

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

PEOPLE OF THE STATE OF NEW YORK
EX REL. ELON HARPAZ, Esq.,
on behalf of DAQUAN VANCE, LAVONE
MCDONALD, TIFFANY GAINES, KAREEM DEAS,
JOSHUA WHITFIELD, et al.,

Petitioners,

v.

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

Respondents.

Index No. _____

WRIT OF HABEAS CORPUS

THE PEOPLE OF THE STATE OF NEW YORK

Upon the relation of Elon Harpaz, Esq.,

TO THE COMMISSIONER, NEW YORK CITY
DEPARTMENT OF CORRECTION and THE
COMMISSIONER, NEW YORK STATE DEPARTMENT
OF CORRECTIONS AND COMMUNITY SUPERVISION:

WE COMMAND YOU, that you have and produce the body of Petitioners named in the Verified Petition attached hereto, by you imprisoned and detained, as it is said, together with your full return to this writ and the time and cause of such imprisonment and detention, by whatsoever name the said Petitioners are called or charged, or show cause why the Petitioners should not be produced, before the Justice presiding at Part ____ of the Supreme Court, Bronx County, at 265 East 161st St, on ____ of April, 2020, at _____ to do and receive what shall then and there be considered concerning the said Petitioners and have you then and there this writ.

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

By the Court Clerk

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

Justice of the Supreme Court
of the State of New York

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**VERIFIED PETITION FOR
WRIT OF HABEAS CORPUS**

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

INTRODUCTION

1. Petitioners are 28 people who received as a sanction for their parole violation a time assessment with a drug treatment alternative, in which they were promised the opportunity to enter a DOCCS 90-day treatment program or the shorter 45-day Edgecombe program, and to be released from custody immediately upon successfully completing it. Although they have been adjudicated in violation of their parole, the violations were not considered serious enough to require them to remain in custody longer than the maximum 90 days it takes to complete any of the treatment programs. In all cases, petitioners have been denied the right to enter the program because transfers to state custody have been suspended due to the COVID-19 epidemic sweeping through New York State and are instead languishing in NYC jails. This petition seeks their immediate release from

jails in New York City because of the denial of the promise that was made to them, a denial exacerbated by the high risk of them becoming infected with COVID-19.

2. In only a few months, more than 1,002,159 people worldwide have been diagnosed with COVID-19 and more than 51,484 of them have died. As of the date of this filing, there are more than 51,810 confirmed cases of coronavirus in New York City, up from just 923 on March 18, 2020. There are now at least 1374 COVID-19 related deaths in New York City alone.¹

3. The situation in New York City's jails is rapidly deteriorating. As of April 1, 2020, there were 184 reported cases of COVID-19 among people incarcerated in our jails,² compared to only *one* known case as of Friday, March 20, 2020.³ These numbers are growing rapidly every day. At current rates of infection, the virus's "attack rate" on Rikers Island – that is, the rate at which the population is being infected – is roughly *eighty five (85) times higher* than the average in the United States of America.

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

5. COVID-19 is most likely to cause serious illness and death in older adults and those with certain underlying medical conditions. But, because COVID-19 is a brand new disease, and thus can infect anyone in the population, younger, healthier people are just as likely to become infected and to spread it to others. And, just because these individuals are less likely to suffer more severe outcomes than older adults and those with underlying medical conditions, does not mean that younger and healthier people are immune from becoming seriously ill, requiring hospitalization, and even dying

¹ N.Y. Times, *Live Updates*, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last accessed Mar. 30, 2020).

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

³ Chelsia Rose Marcius, *Rikers Island inmate has contracted coronavirus: officials*, N.Y. DAILY NEWS (Mar. 18, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-rikers-island-inmate-tests-positive-20200318-gf3r7q4cefaxzlqmwrmuevzz3y-story.html>.

6. Because risk mitigation is the only known strategy to prevent the spread of COVID-19 and risk mitigation is effectively impossible in jails, including those in New York City, correctional public health experts—including the New York City Board of Correction, the lead doctor of New York’s own correctional health system and several experts around the country—have pressed judges, prosecutors and executive officials to release from custody as many people as possible. As these experts have explained, release is the only effective means to protect the people with the greatest vulnerability to COVID-19 from transmission of the virus and also allows for greater risk mitigation for all people who remain held or working on Rikers Island and other New York City jails.

7. New York has recognized the imperative of releasing incarcerated individuals to stem the spread of COVID-19, regardless of health or age. On March 27, Governor Cuomo announced that 1,100 individuals arrested for alleged technical parole violations will be released from jail in the coming days. The release applies to all individuals in this category, unless they are viewed as posing a particular danger to public safety. Unfortunately, however, the Governor’s order is not expected to affect any of the Petitioners, because they have all completed the revocation process and been found in violation of their parole.

