiracy in the Second Degree. In that case, petitioner David, along with other members of a Manhattan gang known as the "Whoaday," conspired to commit homicides, assaults, weapons possessions, narcotics trafficking, and other crimes. While under parole supervision, he failed to appear and a

warrant was issued for his arrest. He was taken into custody on that warrant on February 4, 2020, and the warrant officer alleges he found this petitioner in possession of a switchblade. He has a pending felony case for weapons possession; the ADA on that matter is in plea negotiations with his attorney. On March 2, 2020, he pled to violating the terms of his parole, and was given a time assessment of three months plus time served, and that assessment is scheduled to expire on June 2, 2020. On March 31, 2020, while already at EMTC, he tested positive for COVID-19. He remained at EMTC until his illness resolved and, pursuant to CDC guidelines, has since been returned to a general population facility. He, too, claims the City is acting with deliberate indifference to him, and all other detainees. These facts prove the polar opposite.

There is also some evidence to suggest that the City's jail-related aggressive tactics may be keeping the COVID-19 virus from spreading like wildfire throughout Rikers' Island facilities. During the past weeks, the number of COVID-19 infected individuals held at Rikers' Island has grown. That number has in the past month, at various junctures, has remained steady, grown again, and then plateau. At the time this petition was filed, the number of COVID-19 positive inmates was reported to be 362. While that is much higher than the numbers only three weeks ago, the current number has been steady for several days. As the City argues, this is very similar to "Coronavirus Curve" graphics" shown at press conferences.

All of the statistics being bandied about everywhere are not just numbers; they are human beings. However, nothing in the record before this Court suggests, let alone demonstrates, any deliberate indifference on the part of the City toward the people in its jail population, including those who are more vulnerable than others. The City provided masks for all detainees and staff on April 3, 2020, and mandated that everyone wear them, including detainees, in all public areas. This was immediately after the CDC advised everyone to wear masks, and two weeks before the

State ordered that everyone else wear masks in public places. The State has continued to implement its rules about thoroughly sanitizing all areas of its jails on at least a daily basis. When petitioners in the past have asserted that they have not been provided soap, or toilet paper, or cleaning supplies, the City has responded with facts that show the opposite is true, and that all personal sanitary needs are met. See e.g. People ex. rel. Jackson (Pacheco) v. Brann, Docket Nos. CR-0054232-20BX and CR-004533-20BX, April 8, 2020, Supreme Court, Bronx County (Fabrizio, J.); People ex. rel. Coleman v. Brann, Index No. 260197/20, April 9, 2020, Sup. Ct. Bronx County (Marcus, J.) (finding no evidence of deliberate indifference where City had reasonable plan in place to address and mitigate COVID-19 spread at Rikers' Island).

In legal terms, in order for any petitioner to sustain his or her burden of showing "deliberate indifference" to their serious medical needs as sentenced prisoners, that petitioner must satisfy both prongs of a two-part test. See Hill v. Curcione, 657 F3d 116, 122 (2d Cir 2011) (citing Estelle v. Gamble, 429 US 97, 104(1976)). First, there must be a showing under the "objective" prong of the test that there is a specific medical need that is "sufficiently serious, in a sense that a condition of urgency, one that may produce death, degeneration, or extreme pain exists." Hill, 657 F3d at 122. It could be argued that the COVID-19 pandemic itself meets and probably succeeds the requirements of this first prong, regardless of any individualized risk assessment.

The second prong is a "subjective" one, which requires a showing that the government official being sued acted with a "sufficiently culpable state of mind" to support a finding of deliberate indifference. Id. In each claim brought against the government under the 8th Amendment, each inmate must demonstrate this subjective culpability element. See e.g., Whitnack v. Douglas County, 16 F3d 954, 957 (1994); Berry v. City of Muskogee, Okl., 900 F2d

1489, 1493 (10th Cir. ); see also Collingnon v. Milwaukee County, 163 F.3d 982, 988 (7th Cir. 1988) (citing Farmer v. Brennan, 511 U.S. 825, 837 (1994) ("[D]eliberate indifference [is] essentially a criminal recklessness standard, that is, ignoring a known risk").

Significantly, even when an inmate satisfies this high burden of establishing deliberate indifference, the remedy has never been to release that individual inmate from confinement. see People ex rel. Barnes v Allard,25 AD3d 893, 894 (3rd Dept 2006); see also Glaus v. Anderson, 408 F.3d 382, 387 (7th Cir. 2005) ("If an inmate established that his medical treatment amounts to cruel and unusual punishment, the appropriate remedy would be to call for proper treatment or award damages; release from custody is not an option); Gomez v. United States, 889 F.2d 1124, 1126 (11th Cir. 1990); McBarron v. Jeter, 243 Fed. Appx. 857 (5th Cir 2007); Crooker v. Gondolsky, 2013 US Dist LEXIS 2017 at *7-8 (D. Mass. 2013); People ex. rel Stoughton (Williams) v. Brann, New York County Supreme Court Index No. 451069-2020, April 13, 2020 (Statsinger, J.).

