

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF NEW YORK : CRIMINAL TERM : PART TAP A

3 -----X

4 IN THE MATTER OF PETITION FOR RELEASE :SCID
No. 30042-20

5 VENUS WILLIAMS, ET. AL. :APPLICATION

6 Petitioner. :

7 -----X

8
9 100 Centre Street

10 New York, New York 10013

11 March 20, 2020

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14 B E F O R E:

15 HONORABLE STEVEN STATSINGER,
Justice Supreme Court.

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17 A P P E A R A N C E S:

18 For the Petitioner:

19 LEGAL AID SOCIETY
COREY STOUGHTON, ESQ.
MARIE NDIAYE, ESQ.
LAUREN GOTTESMAN, ESQ.

20 For the Respondents:

21 NEW YORK CITY LAW DEPARTMENT
Office of Corporation Counsel
22 BY: MARTIN BOWE, ESQ.

23 &

24 OFFICE OF THE ATTORNEY GENERAL
Director of Emergency Litigation
25 BY: JAMES B. COONEY, ESQ.
Assistant Attorney General
Maureen Postel
Senior Court Reporter

1 A L S O P R E S E N T:

2 CYRUS R. VANCE, JR., ESQ.

3 DISTRICT ATTORNEY – NEW YORK COUNTY

4 BY: PATRICIA BAILEY, ESQ.

5 Assistant District Attorney

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MAUREEN POSTEL

SENIOR COURT REPORTER

Maureen Postel
Senior Court Reporter

1 THE CLERK: Added to the Tap A calendar, Venus
2 Williams, 30042-20, Calendar Number 11.

3 MS. STOUGHTON: Good afternoon, Legal Aid
4 Society, Corey Stoughton, S-T-O-U-G-H-T-O-N.

5 MS. NDIAYE: Also appearing Lauren Gottesman,
6 G-O-T-T-E-S-A-M, Marie Ndiaye, N as in Nancy, D as in
7 dog, I-A-Y-E.

8 THE COURT: On the other side?

9 MR. BOWE: Good afternoon, Martin Bowe for the
10 City, Corporation Counsel, Martin Bowe, B-O-W-E.

11 THE COURT: For the City.

12 MR. COONEY: James Cooney, Assistant Attorney
13 General of New York, director of Emergency Litigation for
14 State DOCS.

15 And just so everybody knows, Justice Statsinger,
16 I represented you, at least, once.

17 THE COURT: Twice.

18 MR. COONEY: Hopefully I did it well. I don't
19 remember.

20 THE COURT: I'm still here.

21 MR. COONEY: Article 78.

22 THE COURT: Mr. Cooney has represented me on I
23 think two occasions where defendants who had appeared
24 before me had sued me for one form of relief or another.
25 None of them are under the list of inmates. Do you have

1 any objection to him being here?

2 MS. STOUGHTON: No, your Honor.

3 MS. BAILEY: Patricia Bailey on behalf of the
4 District Attorney's Office. We are not a named
5 respondent, but given that the allegations are alleged
6 certain District Attorney's defendants were reported to
7 be here.

8 THE COURT: Any objection to the DA's Office
9 being present --

10 MS. STOUGHTON: No, your Honor.

11 THE COURT: -- perhaps intervening?

12 MS. STOUGHTON: No, your Honor.

13 THE COURT: Thank you all. I don't know who is
14 speaking, Ms. Stoughton?

15 MS. STOUGHTON: Yes.

16 THE COURT: I'm going to let you speak for as
17 long as they like. I do have some questions before we
18 start. First, it seems like some of the people -- there
19 are about 116 in your writs that have already been
20 released.

21 MS. STOUGHTON: Your Honor, I think there's
22 maybe one or two, a small handful. We're getting updated
23 information as it comes in, but I'll say by the same
24 token there were 30 more names that we haven't had the
25 time to file an amended pleading. This is a situation

1 that's fluid, and we're doing our best to keep up and
2 stay on top of those developments.

3 THE COURT: Just probably for the City or the
4 DA's Office, by any chance is there anyone on this list
5 that you're consenting to that person's release?

6 MS. BAILEY: We just received the list last
7 night. We haven't had a chance to go through that list.
8 It's a little rushed for that purpose. We're looking at
9 other lists that we were provided.

10 THE COURT: So, no?

11 MS. BAILEY: Not at this point.

12 MS. STOUGHTON: If I can add on that topic?
13 This is a complete number, but I can tell you today that,
14 at least, 25 of the people in the current petition we
15 have sought consent from the District Attorney's Office
16 for release, and they have affirmatively -- they've
17 withheld that consent. They denied that consent.

18 THE COURT: Even though you're all from the
19 Legal Aid Group, even if I were to -- I have not decided
20 this application, obviously. But even if I were to -- I
21 don't have sufficient identifying information, such that
22 I could feel confident that the right people are being
23 released. All I have are names alone. I would need --
24 and I'm telling you this so if you want to --

25 MS. STOUGHTON: We'll write it down.

1 THE COURT: If you want to write a text or
2 e-mail for someone to get numbers, NYSSID numbers, book
3 and case numbers, docket or indictment numbers at a
4 minimum would be necessary. Some of the names -- like I
5 saw a John Rivera, for example, a number of very common
6 names -- if People are to be released pursuant to this
7 mass application we do need to make sure that the right
8 people --

9 MR. COONEY: Could I add to them? If we could
10 differentiate, also I'm assuming the reason I think on
11 behalf of the DOCCS, their parolees versus pre-trial
12 detainees, those are not detainees.

13 THE COURT: That was another one of my
14 questions. I'm having on-going basis -- my Court
15 attorney, Mr. Levy, Justin Levy, is going through the
16 relevant data base so that I can have better information
17 about who falls into which category. It seems like a
18 sub -- I have about 40 of them that he's looked at so
19 far. A substantial plurality are in on parole holds. I
20 have identified six different categories of potential
21 people.

22 First pre-trial inmates in misdemeanor cases; do
23 you know how many on this list fall into that category?

24 MS. STOUGHTON: No, your Honor, I can tell you
25 parole hole versus pretrial, but I can't -- we can do --

1 we have the data in our office. I can't do that standing
2 today to break it down --

3 THE COURT: Okay, we'll come back to parole hold
4 versus pretrial. Are there any on this list who are
5 pending sentence?

6 MS. STOUGHTON: No.

7 THE COURT: Are there any who are serving
8 sentences?

9 MS. STOUGHTON: No.

10 THE COURT: Are there any who are being held on
11 fugitive warrants?

12 MS. STOUGHTON: No.

13 THE COURT: So only pretrial, misdemeanor,
14 felony, and parole holds? Can you give me the breakdown,
15 if you have it?

16 MS. STOUGHTON: I, actually, have a list. It's
17 so tiny it would take -- if you're patient I'll count it.
18 Forty-seven are pretrial.

19 THE COURT: Forty-seven are pretrial?

20 MS. STOUGHTON: Sorry, no. 47 are parolees.

21 THE COURT: Some are both pending cases and
22 they're being held --

23 MS. STOUGHTON: Forty-seven have parole holds,
24 that will include the subcategory of people who are both.
25 Those 47 will be --

1 MR. COONEY: Exclusive parole hold?

2 MS. STOUGHTON: Anyone with a parole hold.

3 THE COURT: So even, like, for example, I see
4 there are a few people who are in on misdemeanor, a
5 dollar on the misdemeanor and have a parole hold, so you
6 count those as parole hold people, not pretrial
7 detainees --

8 MS. STOUGHTON: In this list, yes.

9 THE COURT: Thank you, that's a rough number.
10 My preliminary questions, one more, I have
11 anecdotically learned that the City is looking into its
12 own program to screen and release inmates. Is any of
13 this muted by that?