8. On or about March 13, 2020, in response to the COVID-19 pandemic, and in an effort to prevent the disease from spreading within the state prison system, DOCCS suspended the transfer of all individuals held in local custody who are ready to enter state custody. That decision has left the Petitioners in limbo, unable to obtain their release upon successful completion of a DOCCS-administered treatment program because they are unable to get to state custody to enter the program. Instead, they are sitting in jail, mostly at Rikers Island, waiting to be infected with COVID-19.

9. All across New York City, extraordinary and unprecedented measures affecting every aspect of life are being taken in the name of protecting people from this pandemic. New York cannot block access to treatment programs and leave people in jail behind with nowhere to go, only to wait, wondering if and when they will become infected with COVID-19, and what will happen to them if they do.

PARTIES

10. I am an attorney with the Parole Revocation Defense Unit of The Legal Aid Society, which is counsel to Petitioners in this matter. I make this application on behalf of the below-named Petitioners.

11. Every petitioner in this case has completed their final parole revocation hearing and been promised the opportunity to be immediately released upon successful completion of a DOCCS 90-day treatment program or the even shorter 45-day treatment program at Edgecombe Correctional Facility. Petitioners should have been able to enter those programs soon after completion of the final hearing. However, because of the COVID-19 pandemic, all transfers from local custody to state custody have been suspended indefinitely. Although petitioners have been adjudicated in violation of their parole, the violations were not considered serious enough to require them to remain in custody longer than the maximum 90 days it takes to complete any of the treatment programs.

12. Petitioner Daquan Vance, warrant number 793898, NYSID 02996507N, entered a plea at the final revocation hearing on March 12, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with the 45-day Edgecombe treatment program alternative and has been waiting since to be transferred to Edgecombe.

13. Petitioner Lavone McDonald, warrant number 817593, NYSID 07008648Y, entered a plea at the final revocation hearing on February 11, 2020 to a technical charge, in

exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

14. Petitioner Tiffany Gaines, warrant number 823520, NYSID 13008899M, entered a plea at the final revocation hearing on March 6, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

15. Petitioner Kareem Deas, warrant number 826838, NYSID 00443031M, entered a plea at the final revocation hearing on February 4, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

16. Petitioner Joshua Whitfield, warrant number 826586, NYSID 00423529Y, entered a plea at the final revocation hearing on March 6, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with the 45-day Edgecombe treatment program alternative and has been waiting since to be transferred to Edgecombe.

17. Petitioner Barry Williams, warrant number 824325, NYSID 02655950Y, entered a plea at the final revocation hearing on March 10, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with the 45-day Edgecombe treatment program alternative and has been waiting since to be transferred to Edgecombe.

18. Petitioner Justin Ramos, warrant number 803806, NYSID 02662832J, entered a plea at the final revocation hearing on March 6, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

19. Petitioner Marquan Morris, warrant number 794207, NYSID 00062149Q, entered a plea at the final revocation hearing on February 27, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with the 45-day Edgecombe treatment program alternative and has been waiting since to be transferred to Edgecombe..

20. Petitioner Daquan Wright, warrant number 827557, NYSID 02680629Q, entered a plea at the final revocation hearing on February 24, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with the 45-day Edgecombe treatment program alternative and has been waiting since to be transferred to Edgecombe.

21. Petitioner Aziz Coleman, warrant number 826832, NYSID 05731260K, entered a plea at the final revocation hearing on March 10, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

22. Petitioner Ari Ortiz, warrant number 821638, NYSID 09363036Q, entered a plea at the final revocation hearing on March 5, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

23. Petitioner Virginia Alphonso a/k/a Fidelina Alphonso, warrant number 810312, NYSID 00387410Q, entered a plea at the final revocation hearing on March 3, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

24. Petitioner Alexis Rivera, warrant number 826642, NYSID 00244137Q, entered a plea at the final revocation hearing on March 6, 2020 to a technical charge, in exchange for which

they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

25. Petitioner Quanne McCutchen, warrant number 821638, NYSID 09427189P, entered a plea at the final revocation hearing on March 10, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

26. Petitioner Pedro Vega, warrant number 817554, NYSID 06863507R, entered a plea at the final revocation hearing on March 3, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

27. Petitioner Rafael Ramirez, warrant number 824049, NYSID 02579804Y, entered a plea at the final revocation hearing on March 9, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

28. Petitioner Rayshawn Waiters, warrant number 800770, NYSID 11912579Y, entered a plea at the final revocation hearing on March 12, 2020 to a technical charge, in exchange for which they were given a sanction of a hold to maximum expiration, with the 45-day DOCCS treatment program alternative and has been waiting since to be transferred to Edgecombe.

29. Petitioner Earl Bryant, warrant number 795663, NYSID 06579728L, entered a plea at the final revocation hearing on March 5, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with the 45-day Edgecombe treatment program alternative and has been waiting since to be transferred to Edgecombe.