As far as the City is concerned, the facts continue to show they provide top of the line medical care to detainees in their custody. They have implemented the same COVID-19 public health initiatives utilized in hospitals. They have not demonstrated a modicum of criminal recklessness in any of their protocols. Their actions have demonstrated and continue to demonstrate awareness, attentiveness, and conscientiousness to the medical needs of all these petitioners, as well as to all individuals detained in City custody during this time.

Another relevant example of the awareness and conscientiousness of its COVID plan, noted in Dr. Yang's affidavit, is the City's relentless pursuit of identifying the most vulnerable members of the jail population who are at risk for developing serious COVID-19 complications. Dr. Yang states that this screening process is done, in part, to "put forward these individuals for

consideration for release from custody." Dr. Yang's affidavit at ¶ 5. This information had provided the factual backbone for individual writ application heard by the Court in prior writs dealing with pre-trial detainees. Some petitioners in this matter have provided this type of medical documentation from the City in this matter, both to this Court and to the State. In the event any detainee is ordered released for any reason, the City has a discharge plan which includes sending some detainees to hotel rooms rather than back to crowded shelters. The City's COVID-19 plan implemented and used in its jails screens, isolate, treats, informs, and safely releases detainees, whether or not they have advanced risks. It is comprehensive. No petitioner has demonstrated, either individually or collectively, that the City has acted with deliberate indifference to their needs. Accordingly, petitioners have failed to meet their burden of establishing either a due process or 8th amendment violation against the City.

Petitioners also argue that the State is acting with deliberate indifference to their asserted individualized risks of suffering serious medical complications if they become infected with the virus. The State has two general answers to these specific claims. First, they argue that since they do not run the City's jails, the deliberate indifference test does not apply to them. Second, they say they take no position about whether the Court should grant any one of these petitions. It is true that the State stands on a different footing than the City in that they are not directly responsible for the medical care for the parolees serving time assessments who are in City custody. However, they also stand on a completely different legal footing. The City informs the State when they determine that a parolee under State supervision who is in City custody has a serious medical concern. However, the City cannot unilaterally order that any individual be released, including those with enhanced medical risk. It is the State that has the power to lift parole detainers, and the power to send a cut-slip to the City, asking for the release of a parolee

serving a time assessment. Indeed, the City is taking on an extra burden to treat and monitor parole detainees and convicted felons destined for state prison, since there are no transfers being made from City jails to DOCCS prisons during the pandemic.

Petitioners' argument in relation to their constitutional claims against the State is that, given that the State's awareness of their specific medical risks while they are held in City jails, the State independently acts with deliberate indifference by not releasing them (Mickens, et. al Petition at ¶¶ 1, 99-108). The State side-stepped this issue during the arguments that lasted many hours in this case. Moreover, while the State argues that it neither supports nor opposes the release of any petitioner in this matter, its conduct stands in stark contrast to this position; they are not even to negotiate to facilitate the release of any of these petitioners. And, as noted, they oppose release in this case on legal grounds in that this Court does not have authority to change any petitioners' sentence.

That legal ground is correct. This Court cannot change any legally pronounced parole assessment sentence. See Matter of Amato v. Perez, 107 AD3d 1259 (3rd Dept. 2013). Petitioners cite no legal authority that would allow this Court to interrupt their sentences and order their release.[1] Thus, this Court lacks legal authority to terminate the remaining time on 55-year-old petitioner William Fenner's six-month time assessment, which is scheduled to expire on April 30, 2020. He will continue to be on parole supervision after that date. The Court also has no legal authority to terminate the remaining time assessment for 54-year-old Louis Serrano, who is scheduled to be released on May 3, 2020, and who will also be subject to continued parole supervision. The Court has no legal authority to terminate the remaining time assessment for

[1] Statutes and regulations allow for any sentenced prisoner in a DOCCS facility to apply for a medical furlough that interrupts their sentence and adds to the overall time calculations for that sentence. Corrections Law §§ 851-855; 7 NYCRR Part 1900 and Part 1901.

immuno-compromised inmate David Cruz, who has served five months of his assessment of a hold to his maximum expiration date of May 27, 2020. The State's position is so inflexible on this point that their "taking no position" on Gerard Moreno's application when it was served on April 20, 2020 resulted in his waiting two days to be released, a time when the State would have no position to take. The Court writes this only to show that taking no position when you are in a legal position to do something and you do nothing is actually taking a position. And a State can in some circumstances be found to have acted act with deliberate indifference to parolees in terms of the length of time spent on parole, something that has have nothing to do with medical concerns. See Hawkins v. Lowe, 786 F.3d 603 (7th Cir. 2015).