14 MS. STOUGHTON: No, your Honor -- I would defer,
15 obviously, to the City or, perhaps, people who are closer
16 to the process to talk about that. But what we know
17 about that process in each of the boroughs there is an
18 informal process underway between the District Attorney's
19 Offices in those boroughs and the Legal Aid Society, and
20 I think also some of the other defender organizations to
21 try to identify some cases in which agreements can be
22 reached that the person should be released. In fact,
23 apart of that process some people have been released.

24 We're here today because that process is not
25 going fast enough, and is moving too slowly, and isn't a

1 full remedy for the constitutional violations that we've
2 alleged in the petition.

3 THE COURT: Anyone on this side want to talk
4 about that petition?

5 MS. BAILEY: I can talk generally from the
6 District Attorney's point of view.

7 THE COURT: You're from the Manhattan DA's
8 Office?

9 MS. BAILEY: Yes.

10 We have a list from the MOCJ Mayor's Office as
11 well as a list --

12 THE COURT: MOC J is M-O-C-J stands for the
13 Mayor's Office on Criminal Justice.

14 MS. BAILEY: -- and the list from OCA, and we've
15 been going through the last two weeks pulling the cases,
16 reviewing the cases, going through them; that process is
17 on-going. It will probably be short circuited by this or
18 interrupted, I should say, in terms of having to look --
19 in terms of having to look at a different set. I don't
20 know if there's much cross pollination between the three
21 sets and this and two other sets from MOCJ or OCA. And I
22 don't think the Legal Aid Society never approached our
23 office with this list before 10:30 last night to ask us
24 to look and review to see if we would consent. But
25 that's as far as I understand those are the two lists

1 would be.

2 THE COURT: Thank you, go ahead.

3 MS. STOUGHTON: On that question or --

4 THE COURT: I'm ready to hear you. I might
5 interrupt your questions.

6 MS. STOUGHTON: Please do.

7 THE COURT: That's what we do.

8 MS. STOUGHTON: Your Honor, thank you so much
9 for hearing this application on an emergency basis. We
10 do appreciate in extraordinary times, and we are here in
11 extraordinary times, even when we filed the petition last
12 night the numbers of confirmed cases in COVID 19 have
13 doubled from 1,871 to now this morning it was just under
14 4,000. I'm sure it's over that number already by now.
15 And from 11 deaths to 26 deaths, and that's in New York
16 City alone.

17 THE COURT: Do you have numbers from the
18 population at Rikers Island?

19 MS. STOUGHTON: We don't have an update since
20 last night when as of last night there was -- there is
21 one confirmed by authorities --

22 THE COURT: Of an inmate?

23 MS. STOUGHTON: Of an inmate and three
24 correction officers, including one who has since died --
25 not a corrections officer, but the person who died was an

investigator who works for the Department of Corrections.
DOC, Department of Corrections. And we at Legal Aid, I
see we have been receiving reports that additional
inmates have been put into respiratory isolation and have
been isolated in the hospital units.

There's every reason to believe the -- we know
it's present at Rikers Island. There's every reason to
believe that it's spreading and spreading rapidly, like
it does in closed environments in, like, jails and
prisons.

THE COURT: Thank you.

MS. STOUGHTON: You're well aware we just
discussed there is a process for identifying inmates that
can be released. We are not here to question the good
faith of many actors across City Government who are
working on that problem. The District Attorney himself
has signed a letter saying he supports in general the
idea that people should be released because of the danger
imposed to their health at Rikers Island. We're here
respectively to question the failure to appreciate the
urgency to move that process forward faster to release
people who, Corrections health officials and experts all
universally agree, face a serious risk of death and
serious infection if they are left in Rikers Island.

THE COURT: I have another question; you have

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identified in the application inmates who are of or above a certain age or of certain underlying medical conditions or both. Putting aside age, is that -- the information contained in your application about these underlying medical conditions, is that based on self reports from the defendants or is it based on medical records from the institution? Tell me a little bit more about that.

MS. STOUGHTON: It's a mix, your Honor. What we've done for some of the inmates, some of them have diagnoses, and some of them have letters of support from Correctional Health Services, CHS, which, you know, is the health service provider on Rikers Island, some of them don't, and there are diagnoses in medical records that are for attorneys who got from HIPPA releases, releases and information they gathered in the course of their representation of the client. So it's a mix of both of those.

THE COURT: But it could just be a client who has said I'm asthmatic, for example?

MS. STOUGHTON: It could be, yes, your Honor. There are some examples of that, I want to be clear about that.

THE COURT: Thank you.

MS. STOUGHTON: What we are asking for is a reorientation of the process that's underway -- the

1 current process is asking the wrong question. It's
2 starting -- it's operating in a system of normalcy, a
3 kind of somewhat speeded up examination of a normal
4 process of filing writs, having them heard, negotiations
5 between the public defense lawyer and the District
6 Attorney, and the application of questions that are
7 relevant to the District Attorney's office, but, frankly,
8 not legally relevant; like what is the public safety risk
9 that this pretrial detainee imposes?

10 The constitution, which exists to protect our
11 values in times of crises like this, is very clear that
12 it is unlawful to incarcerate someone when incarceration
13 poses a risk, a serious medical risk to them, and it
14 requires their release in other circumstances.

15 THE COURT: I'm going to stop you there. I am
16 generally familiar with this Eighth Amendment juris
17 prudence, and, of course, the equivalent privilege of the
18 State Constitution, and the deliberate indifference cases
19 relating to an inmate's medical needs, but it doesn't
20 really seem that those cases generally conclude that the
21 remedy is for the inmate to be released. It may be a
22 change of prison policy or condition. Perhaps, an inmate
23 is moved so he's not sharing a cell with a sick inmate,
24 or compelling the Constitution to provide necessary care
25 or treatment. And in your papers you, certainly,

1 identify cases where the subject of release as a remedy
2 has been discussed.

3 But have there been cases that I'm just missing
4 where inmates have been released under this theory?

5 MS. STOUGHTON: Your Honor, you are absolutely
6 right there that in the vast majority the -- really, all
7 of the conditions of confinement cases that have been
8 litigated. The right and proper remedy is for the jail
9 or prison to institute proper procedures to provide care
10 to that person, that is the normal remedy. And we
11 acknowledge that, but, again, these are not normal times.
12 We acknowledge that the burden is on us as the petitioner
13 to explain why that extraordinary remedy of release is
14 required. But we would also submit to you that on this
15 record that burden is more than met. And it's met by the
16 evidence from medical professionals, including specific
17 Correctional medical professionals who have concluded
18 that the only remedy to prevent serious risk of illness
19 and death for inmates at Rikers Island is a set of
20 remedies; hygiene and social distancing. And those
21 remedies are not possible in this context. So when it is
22 the combination of that and the legal -- it's Paragraph
23 185 in our petition where there is case law that says
24 that release can be an appropriate remedy for conditions
25 of confinement cases, that's Brown -- People XRL Brown

1 vs. Johnston and Calico --

2 THE COURT: It's not immediately apparent as
3 you've described Brown, that's what that case is about.

4 MS. STOUGHTON: Yes.

5 THE COURT: For example, habeas petition to
6 address restraint in excess of that permitted by
7 constitutional guarantees sounds like it could be talking
8 about a person who is held longer than the term of his
9 sentence, for example.