30. Petitioner Alexis Martin, Warrant Number 800592, NYSID 01753711Z, entered a plea at his final revocation hearing on February 13, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

31. Petitioner Jose Santos, Warrant Number 809299, NYSID 00035161R, entered a plea at the final revocation hearing on December 17, 2019 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

32. Petitioner Lamont Oliver, warrant number 793384, NYSID 06307462Z, entered a plea at the final revocation hearing on March 4, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

33. Petitioner Nykori Andrews, Warrant Number 823263, NYSID 00699542L, entered a plea at the final revocation hearing on March 3, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

34. Petitioner Shiva Ramdhanie, warrant number 817518, NYSID 05902041R, entered a plea at the final revocation hearing on February 11, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

35. Petitioner William Talbert, Warrant Number 823270, NYSID 09833466M, entered a plea at the final revocation hearing on February 18, 2020 to a technical charge, in exchange for

which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

36. Petitioner Randolph Diaz, Warrant Number 793785, NYSID 04696272K, entered a plea at the final revocation hearing on March 5, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

37. Petitioner Ramel Adams, Warrant Number 794195, NYSID 02491950M, entered a plea at the final revocation hearing on March 12, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

38. Petitioner Eugene Patterson, Warrant Number 794075, NYSID 08698414Z, entered a plea at the final revocation hearing on March 9, 2020 to a technical charge, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

39. Petitioner Harry Artis, warrant number 828006, NYSID 02710790P, entered a plea at the final revocation hearing on February 6, 2020 to a violation of Rule 8 possession of a rolled cigarette with alleged synthetic cannabinoids, in exchange for which they were given a sanction of 12 months, with a 90-day DOCCS treatment program alternative and has been waiting since to be transferred to the DOCCS program.

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

41. Respondent Anthony J. Annucci is the Acting Commissioner of the New York State Department of Correction and Community Supervision (“DOCCS”). Respondent is a legal custodian of Petitioners who are all detained pursuant to a parole warrant.

JURISDICTION AND VENUE

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

43. Petitioners have made no prior application for the relief requested herein.

44. Copies of the mandates pertaining to individual Petitioners are not attached hereto because DOCCS, which has issued and executed the parole warrants in all these cases, never supplies the petitioners or their attorney with a copy of the warrant.

STATEMENT OF FACTS

45. Petitioners have all received as a sanction for their parole violation a time assessment with a drug treatment alternative, in which they were promised the opportunity to enter a DOCCS 90-day treatment program or the shorter 45-day Edgecombe program, and to be released from custody immediately upon successfully completing it. Although they have been adjudicated in violation of their parole, the violations were not serious enough to require them to remain in custody longer than the 45 or 90 days it takes to complete the treatment programs. Petitioners have been denied the right to enter the programs because transfers to state custody have been suspended due to the COVID-19 epidemic sweeping through New York State. Petitioners remain in NYC jails, subject to the uniquely dangerous conditions presented there by the COVID-19 virus.

An Overview of the COVID-19 Pandemic

46. COVID-19 is a coronavirus that has reached pandemic status. As of April 2, 2020, over 1,002,159 people worldwide have confirmed diagnoses, including more than 235,927 people in the United States. New York City, with more than 51,810 confirmed cases, has rapidly become

the epicenter of the spread of COVID-19 in the United States. Over 51,484 people have died worldwide, including more than 5,148 people in the United States and more than 1,941 in New York, 1374 of whom lived in New York City. Thousands of new cases are being reported each day in New York State.⁴

47. The transmission of COVID-19 is expected to grow exponentially. Nationally, projections by the Center for Disease Control and Prevention (“CDC”) indicate that over 200 million people in the United States could be infected with COVID-19 over the course of the pandemic without effective public health intervention, with as many as 1.5 million deaths in the most severe projections⁵ More recent assessments indicate that, even with aggressive interventions, the virus “could kill between 100,000 and 240,000 Americans.”⁶

48. COVID-19 is a particularly contagious disease. New research also shows that controlling the spread of COVID-19 is made even more difficult because of the prominence of asymptomatic transmission—people who are contagious but who exhibit limited or no symptoms, rendering ineffective any screening tools dependent on identifying symptomatic behavior.⁷

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

50. COVID-19 can cause severe damage to lung tissue, sometimes leading to a permanent loss of respiratory capacity, and can damage other vital organs including the heart and liver. Patients with serious cases of COVID-19 require advanced medical support, including

⁴ N.Y. TIMES, *Live Updates*, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last accessed Mar. 25, 2020).

⁵ Chas Danner, *CDC’s Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead*, N.Y. Mag. (Mar. 13, 2020), <https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html>.

⁶ N.Y. TIMES, *Live Updates: Models predicting expected spread of the virus in the U.S. paint a grim picture* <https://www.nytimes.com/2020/03/31/world/coronavirus-live-news-updates.html?action=click&module=Spotlight&pgtype=Homepage#link-a737c70> (last visited Mar. 31, 2020).

⁷ *Coronavirus: Are People Who Are Asymptomatic Still Capable of Spreading COVID-19?* Independent. Available at <https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html> (last visited Mar. 18, 2020).

positive pressure ventilation and extracorporeal mechanical oxygenation in intensive care. Patients who do not die from serious cases of COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurological damage and loss of respiratory capacity.