The Court considered converting this writ to an Article 78 proceeding, as it pertains to certain petitioners' claims against the State. Contrary to the State's argument, petitioners have alleged a claim against a state employee. They have argued in their papers that the Commissioner has acted with deliberate indifference by not releasing them. And they suggested in Court that he not only has the power to so, but has released other individuals sua sponte based on general COVID-related criteria aimed at depopulating jails. They are not challenging an action as being arbitrary and capricious: they base their challenge on his failure to act as to their case specific claims. The Court contacted petitioners' lawyers and the State's lawyers after the Court hearing and provided them with an opportunity to be heard about converting this writ to an Article 78 proceeding. Petitioners initially argued for some kind of hybrid ruling incorporating Article 78 based law and due process/8th amendment law. The State opposes the conversion to Article 78, arguing that there is no record of any actual state action to review, and there is no record in this matter to show why the Commissioner has refused to act and release any of these petitioners. The State also argues, substantively, that there is a rational basis to have all petitioners serve the

entirety of their remaining time assessments, even where the remaining portion of the assessment is, using the State's word, "de minumus."

The Court makes no ruling about whether the State's public policy argument relating to having parolees remain in jail to serve two, or five or eight days remaining on a time assessment has a rational basis in the age of COVID. The Court also understands that all judicial rulings have precedential value, even non-binding lower court ones. And, the Court understands that each petitioner named in this case has a significant personal interest in its outcome.

In the end, while the Court has the power to convert this to an Article 78 proceeding, it does not have a sufficient record upon which to base a ruling at such a proceeding. The Court is unaware of any reason given by the State for any sua sponte release decision involving parolees who were assessed time in the past. Decisions whether to grant furloughs, or change an incarceratory sentence to a non-incarceratory sentence of "medical parole" under Executive Law § 259-r, are initially the province of the Commissioner, and not the courts. See Matter of Ifill v. Wright, 94 AD3d 1259, 1260 (3d Dept 2012). Those administrative criteria implicate a wide variety of statutory and regulatory criteria. One criteria the State is permitted to consider is the dangerousness to the public in releasing individuals who are serving any type of sentence connected with a felony conviction. See Ifill, 94 AD3d 1260-61. (rational basis for State to consider "reasonable probability of whether petitioner can be at liberty again without violating the law"). The State has not extended that type of discretion to the judiciary in making a decision; courts can only review whether such a criteria was properly considered by the Commissioner.

This Court has reviewed all the records submitted in this matter, including medical records and letters sent by CHC doctors for each of the petitioners who have obtained such

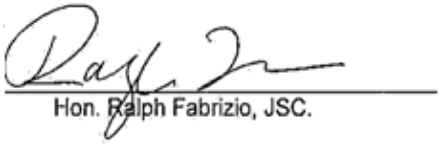
documentation. The Court has considered all submissions and arguments by the City, the State, all of petitioners, the various ADAs who appeared to provide information about other pending cases involving certain petitioners. Having found no deliberate indifference exhibited by the City relating to the actual conditions of each petitioners' individual confinement and medical needs, the petitions against the City are denied.

In terms of the State, the Court does not have a sufficient record in this matter to show that their inaction and their position not to, either sua sponte or at this Court's request, order the release of any one of the petitioners demonstrates that such failure to act evidences deliberate indifference to any one of the petitioners in this matter. This Court finds it has no legal authority to temporarily release anyone serving an incarceratory period of commitment under Article 70. This Court also finds no legal authority to allow it to issue an order to have these sentenced petitioners return to Court if it merely releases them. And, not insignificantly, they are all proven flight risks, some many times over, and especially based on the fact that they have failed to comply with their reporting and living and program and other requirements important to the State's ability to properly supervise parolees released to the community. Therefore, the Court also denies on this record all remaining petitioners' claims against the State.

This constitutes the Decision and Order of the Court.

Given the realities of the Court's virtual operations, the Court directs that this decision is deemed filed as an official court record at the time it is sent to all parties in this matter, especially for purposes of initiating any appellate review.

DATED: APRIL 22, 2020



Hon. Ralph Fabrizio, JSC.