10 What was Brown about?

11 MS. STOUGHTON: You know, Brown was a conditions
12 of confinement case and beyond that, I'm sorry, I can't
13 remember.

14 THE COURT: Do you know if it resulted --

15 MS. STOUGHTON: It did result in a release. It
16 was not a medical conditions case. I don't want to
17 overstate -- I want to acknowledge, your Honor, we are
18 putting together the universe of what the judicial
19 authority is; constitutional argument.

20 THE COURT: So, for example, it could have been
21 a person who was held in solitary and was ordered release
22 from solitary, for example?

23 MS. STOUGHTON: I don't think it was, but it
24 could have been. And to acknowledge the point, your
25 Honor; you ask is there an example of a conditions of

1 confinement case where someone was ordered released, and
2 the answer is I don't have that case in New York, that's
3 not happened.

4 THE COURT: Thank you.

5 MS. STOUGHTON: Again, I would go back to the
6 fact that it's very clear that the Court has authority to
7 order whatever relief is necessary to vindicate the
8 constitutional right, and in these extraordinary times on
9 the record that we made it's clear that the only viable
10 remedy -- the only remedy to actually accomplish that is
11 release in this case.

12 THE COURT: Let me ask you about that; is there
13 a viable remedy along with the lines of distributing
14 inmates more sparsely among larger number of facilities
15 so they are not crowded closely together? Moving them
16 around so that they're -- it's possible to maintain a
17 social distance?

18 MS. STOUGHTON: No, no, your Honor. And I'll
19 tell you why I know that. I know that because the New
20 York Board of Corrections, which is staffed by experts in
21 this subject has considered that question and rejected it
22 and advised exactly as we're asking here; that people
23 over the age of 50 and with underlying medical conditions
24 should be released. I know that because as we appended
25 on our petition medical experts who are around the

country who are being asked to weigh in on this in litigation across the country have concluded that death -- they have filed attempts in other courts. And we know that because the Chief Medical Officer of Rikers Island tweeted 36 hours ago that we need to release people to save their lives from Rikers Island. We need to do that now, and call out the City for not doing that. On that basis we know that the people who have real expertise on the question -- that you asked and answered that question in the negative.

THE COURT: Just a couple of questions before we shift gears. As I was reading your application it struck me that it might be both over-inclusive and under-inclusive, just which is to say might be including people who aren't at a greater risk as you have said, maybe because it's simply a self report of asthma or high blood pressure, but also under-inclusive because the Legal Aid Society can only represent its own clients. I was wondering if there were a way maybe all the defense agencies, and maybe even representatives from the 18B panel could sort of work directly with the City or MOCJ to hash this out so that the concerns of about over-inclusiveness and under-inclusiveness are minimized? And I understand that all of these things take time, but has that been considered?

1 MS. STOUGHTON: Yes, your Honor, that has been.
2 What has been going on for the past week, and it's not
3 moving fast enough, that's the problem.

4 First, let me say -- there's no question, you're
5 right, this petition is incredibly under-inclusive for
6 all the reasons you just said. As to the question
7 whether it's over-inclusive I don't think it is. Again,
8 we are following the guidelines issued by correctional
9 medical professionals and who's at risk. No question
10 that within that category of people at serious risk there
11 are different gradations of risk. There's no question of
12 that, that's a matter of logic. But the question is for
13 what class of people is release the only way to
14 effectively address the risk of serious medical harm?
15 And, again, I go back to the fact that those correctional
16 medical professionals have set that bar for us. In this
17 petition -- everyone in this petition falls into that
18 class. And that's why we brought this as a mass, right,
19 because the process that you are asking for it's a
20 perfectly reasonable response. It was the approach that
21 I think everyone would prefer to be taking. What we're
22 learning now, it's not moving fast enough. It's not
23 sufficiently encountering for the urgency of the
24 situation given that we now have the virus on the Island
25 and it's spreading. We need a categorical -- the

1 constitution demands, and we need a categorical response
2 to that.

3 The other thing I'll just add is that I
4 mentioned that there are, at least, I think 25 -- at
5 least 25 pretrial people for whom we have affirmatively
6 denied consent from the District Attorney's Office.

7 I'll add with regard to the parole category we
8 have sent the entire list of parole hold people in this
9 petition to the Department of Corrections and Community
10 Supervision, Department of Corrections and Community
11 Services, State Prison Authority. Our parole revocation
12 defense system sent that list days and days ago. There's
13 been no consent to release anyone in the parole hold.

14 THE COURT: And that consent would have to come
15 from other than the District Attorney's Office?

16 MS. STOUGHTON: That's right. So that is why
17 I'm glad the Attorney General's Office is here to talk
18 about that. My understanding in that process in any case
19 even if that consent came we would need a court order to
20 enable the listing of a real order.

21 THE COURT: That's a different order from the
22 one you're seeking today. A writ of habeas corpus would
23 suffice, as I understand the law. But I'm sure the
24 Attorney General's Office can speak to this.

25 MS. STOUGHTON: The last thing I say about this,

I would just -- I think I made this point, but to make it very clearly the process of negotiating person by person is asking the wrong set of questions about this process. It's asking a set of questions that are actually legally foreclosed as relevant factors. The process we've been engaging with, I will also say there's another process happening that defenders have not been a part of, which is -- you know, let me take a step -- I think it is important to break this down. There are two layers of process as I understand happening right now; one is a communication between the Department -- DOCCS and the Legal Aid Society by parole, and then the parallel conversations between the District Attorney's Office and Legal Aid trying to get agreement and consent of those actors to let those people out, that's been going on. And as I say again, moving too slowly and asking the wrong questions.

There's another process, which I think counsel was alluding to, which is that the Mayor's Office of Criminal Justice, OCA, and the District Attorney's Office, I understand, have been having conversations based on lists that the public defenders have not been apart of.

All I can speak to about that process, we haven't seen any results from it because our clients

aren't being released by it. Both of those processes are asking the wrong questions because it's our understanding, certainly, we know from a first hand experience in the first category of discussions, that the focus of the District Attorney's Office has been on questions of public safety. We have to, again, go back when we were talking about people's lives and constitutional rights as to what the Constitution requires -- and it is clear as day under New York State statutes governing what the legitimate concerns of the State are for pretrial detainees that public safety is not a concern.

It is also clear as day from New York Court Of Appeals precedent on this very question of due process, and the balancing test under State law for what process is due, that the only factor that can be balanced on the State side defense, in this case the risk of death for individual inmates is the State's interest in getting that person to appear at their next court hearing. And that's in the Schipski, S-C-H-I-P-S-K-I, vs. flood -- it's cited in our petition. It precludes the notion that a person who faces the risk of serious medical harm, and in this case death, should be continued to be held in an institution under circumstances that pose that risk because somebody has decided that they're a public safety

1 risk. That is the law that we're dealing with when we're
2 dealing with presumptively innocent pretrial detainees.
3 And that's critical because part of that is why this
4 process is moving too slowly. It's moving too slowly
5 because consent is being unreasonably withheld on grounds
6 having to do with public safety.

7 What we need to do, your Honor, if you permit
8 me, getting people out of Rikers faster for their safety,
9 for the safety of inmates and staff to remain on that
10 Island, for the safety of the City at the risk that
11 Rikers -- as it did in China and as it did in Iran --
12 becomes a point of spread for this virus throughout this
13 City. All throughout this City, City and State leaders
14 are making difficult choices. I'm not here to pretend
15 that this is not extraordinary.