51. The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 than from influenza. According to recent estimates, the fatality rate of people infected with COVID-19 is about ten times higher than a severe seasonal influenza, even in advanced countries with highly effective health care systems. According to preliminary data from China, 20 percent of people in high-risk categories who contracted COVID-19 there died.⁸

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

53. The only known methods to reduce the risks associated with COVID-19 are to prevent infection in the first place through social distancing and improved hygiene, including washing hands frequently with soap and water.

⁸ *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, World Health Organization (Feb. 28, 2020), at 12, <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> (finding fatality rates for patients with COVID-19 and co-morbid conditions to be: “13.2% for those with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer”); Wei-jie Guan et al., *Comorbidity and its impact on 1,590 patients with COVID-19 in China: A Nationwide Analysis*, medRxiv (Feb. 27, 2020), at 5, <https://www.medrxiv.org/content/10.1101/2020.02.25.20027664v1.full.pdf> (finding that even after adjusting for age and smoking status, patients with COVID-19 and comorbidities of chronic obstructive pulmonary disease, diabetes, hypertension, and malignancy were 1.79 times more likely to be admitted to an ICU, require invasive ventilation, or die, the number for two comorbidities was 2.59); Fei Zhou et al., *Clinical course and risk factors for mortality of adult inpatients with COVID-19 in Wuhan, China: a retrospective cohort study*, *Lancet* (March 11, 2020), tb. 1, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30566-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext) (finding that among hospital patients, who tended to be older, of those who had COVID-19 and died, 48% had hypertension, 31% had diabetes, and 24% had coronary heart disease).

People Imprisoned in New York City Jails Face a Drastically Elevated Risk of COVID-19 Transmission

54. COVID-19 has now reached Rikers Island and is rapidly spreading. On March 20, 2020, there was only one confirmed case of a detainee with a positive COVID-19 diagnosis.⁹ Just 12 days later, on April 1, at least 184 detainees in New York City DOC jails had tested positive for the virus.¹⁰ These 184 inmates represent approximately 4% of the total inmate population. If 4% of all residents of New York City were infected, there would currently be more than 335,000 people with COVID-19 in the City, nearly seven times the number of actual confirmed cases. And New York City experienced its first confirmed case on March 1, whereas the first confirmed case on Rikers Island was not until March 20. COVID-19 is spreading that rapidly in the City jail system, as compared with New York City as a whole.

55. Employees of the City Department of Correction as well as of Correctional Health Services (CHS) are no more immune from being infected than inmates are. As of March 30, 137 employees have been infected. One DOC staff member, a 56-year-old Investigation Division staffer, whose position entailed interviewing detainees in several facilities as part of investigations, died on March 15, 2020.¹¹

⁹ Chelsia Rose Marcus, *Rikers Island inmate has contracted coronavirus: officials*, N.Y. DAILY NEWS (Mar. 18, 2020), <https://www.nydailynews.com/coronavirus/ny-coronavirus-rikers-island-inmate-tests-positive-20200318-gf3r7q4cefaxzmqmrmuevzz3y-story.html>.

¹⁰ Jacqueline Sherman, Interim Chair of NYC Board of Correction, letter, Mar. 21, 2020, *available at* <https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf> (last visited Mar. 22, 2020).

¹¹ Chelsia Rose Marcus, *Coronavirus kills NYC Correction Department official*, N.Y. DAILY NEWS (Mar. 18, 2020) <https://www.nydailynews.com/coronavirus/ny-coronavirus-department-correction-employee-dies-from-coronavirus-20200316-akeai6gop5alledhzhi7u3pivm-story.html>.

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

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

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

59. Severe outbreaks of contagious illness regularly occur in jails. For example, during the H1N1 epidemic in 2009, many jails and prisons saw a particularly high number of cases.¹² H1N1 is far less contagious than COVID-19. Not surprisingly, Chinese prison officials report that over five-hundred (500) COVID-19 cases in the current outbreak stemmed from the Hubei province prisons.¹³ The rate of incarceration in China is far lower than in the United States, suggesting the problem here will be much worse. Experts predict that “[a]ll prisons and jails should anticipate that the coronavirus will enter their facility[.]”¹⁴

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

¹³ Evelyn Cheng and Huileng Tan, China Says More than 500 Cases of the New Coronavirus Stemmed from Prisons, CNBC, Feb. 20, 2020, available at <https://www.cnbc.com/2020/02/21/coronavirus-china-says-two-prisons-reportednearly-250-cases.html>.

¹⁴ *Id.* (quoting Tyler Winkelman, co-director of the Health, Homelessness, and Criminal Justice Lab at the Hennepin Healthcare Research Institute in Minneapolis).

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

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

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

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

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

65. Petitioners lack ready access to soap and water for washing hands. If a sink in a housing area is broken, they do not have a choice to walk to an area with a working sink. Soap and paper towels are not provided by the jail. Often, the only means to access soap is by purchasing it

in commissary—which is not an option for many detainees who lack access to funds. There is no recourse if another person takes a vulnerable person’s bar of soap.

66. Clients of the Legal Aid Society have been reporting to their attorneys that they had no access to soap or hand sanitizer despite DOC’s public pledges that it was ensuring such access.

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

68. The procedures outlined in the DOC’s “COVID19 Preparation & Action Plan” issued on March 5, 2020 are not sufficient to mitigate the risk of widespread transmission of the virus. According to this plan, newly admitted detainees will only be separated from other detainees if they exhibit “flu-like” symptoms upon admission.¹⁵ This initial screening process overlooks the fact that COVID-19 may present with a slower onset of symptoms than the flu — meaning that many who are infected with COVID-19 do not show signs of illness.¹⁶ And, a significant percentage of individuals infected with COVID-19 never develop symptoms at all. The dangers of asymptomatic transmission are thus ever present within DOC facilities. DOC and CHS have established only symptom-reactive policies—that staff will be sent home and incarcerated people

¹⁵ See N.Y.C. Dept. of Corr., *COVID19 Preparation & Action Plan*, <https://www1.nyc.gov/site/doc/media/coronavirus-news.page> (last visited Mar. 19, 2020).

¹⁶ CDC, *Coronavirus Disease 2019 (COVID-19) Symptoms*, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last visited Mar. 19, 2020); see also Yale New Haven Health, *Coronavirus (COVID-19) vs. Influenza (Flu)*, <https://www.ynhhs.org/patient-care/urgent-care/flu-or-coronavirus> (last visited Mar. 19, 2020).

will be separated and treated *if they display symptoms*¹⁷—which are ineffective to stop the rampant asymptomatic transmission of the disease.¹⁸

69. DOC plans to warehouse all of its “sick” detainees together, in communal living spaces, where they will “sleep head to toe thereby increasing breathable space between inmates,”¹⁹ a measure that will do little to avoid transmission among detainees.

70. Even if all of these problems could be resolved, however, they would not sufficiently address the risk of transmission of COVID-19. As Dr. Homer Venters, former chief medical officer of New York City jails, recently said, “[i]n ordinary times, crowded jails overlook prisoners’ medical problems and struggle to separate them based on their security classification...[i]f jails have to add quarantines and sequestration of high-risk prisoners to the mix...they will find managing a COVID-19 outbreak ‘*simply almost impossible*.’”²⁰

LEGAL ARGUMENTS

Failure to Release Petitioners Violates Their Due Process Rights

71. Release of petitioners is required because of the failure to transfer them to the treatment programs administered by the Department of Corrections and Community Supervision. As individuals mandated to enter and complete a DOCCS 90-Day Drug Treatment Program or the 45-Day Program at the Edgecombe Correctional Facility pursuant to the final hearing adjudication,

¹⁷ New York City Department of Correction: COVID19 Preparation & Action Plan, *available at* <https://www1.nyc.gov/site/doc/media/coronavirus-news.page> (last visited Mar. 18, 2020).

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

¹⁹ *Id.*

²⁰ Madison Pauly, *To Arrest the Spread of Coronavirus, Arrest Fewer People*, MOTHER JONES (Mar. 12, 2020), https://www.motherjones.com/crime-justice/2020/03/coronavirus-jails-bail-reform-arrests/?utm_source=The+Appeal&utm_campaign=0a31827f48-EMAIL_CAMPAIGN_2018_08_09_04_14_COPY_01&utm_medium=email&utm_term=0_72df992d84-0a31827f48-58432543.

Petitioners were entitled to be transferred to the Treatment Facility “forthwith”. The New York Court of Appeals in *Ayers v. Coughlin*, 72 N.Y.2d 346 (1988) has defined “forthwith” as requiring the transfer of adjudicated parole violators to DOCCS’ custody within 10 days of state-readiness.

72. However, transfer is no longer an option. As of March 13, 2020, DOCCS suspended all transfers to state prison indefinitely, for the duration of the crisis occasioned by the COVID-19 epidemic. The crisis has not come close to reaching its peak in New York State and is not expected to abate for a number of months. Thus, Petitioners have been robbed, through no fault of their own, of the benefit of their final hearing adjudication.

73. Under these circumstances, this Court should provide a remedy that gives effect to the due process rights of Petitioners. That remedy is immediate release from custody. *See People ex. rel. Woelfle v. Poole*, 836 N.Y.S.2d 501 (Sup. Ct. Seneca Co. 2007) (Bender, J.) (holding that failure to transfer an inmate from local custody to the Willard Drug Treatment Program within 40 days of the inmate’s final hearing violates due process and entitles the petitioner to immediate release from custody); *State ex rel. Ryniec v. Willard Drug Treatment Campus*, 11 Misc.3d 1088(A), 819 N.Y.S.2d 851 (Sup. Ct. Seneca Co. 2006) (Falvey, J.) (same holding where delay exceeds 20 days from final hearing adjudication); *see also People ex rel. Speight v Warden*, Index No. 25125-16 (Sup. Ct. Bronx Co. 2016) (Robert Torres, J.) *People ex rel. Sierra v. Warden*, Index No. 251672-14, (Sup. Ct. Bronx Co. 2015) (Sackett, J.); *People ex rel. Velasquez v. Warden*, Index No. 251271-08, (Sup. Ct. Bronx Co. 2008) (Paynter, J.) (all three cases ordering the release of the petitioners because of the delay in transferring them to a DOCCS treatment program).