16 The Mayor has closed down the schools despite
17 the fact that there are 14,000 homeless children. The
18 Governor today has just issued an order saying that all
19 businesses have to shut down, and not bring employees to
20 work except for limited essential services. These are
21 difficult decisions, but in this crisis leadership
22 requires those difficult decisions.

23 Unfortunately, for the process we've been trying
24 to engage in, the actors in that process have not been
25 willing to make those difficult decisions. They haven't

1 been even willing to make the decision in line with the
2 criteria that the Constitution, the State of New York
3 sets down. And that's why we're here today. We have got
4 to make these hard choices because public safety, as a
5 concept, doesn't just encompass the risk that certain
6 individual pretrial detainees pose to us, it encompasses
7 the risk of this virus spreading and killing people, and
8 that public safety and risk is part of the calculation
9 here and isn't adequately considered.

10 We need to move faster on this, and that's why
11 we're here today.

12 THE COURT: All right, another couple of
13 questions.

14 MS. STOUGHTON: Yes.

15 THE COURT: There's a way of looking at it; that
16 pretrial detainees and people held on a real warrant are
17 differently situated. Now, of course, along the
18 dimension you're talking about they're identically
19 situated because they're all a part of this population.
20 But isn't there another remedy for people charged with
21 parole violations? Either those people could be moved,
22 they are State prisoners, they were serving a State
23 prison sentence, they were released conditionally with
24 the understanding that if there was a finding that they
25 violated those conditions they would simply resume

1 serving that sentence? Isn't there a remedy that would
2 either -- perhaps, some sort of Article 78 to DOCCS or
3 the State division of Parole to demand expedited hearings
4 for them, or is there a reason why they couldn't simply
5 be moved to State prisons, which are not the subject of
6 the petition like this as opposed to pretrial detainees
7 who are there because they are pretrial detainees?

8 Go ahead.

9 MS. STOUGHTON: So, first, to be very clear the
10 parolees who are in this petition are not people who have
11 adjudicated -- violated their parole.

12 THE COURT: I understand, they are awaiting
13 adjudication.

14 MS. STOUGHTON: I say that to make very clear,
15 and the law is actually clear on this, there's a Federal
16 case on this, which I have to search the petition. It's
17 in the petition, we'll find it, but it's very clear that
18 the due process standard -- this question has come up
19 before; should you treat parolees picked up on a warrant
20 accused of violating a parole, but not adjudicated to
21 have done so the same way we treat prisoners under the
22 Eighth Amendment standard, which is admittedly more
23 stringent than we are dealing with this case, or are
24 their claims adjudicated under the Ninth Amendment, the
25 due process clause, and the Federal Courts in New York

1 have been clear that it is the --

2 THE COURT: I do understand, but that doesn't
3 really get to the answer to my question, which is that if
4 there is a remedy available to that group that, of
5 course, is not available to pre-trial detainees?

6 MS. STOUGHTON: So the answer to that is that
7 moving people from one prison to another isn't a remedy.
8 Although, obviously, Rikers has some particular
9 difficulties. We mentioned those in this petition, the
10 realities that the conclusions of those correctional
11 medical professionals and the board Of Corrections isn't
12 that Rikers Island is the one place that's dangerous,
13 it's that jails and prisons --

14 THE COURT: But Rikers Island is the subject of
15 this petition?

16 MS. STOUGHTON: Yes.

17 THE COURT: And the logical extension of that
18 is, of course, to release everybody, whereas the specific
19 petition before me is to release these people before me
20 from Rikers Island because of a specific set of factors
21 are that you folks are saying make it a particularly
22 dangerous place for these people. If there's a remedy
23 that gets parolees, the people held on parole violation
24 warrants a move to other places where they can lawfully
25 be, or if there's a process to demand, say, through an

Article 78 expedited revocation hearings, so that they're not pending adjudication I think it's constitutionally permissible to identify a remedy available to one group that simply is unavailable to the other.

MS. STOUGHTON: I would say if we're talking about a remedy, just transferring to another prison, that's going out of the frying pan into the fire. But if you're talking --

THE COURT: I need to stop you again because even your petition says, well, of course, you know, people accused of parole violations could be released, and then there could be a new violation petition at a later time, which if they were adjudicated, if they were found to have violated the condition of that parole would end up back in State prison anyway.

When you say out of the frying pan into the fire, a person who has found to have violated conditions of her parole is going to end up in prison?

MS. STOUGHTON: Hopefully, not COVID 19 is abated. That's, I think, the critical element here. In the situation of the current pandemic there isn't a prison I think that can really -- look, I can't be -- I can't stand here and say I know what the conditions are like in all the Upstate prisons. I can't do that, but it strikes me given -- having looked very carefully at the

underlying basis for the conclusions of those correctional medical professionals, I don't think that there's any reason to believe that transferring parolees to another correctional institution is any remedy for the constitutional violation that we've alleged.

But I do want to come back to what you're saying about expediting parole hearings. This puts us in a bit of a tricky situation procedurally. The only vehicle available when you're seeking release is habeas corpus, as you know. And in habeas corpus the only relief we can ask for is release as a person. And as someone whose looked at this problem I think there are a range of solutions that could be implemented to get to the ultimate outcome to solve this problem. If this process spurs conversations for those solutions to happen immediately, I think that would be a great success of this process. But I don't think we have the legal basis to stand and ask you to order that, for example, in this case.

THE COURT: I meant through some other process, I didn't mean through this particular writ. I was thinking --

MS. STOUGHTON: My colleagues have asked me to mention --

MS. NDIAYE: There is a case of positive COVID

1 19 diagnosis for a correctional officer in an Upstate
2 facility in New York. I just can't -- I can look through
3 my phone, I can tell you that it has -- as proof of the
4 purposes of this proceeding, thank you.

5 THE COURT: Just another question for pre-trial
6 detainees, as far as I know, and please correct me if I'm
7 wrong, because I've been incredibly busy today, and I
8 haven't been able to catch up with much of anything. As
9 far as I know the Governor has not suspended 30.30.

10 MS. STOUGHTON: That's right.

11 THE COURT: Thank you.

12 MS. STOUGHTON: Your Honor, we are all -- these
13 are extraordinary times so there's, certainly, no
14 judgement. We are all trying to deal with a crisis
15 situation. And, again, we appreciate you hearing us very
16 quickly on this.

17 THE COURT: My pleasure, let me go to the other
18 side.

19 Who is going first?

20 MR. BOWE: First, your Honor, I can only
21 speak -- to back up, your Honor was asking questions
22 indicating a desire to try to think of, perhaps, another
23 remedy. I'm unprepared, I've been communicating, and I
24 ask the Court's forgiveness to the client. I wasn't
25 asked to come to court until three o'clock -- 'till two

1 o'clock --

2 MS. STOUGHTON: I was home because our office is
3 closed because of infection and contact.

4 THE COURT: I understand.

5 MR. BOWE: I can speak to issues raised in
6 petitioner's letter forwarded to the Department of
7 Corrections on March 13th where five or six questions
8 were asked with respect to sanitation; availability of
9 soap, availability of showers, and those are sort of
10 issues that didn't come up in your Honor's discussion
11 with counsel. But I can provide that information to the
12 Court.

13 THE COURT: I would be interested. That came up
14 in general in my questions about whether, you know, a
15 blanket release is either drastic or unprecedented, and I
16 don't think I'm being asked to release these people.
17 That's what this petition is, but a different kind of
18 lawsuit that might seek some sort of remedy along the
19 lines that you have discussed that have access to,
20 apparently, alcohol-based hand sanitizers are not
21 permitted; but things like that where is the department
22 if you know on that?