74. Courts that have denied this claim have done so based on the view that an order directing the petitioner’s immediate transfer to state custody is sufficient to remedy the problem. *See People ex rel. Gonzalez v. Warden*, Index No. 340137-14, (Sup. Ct. Bronx Co. 2015) (Hubert,

J.); *People ex rel. Nieves v. Warden*, Index No. 340220-14, (Sup. Ct. Bronx Co. 2015) (Lorenzo, J.); *People ex rel. Lamberty v. Warden*, Index No. 340331-14, (Sup. Ct. Bronx Co. 2014) (Newman, J.). But that is insufficient under the facts here. There are no transfers to state custody occurring and there can be no expectation of transfers for the foreseeable future.

75. For the same reason, it is no answer to say petitioners have not been deprived of anything because they could still go to the treatment program and finish it before the time assessment is completed. Through no fault of their own, they cannot go to the treatment program. And even if they could at some point long down the road when the COVID-19 pandemic is behind us, it would provide no remedy. Every petitioner pleaded guilty to violating their parole because of the promise they would be sent expeditiously to a treatment program, where they would have the opportunity to regain their freedom in relatively short order. That promise cannot be fulfilled. Given the indefinite suspension of transfers to state custody, Petitioners are entitled to the same remedy as in the cases cited in Paragraph 73 above: immediate release from custody.

The COVID-19 Epidemic Makes It All the More Imperative to Release Petitioners, Who Would Pose No Danger to the Community

76. In ordinary times, an indefinite suspension of transfers to state custody would be grounds enough to grant this writ. But these are not ordinary times. They are times that have no precedent in any of our lives. The COVID-19 pandemic has overturned virtually our entire world, forcing people to retreat into their homes and avoid human contact because that is the only way to slow the spread of this disease. That social distancing is impossible in a jail setting with dormitory style sleeping arrangements, cafeteria style eating, and an inability to engage in necessary hygienic measures. And that is why COVID-19 is spreading so fast in City jails, at a rate dwarfing the rate of increase in the City at large. Every single person incarcerated at Rikers Island is at extreme risk of contracting COVID-19, if not today, then tomorrow.

77. Petitioners are not only being denied the opportunity to complete the treatment program they were promised, which would result in their release after, at most, 90 days. They are forced to remain in what, due to the COVID-19 virus, is a uniquely dangerous physical environment – the city jails.

78. Because risk mitigation is the only known strategy to slow the spread of COVID-19, correctional public health experts, including the New York City Board of Correction, initially recommended the release from custody of people most vulnerable to the disease. On March 17, 2020, they called on New York City to “immediately remove from jail all people at higher risk from COVID-19 infection” and to “drastically reduce the number of people in jail right now and limit new admissions to exceptional circumstances.”²¹ The Board reasoned that “[t]he City’s jails have particular challenges to preventing disease transmission on a normal day and even more so during a public health crisis.”²² Accordingly, the Board recommended that DOC prioritize the release of “[p]eople who are over 50; [and] [p]eople who have underlying health conditions, including lung disease, heart disease, diabetes, cancer, or a weakened immune system[.]”²³

79. On March 21, 2020, the Board of Correction (“BOC”) issued its second advisory letter. The Board again urged judges and prosecutors to act quickly to release people who are over fifty years old and who have health conditions that make them high-risk for COVID-19.²⁴ But the BOC extended its recommendation to younger, healthier individuals, recommending immediate

²¹ Press Release, N.Y.C. Bd. of Corr., New York City Board of Correction Calls for City to Begin Releasing People from Jail as Part of Public Health Response to COVID-19 (Mar. 17, 2020), <https://www1.nyc.gov/assets/boc/downloads/pdf/News/2020.03.17%20-%20Board%20of%20Correction%20Statement%20re%20Release.pdf>.

²² *Id.*

²³ *Id.*

²⁴ Jacqueline Sherman, Interim Chair of NYC Board of Correction, letter, Mar. 21, 2020, *available at* <https://www1.nyc.gov/assets/boc/downloads/pdf/News/covid-19/Letter-from-BOC-re-NYC-Jails-and-COVID-19-2020-03-21.pdf> (last visited Mar. 22, 2020).

release of those incarcerated for technical violations of parole and those serving city sentences.²⁵

As the BOC concluded: “The best path forward to protecting the community of people housed and working in the jails is to rapidly decrease the number of people housed and working in them.”²⁶

80. Similarly, Ross McDonald, the Chief Medical Officer of CHS, publicly called for the release from Rikers Island of “as many [people] as possible” on Twitter on March 18, 2020.²⁷

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

You cannot implement effective social distancing in a room that sleeps forty men. You cannot implement effective social distancing when those forty men are using two or three sinks and one of them may be broken. You cannot implement effective social distancing when the staff interacts with all of them and has to touch all of them in the course of a day. . . . [Detainees] don’t have our own cleaning supplies. They can’t wipe down their own surfaces. They have to wait for someone to come in and do that for them.²⁸

Dr. Bedard stated that Rikers’ physicians’ public cry for immediate release of large numbers of detainees is unprecedented but necessary because “the moral calculus has changed and our voices needed to be heard on this issue.”²⁹ Dr. Bedard noted that, to be effective, the DOC must release “hundreds of people . . . so that the jail population is decreased enough that you don’t just benefit the people who are released but you also benefit those who are left behind—and the staff who take care of them and the officers who take care of them.”³⁰

²⁵ *Id.*

²⁶ *Id.* (emphasis added).

²⁷ <https://twitter.com/RossMacDonaldMD/status/1240455796946800641>

²⁸ Jennifer Gonnerman, A Rikers Island Doctor Speaks Out to Save Her Elderly Patients from the Coronavirus, *New Yorker Magazine*, available at <https://www.newyorker.com/news/news-desk/a-rikers-island-doctor-speaks-out-to-save-her-elderly-patients-from-the-coronavirus> (last visited Mar. 22, 2020).

²⁹ *Id.*

³⁰ *Id.*

82. Courts and public officials in other jurisdictions, including in Los Angeles, California and parts of Ohio and Texas, have already responded by taking steps to facilitate the release of elderly and sick prisoners, and to reduce jail populations in general by refusing the admission to jails of individuals arrested on certain charges.³¹ In Iran, one of the first countries to see the outbreak of COVID-19, 85,000 inmates of all ages and health status were temporarily released back to their communities amid virus concerns.³² The State of New Jersey just announced plans to temporarily release up to 1,000 people held in county jails.³³

83. Courts across the country have also begun granting specific applications for release of pretrial detainees, with many more such applications pending. *See, e.g., United States v. Raihan*, No. 20-cr-68 (BMC) (JO), Dkt. No. 20 at 10:12–19 (E.D.N.Y. Mar. 12, 2020) (ordering continued release of a pre-trial detainee on the grounds that “[t]he more people we crowd into that facility [the Manhattan Detention Center], the more we’re increasing the risk to the community”); *United States v. Barkman*, 2020 U.S. Dist. LEXIS 45628 (D. Nev. Mar. 17, 2020) (“With confirmed cases that indicate community spread, the time is now to take action to protect vulnerable populations and the community at large.”); *In The Matter Of The Extradition Of Alejandro Toledo*

³¹*See, e.g.,* Alene Tchekmedyan et al, *L.A. County releasing some inmates from jail to combat coronavirus*, L.A. Times, (Mar. 16, 2020, 7:25 PM), <https://www.latimes.com/california/story/2020-03-16/la-jail-population-arrests-down-amid-coronavirus>; Cory Shaffer, *Cuyahoga County official will hold mass plea, bond hearings to reduce jail population over coronavirus concerns*, CLEVELAND.COM (Mar. 12, 2020), <https://www.cleveland.com/court-justice/2020/03/cuyahoga-county-officials-will-hold-mass-plea-hearings-to-reduce-jail-population-over-coronavirus-concerns.html>; WKBN Staff, *Local county jails making changes due to coronavirus outbreak*, WKBN (Mar. 12, 2020) (“The Mahoning County [Ohio] Sheriff’s Office is refusing all non-violent misdemeanor arrests at the county jail”), <https://www.wkbn.com/news/coronavirus/mahoning-county-jail-refusing-some-inmates-due-to-coronavirus-outbreak/>; *see also* Charles Scudder, *Facing coronavirus concerns, Collin County [Texas] Sheriff asks police not to bring petty criminals to jail*, DALLAS MORNING NEWS (Mar. 12, 2020 5:57 PM), <https://www.dallasnews.com/news/public-health/2020/03/12/facing-coronavirus-concerns-collin-county-sheriff-asks-police-not-to-bring-petty-criminals-to-jail/>.

³² *Hard-hit Iran frees more prisoners amid coronavirus outbreak*, AL JAZEERA (Mar. 17, 2020), <https://www.aljazeera.com/news/2020/03/hard-hit-iran-frees-prisoners-coronavirus-outbreak-200317110516495.html>.