23 MR. BOWE: Thank you, your Honor, to start with
24 the alcohol-based sanitizers, I have been familiar with
25 over the 19 years at the Law Department, cases where

1 alcohol-based substances have been used as flammable
2 weapons, it happens. It's naive to think that you could
3 distribute -- that's a non-starter --

4 THE COURT: I'm not in a position to question
5 the wisdom of that policy. I was taking it as a glitch,
6 and you have conferred. But there are other means of
7 practicing good hygiene to help minimize the spread of
8 the virus?

9 MR. BOWE: Yes.

10 THE COURT: Like better access to soap, enough
11 sinks, and you know --

12 MR. BOWE: Yes.

13 THE COURT: -- making surfaces kept clean
14 through non-alcohol-based cleaning agents.

15 MR. BOWE: And I would suggest, your Honor, that
16 this should be thought about within the contours of the
17 questions that petitioner asked in that letter. I don't
18 know if it was submitted, your letter to DOCC, I scrolled
19 through the papers on my phone.

20 Generally, the answer to those questions we
21 think should frame the way we think about this, the DOY
22 has enacted various new policies. And I'm prepared to
23 call in a witness who would testify live to the
24 sanitation issues, if it pleases the Court. I know that
25 would be an unusual move, but as we've all been saying

1 these are unusual times.

2 Pat Feeney is Deputy Commissioner at DOC for
3 Quality Assurance and Integrity. Some of the things that
4 I can speak to now if the Court wants more detail she's
5 ready to be called in if the Court wants to hear from her
6 new policies and practices that are ensuring that there
7 is individual soap in every cell. Every inmate is being
8 provided and monitored to have possession of their own
9 soap. Every captain on every tour is now mandated to
10 inspect all sinks and showers to be sure that they're
11 working for purposes of washing. Disinfectants and mold
12 cleaners, mildew cleaners, general cleaners, floor
13 cleaners, scrubbing cleaners and all of those supplies in
14 every housing area have been greatly supplemented.

15 THE COURT: Do the inmates, themselves, do the
16 cleaning?

17 MS. STOUGHTON: Some inmates, yes, some inmates
18 do those tasks.

19 There are now daily inspections conducted by the
20 Environmental Unit of every housing area, day room,
21 intake common space to be sure that there are full
22 supplies of soap dispensers, and, again, to make sure
23 that all the sinks are functional, and also supplies are
24 stocked in that unit, that DOC units -- that the
25 Environmental Health Unit is providing -- has trained and

1 is continuing to train institutional aides and sanitation
2 work details on ramping up cleaning and sanitizing
3 procedures throughout the facilities.

4 We note -- I'm paraphrasing from a draft
5 response that had almost been completed to in response to
6 the concerns that we think should frame this
7 conversation; the Center For Disease Control -- this is
8 with respect to the alcohol-based hand sanitizer -- the
9 Center For Disease Control and Prevention and New York
10 City Department of Health and Mental Hygiene, first,
11 recommend over a preferable option for cleaning one's
12 hands the consensus is not alcohol-based flammable
13 liquids, it's soap and water.

14 I have spoken to the captains, and they are now
15 mandated to cut tours and to report to their deputy or
16 wardens and report on their operational or
17 non-operational plumbing, and any work orders are
18 immediately expedited. The Department is taking this
19 very, very seriously with respect to health care. The
20 Correctional Health Service, which is part of the
21 Department of Health is working with health and
22 hospitals, they are in constant contact. I know they are
23 in constant contact because I'm dealing with some senior
24 medical staff in our litigation. So I have some insight
25 with what's going on.

1 The medical staff are dealing with extra hours,
2 tours that begin at or run until four. Some of these
3 dedicated professionals are going in at seven and staying
4 until ten. They're meeting with inmates, discussing
5 hygiene with inmates, the importance of social
6 distancing. All the DOCC staff are being encouraged
7 to -- they're being trained to constantly remind -- to
8 needing to remind the residents of housing areas of the
9 importance of social distancing.

10 For example, one specific contact that is
11 mentioned about people lounging in other people's spaces.
12 Staff is being specifically trained not do that, to keep
13 a safe distance, to not get too close when the residents
14 speak with each other.

15 With respect to the medical care counsel for
16 petitioner had referred to I think if I recall correctly
17 what they believe they learned from two residents on
18 Rikers Island who are in hospitalized settings, in fact,
19 if an inmate exhibits symptoms which require hospital
20 setting care has always been the case that inmate is
21 taken to Bellevue. So there aren't any and aren't going
22 to be any people on Rikers Island who appear to be in
23 extreme distress headed for worst territory, having been
24 exhibiting symptoms of COVID 19.

25 What I wanted to note was counsel had

Maureen Postel
Senior Court Reporter

1 overstated, and I think this is a quote, all CHS medical
2 experts universally agree, and then to paraphrase that
3 this risk of death should require immediate release of
4 the population that are subject to this petition, not the
5 case, which is part of why this is the expedited nature
6 of this proceeding.

7 If it did result in an order to grant a petition
8 there should be a bit more time because I'm prepared to
9 call in one expert on health and sanitation issues from
10 the DOC's perspective. We haven't had time, we didn't
11 get papers I think until 12:30 so the City didn't have
12 papers. My officers didn't get papers until 1:30. I
13 have no doubt that I would be able to present medical
14 expert testimony from health and hospital senior people,
15 as well as CHS senior people who -- including doctors,
16 who are clinical directors that would disagree with much
17 of what counsel has said.

18 Two, respectfully, if I may, this has been aimed
19 at a moment of humor to refer to a tweet at ten o'clock,
20 to cite that in your papers and rely on that as expert --
21 the equivalent of sworn expert testimony about what the
22 result should be I think is a little bit untethered from
23 lethal reality generally.

24 Before I ask if the Court has a few questions
25 for me, your Honor did intimate this or discuss it

1 directly, if your Honor were to grant the petition why
2 wouldn't the equal protection clause require the
3 immediate release of an elderly and immune compromised
4 person at risk of the --

5 THE COURT: I don't have any questions for you.
6 Does anyone want to be heard.

7 MS. BAILEY: Just one or two things to say, you
8 had asked earlier if there were any other previous
9 decisions made regarding a bail application based on
10 COVID 19; one of the individuals in the list provided in
11 the petitioner's paperwork did make such a bail
12 application, although they didn't provide any of the
13 transcripts from that -- in order for this Court to
14 review, that was denied. The bail application was
15 denied. So it seems that they're trying to boot strap
16 the review of that denial of a bail app in this habeas
17 with the other one hundred --

18 THE COURT: I think I would not go that far. I
19 think you're dealing with something that happened, a
20 petition that was put together very quickly by different
21 units of the Legal Aid Society. It might have been
22 just --

23 MS. BAILEY: Perhaps, it might have been an
24 oversight.

25 THE COURT: Or an inability to communicate that

1 on time.

2 MS. BAILEY: Then with respect to the staff
3 member that has passed away from the DOC, our
4 understanding is he did not work at Rikers Island, at
5 headquarters, but not on the Island. And then if you
6 have any particular questions about the process that
7 we're going through in terms of reviewing cases I do
8 know --

9 THE COURT: Are you doing it in consultation
10 with the defense agencies? Are you open --

11 MS. BAILEY: The defense has not reached out to
12 us. OCA provided us a list of the inmates that we put
13 together in conjunction with the medical staff at Rikers.
14 I'm not sure when we got that list, but we started going
15 through it and consented to the release of three on that
16 list. I don't know if any of the individuals on
17 petitioner's list is on that same list, but that we
18 started that process, and I also know that with respect
19 to those that are detained sentenced inmates, that which
20 I understand is not part of this. But another list given
21 to us that we consented to a reduction in sentencing to
22 the affect that it's almost time served as opposing to
23 serving that out, almost half of those applications.