³³ In the Matter of the request to Commute or Suspend County Jail Sentences, https://www.aclu-nj.org/files/5415/8496/4744/2020.03.22_-_Consent_Order_Filed_Stamped_Copy-1.pdf?utm_source=The+Appeal&utm_campaign=738080af0c-EMAIL_CAMPAIGN_2018_08_09_04_14_COPY_01&utm_medium=email&utm_term=0_72df992d84-738080af0c-58432543

Manrique, 2020 WL 1307109, (N.D. Cal. March 19, 2020) (ordering pre-trial detainee's release on bond despite finding the person was a flight risk and despite the fact that no cases had yet been confirmed in the San Mateo County jail, since by the time there is a case it will likely be "too late"); *U.S. v. Stephens*, 19cr95, 2020 WL 1295155, (AJN) (S.D.N.Y. Mar. 19, 2020) (ordering release of federal pretrial detainee in part due to "unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic" which may place inmates, in particular, at "heightened risk."); *United States v. Perez* 19-cr-297 (PAE), Dkt. No. 62 (March 19, 2020) (ordering the release of a detainee held on sex crime charges with "serious progressive lung diseases after finding "compelling reasons exist for temporary release of the defendant from custody during the current public health crisis"); *People ex rel. Stoughton o/b/o Little, et al. v. Brann*, Index No. 260154-20 (Sup. Ct. Bronx Co. March 27, 2020) (Marcus, J.) (court orders release of 106 medically vulnerable individuals awaiting adjudication of technical parole violation charges).

84. And, it is not just individuals especially vulnerable to COVID-19 who have begun to be released in New York. On March 27, 2020, Governor Cuomo announced that the State would release 1,100 people statewide who are incarcerated awaiting revocation proceedings for technical parole violations, irrespective of whether they face a serious risk of severe illness or death if infected with COVID-19. Approximately half of these individuals are currently held in local custody in the New York City. Their release, by significantly reducing the New York City jail population, will not only help them reduce the likelihood of being infected with COVID-19, it will also help reduce the rate of spread of the virus among the remaining inmates and jail personnel. Social distancing at Rikers Island can never approach social distancing in the community at large. But reducing the jail population can help. And, since jail personnel, both correction officers and

CHS employees, go home each night to their families and communities, it will also help reduce the rate of spread in neighborhoods throughout New York City.

85. There is not only a moral obligation on the part of respondents to protect against the spread of COVID-19, there is also a legal obligation. *See Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (“[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease”); *Narvaez v. City of New York*, No. 16-CV-1980 (GBD), 2017 WL 1535386, at *9 (S.D.N.Y. Apr. 17, 2017) (denying “motion to dismiss Plaintiff’s claim that the City of New York violated Plaintiff’s rights under the Due Process Clause by repeatedly deciding to continue housing him with inmates with active-TB” during his pretrial detention); *Bolton v. Goord*, 992 F. Supp. 604, 628 (S.D.N.Y. 1998) (acknowledging that prisoner could state claim for eighth amendment violation under § 1983 for confinement in same cell as inmate with serious contagious disease).

86. If the COVID-19 pandemic did not exist and DOCCS had suspended all transfers to state custody for an indefinite, lengthy period of time for some reason unrelated to health concerns, petitioners would be entitled to immediate release under the case law set forth in paragraph 73 above. *See Ayers v. Coughlin, supra; People ex. rel. Woelfle v. Poole, supra; State ex rel. Ryniec v. Willard Drug Treatment Campus, supra; People ex rel. Speight v Warden, supra; People ex rel. Sierra v. Warden, supra;; People ex rel. Velasquez v. Warden, supra.*

87. But the COVID-19 pandemic is a terrifying reality that is spreading like wildfire throughout the New York City jail system. The only effective way to combat the spread of this disease is to release everyone not being held on serious charges. Petitioners are adjudicated parole violators whose violative conduct was deemed minor enough to warrant their release upon completion of a 45 day or 90 day drug treatment program. Indeed, in every single case except one,

the charge to which they pleaded guilty was a technical violation of the conditions of parole supervision. They had every expectation of being sent expeditiously to their treatment program and of being released back to the community in the near future. Instead, through no fault of their own, that expectation has been thwarted. Petitioners have been prevented and will continue to be prevented from entering and completing their treatment program. For DOCCS to leave them in limbo, with no end in sight to their incarceration, waiting to be infected with COVID-19, worried that they might become seriously ill or even die, is unconscionable. In the absence of DOCCS voluntarily releasing petitioners, this Court should order their release.

88. Petitioners have not been committed and are not detained by virtue of any judgment, decree, final order or process of mandate issued by a court or judge of the United States in a case where such court or judge has exclusive jurisdiction to order him released.

89. Petitioners are not detained by virtue of any final judgment or decree of a competent tribunal or civil or criminal jurisdiction. Petitioners have no other holds.

90. No prior application for the relief requested herein has been made.

PRAYER FOR RELIEF

WHEREFORE, Petitioners ask this Court to issue a writ of habeas corpus ordering their immediate release, with appropriate precautionary public health measures, on the ground that continuing detention violates the Due Process Clause of the United States and New York State constitutions.

Dated: April 2, 2020
BROOKLYN, NEWYORK

Respectfully Submitted,

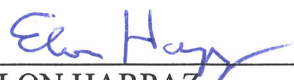


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Elon Harpaz, an attorney admitted to practice law in the State of New York, states that he has read the foregoing petition and that same is true to his own knowledge, except for those portions stated on information and belief, for which citations are provided.

Dated: April 2, 2020
BROOKLYN, NEW YORK



ELON HARPAZ