24 My understanding, the MOCJ has provided a list
25 of approximately 200 probationers that we're going

1 through at this point. In my own bureau we've been
 2 before your Honor multiple times this week on these
 3 issues. We have Legal Aid and other defense providers
 4 constantly calling on the types of particular cases we
 5 deal with there. And we work right away with Legal Aid
 6 very closely and get them on your calendar and consent to
 7 ROR and the appropriate cases. So it's not a dragging
 8 defeat. We work pretty quickly. If counsel for Legal
 9 Aid wants to reach out I don't see why they haven't, even
 10 on these particular individuals.

11 THE COURT: Now, that you have the list of
 12 names, as long as, I said, we don't have indictment
 13 numbers, book and case numbers, NYSSID numbers; we need
 14 to make sure we're talking about the same people. Can
 15 you either include those in your review since you're
 16 being -- since you're open --

17 MS. BAILEY: I'm sure we can. It's, obviously,
 18 going to drag time away from the other cases that we're
 19 working on in conjunction with MOCJ and OCA.

20 THE COURT: I'm not telling you to prioritize
 21 them --

22 MS. BAILEY: Yes, yes, we can, obviously.

23 THE COURT: I'm asking if you could add to the
 24 base of People.

25 MS. BAILEY: To start to review them, yes.

1 THE COURT: These 100 odd names as well.

2 Did you want to add anything, Mr. Cooney?

3 MR. COONEY: Unfortunately, and I apologize to
4 all; I'd like to say I feel at a bit of a disadvantage.
5 I don't really have anything substantive I can relay to
6 the Court or even answer for. I only got notice of this
7 about one, and then didn't realize I was going into Court
8 until shortly thereafter.

9 THE COURT: Maybe you can answer a general
10 question just based on your institutional knowledge and
11 experience. I had asked whether there had been a case in
12 New York where a writ of habeas corpus was granted
13 resulting in the release of a prisoner, whether pre-trial
14 or not, based on a claim of deliberate indifference to
15 medical care. I'm not talking about compassionate
16 release. I think if that even exists as a systematic
17 thing in New York -- I think it does, but --

18 MR. COONEY: I'm not aware. I have not done any
19 research on it recently. I handled my fair share of 1983
20 Federal deliberate indifference cases. In State
21 facilities none of those asked for release. They were
22 not habeas corpus matters, otherwise, I'm only aware of
23 parole habeas corpus matters asking for release on
24 regular due process grounds. I never heard --

25 THE COURT: Okay.

1 Back to you, folks.

2 MR. BOWE: There was just one other point I
3 wanted to make; obviously, it's unavoidable. There's
4 quite a bit of speculation and conjecture here in this
5 proceeding. I just -- what we don't have yet is data
6 that tells us that the majority of those who have
7 perished from COVID 19 are people who were especially at
8 risk and pursued medical care early but still died; we
9 don't know.

10 And so the point I want to make is, as a lawyer
11 who is really very familiar with the medical care that's
12 provided over on Rikers Island, it's severe speculation
13 to suggest that taking this request of at-risk population
14 of people who have daily access to medical professionals,
15 daily access to people who can immediately take their
16 temperature, immediately assess whether they're going
17 into some serious condition, and to release them en mass,
18 it's pure speculation to argue that that puts them at
19 less risk in this current pandemic death of COVID 19,
20 especially if they've already been exposed.

21 THE COURT: All right, back you to you folks.

22 Just so while we're talking I had a chance to
23 read the Brown case, the Court of Appeals case.

24 MS. STOUGHTON: Thank you.

25 THE COURT: And that was a case where an inmate

1 had complained about what the inmate viewed as an
2 illegitimate transfer from one institution to another.
3 The Court Of Appeals really just agreed with that inmate,
4 that is something that could be looked on by writ of
5 habeas corpus and accepted it back to the Appellate
6 Division to review the validity of the transfer.

7 MS. STOUGHTON: It occurred to me as soon as we
8 spoke about this there's one additional case which,
9 again, I think is more in the universe of that than I
10 acknowledge being, perhaps, the direct license that you
11 seek. And it's out of the jurisdiction, but in the MLATA
12 vs. Brown litigation in California, which you might know
13 it was in the newspaper headlines for over ten years,
14 on-going litigation, jail conditions in California. At
15 one point the Federal Court there did order part of the
16 claim was the risk of disease from an epidemic of Valley
17 Fever that had swept through amidst, the kind of poor
18 conditions there. And at some point there the Court did
19 order transfer, not release -- I want to be clear about
20 how far this goes -- as part of a habeas petition, a
21 Federal habeas petition, in that case where that leads
22 us. I can't stand here before you as an attorney and
23 tell you that I have a case in which a conditions of
24 confinement of habeas petition leads to release based
25 solely on conditions of confinement.

1 I think what we have are clear constitutional
2 mandates for your Honor to order remedies that are
3 necessary to cure violations, an indication in the habeas
4 law that decisions that relate to the conditions in which
5 a prisoner is being incarcerated are the proper subjects
6 of a habeas petition. And the fact that these are
7 extraordinary times, and we have made, I think, an
8 extraordinarily strong record in the petition for why the
9 only remedy that cures the violation here is release. So
10 that remedy, I think if the Court were to order it, which
11 we really hope the Court does for the sake of these
12 folks, this is not a precedent for this to be a standard
13 operating procedure. There is not the claim we are
14 making.

15 We recognize that in the vast majority of cases
16 a person's system doesn't always have, but must have a
17 system to deal with the kind of medical challenges that
18 arise in the normal course including outbreaks. But this
19 is just an extra -- we have never seen a national, State
20 or City response to an outbreak like this; not H1N1, not
21 SARS, or Ebola. This is different, so that's the first
22 thing.

23 So a couple of other things to address, the
24 points made I will be brief. First, with regard to the
25 questions of remedy that counsel from the Department Of

1 Corrections were raising; I think it's important and
2 heartening to hear that the Department is taking issues
3 around soap and cleanliness around the facility. That is
4 important and critical to the health of inmates, many of
5 whom will remain on Rikers Island.

6 With regard to people who are especially
7 vulnerable, that is rearranging the deck chairs on the
8 Titanic, that cannot solve the problem. You don't have
9 to take my word for it. It is not me as a liar whose
10 authority stands behind the statement. It's in Paragraph
11 164 of our petition. We quote, Dr. Homer Venters,
12 V-E-N-T-E-R-S, who said -- who was released in saying
13 even under the best of circumstances you cannot social
14 distance in a prison environment, it is not possible.
15 And, therefore, you cannot take steps that are necessary
16 to fully protect the obligation. We have to fully
17 protect people there who are physically, medically
18 vulnerable to this virus.

19 Counsel talked about a lot of speculation, but
20 respectfully this is not the case. We have verified
21 petitioner with extremes of evidence that is not
22 speculation proving why this remedy is necessary for this
23 class of people. And I found it odd that, you know, the
24 counsel pointed to a lack of data suggesting the vast
25 majority of people who have died of COVID 19 are

1 medically vulnerable because we have attached four
2 studies that are the only four studies to day on this
3 virus, the main thrust of which is exactly that
4 proposition.

5 We would not come before the Court asking for an
6 extraordinary remedy unless we are confident the data and
7 science back this up. Unless and, again, we recognize
8 this is an extraordinary situation --

9 MR. BOWE: If I may, counsel misunderstood?
10 Certainly, it takes a much more greater toll on a certain
11 group of people. For example, elderly, especially a
12 combination of the elderly and compromised immune
13 systems. What I was suggesting, I feel free to point it
14 out, we don't have data that tells us that if you are a
15 member of that group and you get medical care early that
16 is the first sign of a severe sore throat, and you may
17 have contact with someone, and you may immediately get
18 care. We don't know from the data that those people
19 perished at these very high rates, that is what the
20 general data tells us with respect to people who are at
21 risk.

22 And more to this point, if I may, your Honor;
23 how do you determine if your Honor were to issue an
24 order, how does your Honor determine what residents on
25 Rikers Island are actually at risk?

1 We learned yesterday the oldest person to
2 recover from COVID 19 is a 103 year old woman. How does
3 your Honor make a decision if this is a life and death
4 decision that carves out a lot of people over there who
5 history tells us were at very high risk? But we don't
6 know because they don't fit the contours of the
7 descriptors in the petition.

8 It's a leap to suggest that taking these people
9 from immediate access to health care and immediate access
10 to Bellevue Hospital if need be -- I'm not sure -- a week
11 from now -- how quickly any one of us would get to
12 Bellevue Hospital. That's to the benefit of these people
13 that we're releasing them -- that the petitioner seeks to
14 release. How many of these people don't have a home to
15 go to? How many of these people have to go to an
16 environment where you can't social distance in the way
17 that I represented to the Court? They can over on Rikers
18 Island right now. And they're being encouraged to stand
19 apart, stay separate. I can tell your Honor and your
20 Honor may well be aware there are many residents on
21 Rikers Island who get medical access everyday, every
22 other day. There are only so many things to do when
23 you're over there. So the relationship that builds
24 between the residents and medical staff is real. They
25 actually care about the patients.

1 So what I'm suggesting is this petition doesn't
2 show us that at-risk people who get early medical care
3 are at a higher risk of death than anybody else at Rikers
4 Island.

5 THE COURT: Respond to that and then I'll ask
6 your question.

7 MS. STOUGHTON: I apologize to misunderstanding
8 the point, but I think there's no less of a strong
9 rebuttal to the point counsel just made in the petition
10 than the previous point that the -- first of all, the
11 studies that were done on COVID patients, were of people
12 who were being treated. The Chinese doctors who
13 conducted -- the WHO doctors who conducted those studies
14 were conducting them on people who were receiving active
15 treatment.

16 Do I know whether they got that treatment? No.

17 But what I can tell you again the expert
18 testimony that we appended to this petition says it is.
19 There's no such thing as extremely prompt treatment of
20 COVID. Unlike the flu where the incubation period in
21 COVID is long, symptoms don't begin to manifest until
22 after the person is actively spreading their disease
23 around Rikers Island.

24 Even under the best of circumstances, even if we
25 imagined a fantasy world in which medical care is as good

1 a counsel represented to me, it cannot identify people
2 who have the virus and prevent them from transmitting it
3 to these medically vulnerable people that are named in
4 the petition, it's just not possible.

5 Again, that's not my word for it, that is what
6 the head of Correctional Health Services says in a tweet,
7 but he said it. That's what the sworn testimony
8 submitted and appended to this petition also says. And
9 on that basis I think it's amply clear that we have to
10 release. The idea that you can social distance, and,
11 respectfully to counsel, that is not what the evidence
12 suggests.

13 MR. BOWE: If I may, the data -- your Honor may
14 be aware of it, we're all listening to the noise. The
15 data as of yesterday tells people between the ages of 25
16 and 50 are now currently comprising between 45 and
17 50 percent of those in need of hospitalization. Those
18 statistics are at odds with the statistics we have from
19 the eastern countries where I would suggest common sense
20 would tell us you have a much larger of the percentage of
21 the people who died, didn't bother to go get medical care
22 early when they had a combination of runny nose, sore
23 throat, and cough. They waited it out the way many of us
24 do for a week to ten days before finally saying, you know
25 what, I better go to the doctor. We now know that it's

1 too late.

2 THE COURT: Do you know -- I will understand if
3 you don't -- whether there is any systematic effort to
4 begin mass testing of inmates and staff at Rikers Island?

5 MS. STOUGHTON: I don't know, I can inquire --

6 THE COURT: Probably nobody knows.

7 MR. BOWE: I don't know how much longer your
8 Honor is keeping us here --

9 THE COURT: I'm not keeping you that much
10 longer, but if you can get the answer.

11 Just back to you; it does strike me about the
12 many unusual things about this particular situation is
13 that this is a medical issue, putting aside specific
14 vulnerabilities based on age and underlying conditions in
15 the very real sense inmates and staff are kind of in the
16 same boat. And doesn't that incentivize the staff to
17 make sure that the inmates practice good hygiene to
18 reward them for doing so, to make sure that surfaces are
19 cleaned and disinfected more vigorously than they
20 otherwise would be, doesn't that incentivize the staff to
21 attend to that?

22 MS. STOUGHTON: I can't answer that question,
23 your Honor. I certainly see the logic of it.

24 I will say though, if you'll forgive me, last
25 night I was watching a video of young people going out on

1 spring break in Florida, despite everything that's
2 happening, and it just reminded that the human brain
3 doesn't always act rationally in self interest of those
4 that perceive risk greatly. It's a bit of a flippant
5 point --

6 THE COURT: No, it's not. But just on the
7 spectrum of levels of supervision of affluent teenagers
8 on spring break and Rikers Island inmates, the Rikers
9 Island inmates are about as far apart as you can get.

10 MS. STOUGHTON: I take your point. We just
11 don't know. Again, what I have tried to stay away
12 from -- what we have tried to stay from interjecting our
13 own suggestions as lawyers about what the right approach
14 to this is. We recognize we are not the experts. We
15 have tried, and I think succeeded in relying on the
16 judgement of correctional medical professionals, and
17 tried to use that as the lodestar here in determining
18 what the right approach is. And so, again, I just kind
19 of go back to the Board of Corrections; this is the
20 remedy the Board of Corrections has recommended, this is
21 the lines we have drawn here, and the fundamental
22 conclusion that release is the only viable solution that
23 comes directly from the judgements of those experts, not
24 from any assumptions or speculations that we are making
25 here on behalf of our clients.

1 THE COURT: Were you able to answer that
2 question.

3 MR. BOWE: How many inmates are residing on
4 Rikers Island with HIV undetectable? Currently, how do
5 you carve those out under the class of people under this
6 novel theory's footnote? I'm not sure that it applies to
7 convicted people as well.

8 I've done a lot of Eighth Amendment briefing.
9 I'm sure the standard with respect to deliberate
10 indifference to medical need it's, again, the leak
11 between we have the COVID 19 on Rikers Island, and these
12 people at risk are going to be safer if they're released
13 in this current environment.

14 We don't know what tomorrow looks like. How do
15 we know before they're going? How do we know they're
16 going to get medical care?

17 The petition asks for an order based entirely on
18 speculation. It unfairly, arguably, presumably excludes
19 a whole lot of other people that are at great risk; maybe
20 not today, but maybe two days from now. So the efforts
21 that are being made with respect to sanitation and social
22 distancing, and we all know that the population on Rikers
23 Island dropped precipitously, the medical care which is a
24 little bit aligned by counsel is actual considered to be
25 high quality medical care.

1 There's a doctor Vessel (ph.) at Rose M. Singer
2 Center who is someone who I'm currently working with on
3 another case in front of Judge Carter (ph.) who is a
4 consummate professional. She's spending 12, 13 hours a
5 day to talk with the residents at Rose M. Singer to talk
6 about social distance, importance of hygiene, and the
7 importance of being aware of what you're experiencing in
8 terms of symptoms and coming to the clinic.

9 THE COURT: Anything else?

10 MS. STOUGHTON: Two things; first, counsel for
11 the District Attorney mentioned that, at least, one
12 possibly more of the petitioners had filed bail
13 applications. And we discussed that that was discussed
14 in the context of being an oversight. To be clear,
15 several -- I know that several petitioners have filed
16 bail applications.

17 THE COURT: I'm just going to interrupt you. I
18 heard a bail application today from one of these people.
19 I denied it, and then saw the person's name on your list.

20 MS. STOUGHTON: So we ran into counsel in our
21 office, Seth Gross. And that's not a unique -- there are
22 few other people -- that's not an oversight. That is us
23 using the normal process to be able to appeal -- what I
24 can tell you that there's nobody here who has filed a
25 writ to appeal determination because that would be a

1 successive writ, which is not permitted, as you know.
 2 And there's -- we're not trying to play games with that
 3 here. Again, this is just as obvious to everyone. This
 4 is our effort to try to move forward faster on this class
 5 of people.

6 Also just to be clear, to shift the framework
 7 back on to a constitutional framework, and the
 8 assessments of the constitutional rights in this unique
 9 situation for all the reasons I said, and I won't repeat
 10 again.

11 And one of the reasons we are here on this
 12 procedural mechanism is because we are -- this is,
 13 obviously, not criticism -- I hope you don't perceive
 14 this as a criticism, because it isn't. The system as a
 15 whole is failing -- is failing to understand that our way
 16 of going about reviewing these classes is just patently
 17 not adequate to address the constitutional threat of
 18 serious medical harm to people at Rikers. That is the
 19 bottom line. And we can't -- we will continue -- we have
 20 been participating in discussions to attempt to get an
 21 agreement where we can expedite that.

22 I want to address that, too. Counsel addressed
 23 that. We continued to do that. We are -- literally it's
 24 happened now. There are conversations happening now
 25 between members of the Manhattan District Attorney's

Office and the Legal Aid Society about trying to get some specific people out. But it is not enough. We can't be litigating facts that are legally irrelevant. We need to focus on the big picture that there is a pandemic spreading on Rikers Island. We have got to get medical people out, that is what this comes down to. This system is not working to accomplish the constitutional demands anymore. That's why we're here.

I want to address it as I flagged -- I want to address there was a discussion about whether we have or haven't been talking about the District Attorney. I want to be very clear about that, there have been on-going discussions between senior people in the Legal aid Manhattan Bureau and senior people in the District Attorney's Office. It is -- I could tell you their names. It's David O'Keefe from the District Attorney's Office, and Shanny Nora (ph.) from our office trying to get an agreement on some of these cases. And there also have been a multitude of bilateral communications between line attorneys in both offices where attorneys from Legal Aid Society office have called up their direct counterpart to get their people out. That process, I don't want your Honor to be left with the idea that we didn't try that, and we're still trying.

THE COURT: I don't have that idea.

Maureen Postel
Senior Court Reporter

1 MS. STOUGHTON: The bottom line it is not
2 sufficient. A handful of people, at most, had been
3 released in that process, that's all, thank you.

4 THE COURT: Why don't we take a ten minute
5 break?

6 Mr. Cooney?

7 MR. COONEY: I would be remiss if I didn't add
8 this, while the New York City Attorney General Office is
9 here representing the New York State Department Of
10 Corrections And community Supervision, otherwise known as
11 DOCCS, D-O-C-C-S, I'm at a little bit of a disadvantage
12 because I do not have knowledge of these allegations, nor
13 does my client up until a couple of hours ago. I would
14 request the Court not pull the trigger too fast on this.
15 I know it seems that a habeas corpus is an urgent matter
16 pursuant to what we've been all been hearing about. To
17 appreciate my client's rights, and I think as your Honor
18 has differentiated that there might be different --
19 pretrial detainees, parolees who are people who have been
20 found guilty of crimes, and they're serving out their
21 sentence by other means in the community, and at Rikers
22 right now on parole revocation allegations, I think it's
23 better to say to be treated the same.

24 Again, this is coming very fast and quick. I'm
25 not trying to waste time or slow this time down to

1 protect my client's rights. I need to speak to my
2 client. My client needs to be able to put in their
3 defense or their viewpoint on this. So I would just like
4 to make that record.

5 MR. BOWE: If I may; I did not get an answer
6 specifically. But I'm told that they're making efforts
7 to get tests -- to get sufficient tests. And there has
8 not been sufficient supplies available as of yet, but
9 it's a little bit of a confused answer.

10 THE COURT: I understand it perfectly actually.

11 MR. BOWE: Counsel talks about the pandemic on
12 Rikers Island; my office at is at 100 church Street.
13 We've had two cases, we're in an office of several
14 hundred offices and staff. There is one diagnosed case
15 on Rikers Island.

16 THE COURT: Of an inmate?

17 MR. BOWE: Of an inmate.

18 What's the current population of Rikers Island?
19 I don't know, somewhere of 5,000. One diagnosis in
20 5,000. Is Rikers Island the unsafe place to be or is 100
21 Church Street?

22 THE COURT: However this shapes out, I am
23 unlikely to conclude that Rikers Island is a safer place
24 to be than not at Rikers Island.

25 Let's take a ten minute recess.

1 (Whereupon, there is a short recess.)

2 THE COURT: We're back on the record.

3 Everyone, is present. I want to thank you all
4 for your extremely helpful presentations. The papers
5 were very helpful. I know nobody had a lot of time. But
6 all of the answers as to my questions were extremely
7 helpful. And I'm very grateful for that assistance. I
8 am going to deny the petition for writ of habeas corpus.

9 I'm not going to make a long ruling now. I will
10 eventually file something in writing. I am not prepared
11 in this case that the constitutional standard of
12 deliberate indifference is met.

13 Deliberate indifference, in general, requires a
14 dangerous condition; knowledge, either actual or
15 constructive, on the part of the incarcerating agency,
16 and the failure to take any steps to remedy.

17 In this case although the first two are
18 satisfied, there is a dangerous condition of a sort that
19 is truly unprecedented, and the Department Of
20 Corrections, clearly, knows about it. I'm simply not
21 prepared to find either that Corrections has done nothing
22 to remedy the situation, or that release is the only way
23 to mitigate the harm.

24 So I'll go into more detail in a written order
25 at sometime in the future, but the application is denied,

1 and I thank you all.

2 MS. STOUGHTON: Thank you.

3 MR. BOWE: Thank you.

4 MS. STOUGHTON: Do you have a time frame roughly
5 when you might have a written opinion?

6 THE COURT: In the next couple of weeks.

7 MS. STOUGHTON: Okay.

8 THE COURT: I'll do it as soon as I can.

9 (Discussion off the record.)

10 THE COURT: Thank you.

11 MS. STOUGHTON: Thank you.

12 MR. BOWE: Thank you.

13 (Whereupon, the proceedings are adjourned.)

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17 I, Maureen Postel, Senior Court Reporter,
18 certify the foregoing to be a true and accurate
19 transcript to the best of my skill and ability.

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MAUREEN POSTEL
SENIOR COURT REPORTER

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Maureen Postel
Senior Court Reporter