

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONEIDA

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THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. Stefen R. Short, Esq., on behalf of JOHN
FRATESCHI, DIN 11B0827; ALBERT JACKSON,
DIN 18A4662; THOMAS JACKSON, DIN 20R0016;
RICARDO LOPEZ, DIN 18R1196; and MICHAEL
YANCY, DIN 16A4993,

**AFFIRMATION IN OPPOSITION
TO PETITION AND IN SUPPORT
OF MOTION TO DISMISS**

Petitioners,

Index No.: EFCA 2020-000910

RJI No.: 32-20-0220

- against -

Hon. David A. Murad, J.S.C.

WILLIAM FENNESSY, Superintendent, Mid-State
Correctional Facility; PATRICK REARDON,
Superintendent, Marcy Correctional Facility; and
ANTHONY J. ANNUCCI, Acting Commissioner,
New York State Department of Corrections and
Community Supervision,

Respondents.

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THOMAS P. CARAFA, ESQ., an attorney duly admitted to practice law before all of the
Courts of the State of New York, affirms the following to be true under penalties of perjury pursuant
to CPLR 2106:

1. I am an Assistant Attorney General, of counsel to **LETITIA JAMES**, Attorney
General of the State of New York, and Attorney for the above captioned Respondents, **WILLIAM
FENNESSY**, Superintendent, Mid-State Correctional Facility, (hereinafter referred to as "**Mid-State
CF**"), and **PATRICK REARDON**, Superintendent, Marcy Correctional Facility (hereinafter referred
to as "**Marcy CF**"), and **ANTHONY J. ANNUCCI**, Acting Commissioner, New York State
Department of Corrections and Community Supervision (hereinafter referred to as "**DOCCS**"), and
as such, and from a review of the file maintained by our office, I am fully familiar with all of the facts
and circumstances, pleadings and proceedings heretofore had herein.

2. This Affirmation is submitted in support of the instant motion for an Order denying Petitioners' application and granting Respondents' motion dismissing the above-captioned Petition pursuant to CPLR §3211 (a)(7), on the ground that it fails to state a cause of action.

3. Respondents generally DENY each and every allegation contained in the Petition that are not supportable by the record.

4. Petitioner John Frateschi was convicted of Robbery in the First Degree (C Felony) and 2 counts of Burglary in the Second Degree (C Felony) and on May 2, 2012 was sentenced to 5 concurrent years of incarceration on the Robbery and first count of the Burglary convictions and 12 concurrent years of incarceration on the second count of the Burglary conviction, with a maximum expiration date of January 29, 2023. (See **Exhibit "A"** annexed hereto).

5. Petitioner Albert Jackson was convicted of Aggravated Family Offense (E Felony) and on December 3, 2018 was sentenced to (1 ½ - 3) years of incarceration; with a maximum expiration date of October 27, 2021. (See **Exhibit "B"** annexed hereto).

6. Petitioner Thomas Jackson was convicted of Robbery in the First Degree (C Felony) and on December 19, 2019 was sentenced to (3 ½) years of incarceration; with a maximum expiration date of May 5, 2022. (See **Exhibit "C"** annexed hereto).

7. Petitioner Ricardo Lopez was convicted of Criminal Sale of a Controlled Substance in the Third Degree (C Felony) and on May 8, 2018 was sentenced to (3 ½) years of incarceration; with a maximum expiration date of November 25, 2020. (See **Exhibit "D"** annexed hereto).

8. Petitioner Michael Yancey was convicted of Burglary in the Second Degree (C Felony) and on December 5, 2016 was sentenced to (5) years of incarceration; with a maximum expiration date of January 31, 2021. (See **Exhibit "E"** annexed hereto).

A. Habeas corpus relief is not an available remedy here.

9. A writ of habeas corpus may be sustained only when a petitioner is subject to immediate release from custody. *See People ex rel. Kaplan v Commissioner of Correction*, 60 NY2d 648 (1983); *People ex rel. Vansteenburgh v Wasser*, 69 AD3d 1135 (3d Dept 2012). These Petitioners are and have been lawfully confined and fail to make any argument to the contrary. Rather, Petitioners argue their due process are being violated based on their incarcerations during the current Covid-19 pandemic. This is not a lawful basis for ordering Petitioners' release and is not a legal basis to contest Petitioners' lawful detention.

10. It is respectfully submitted that the Court "lack[s] the authority to direct the release of an inmate to parole status because that remedy invades the discretionary decision-making authority of [the Board]." *Matter of Moore v New York State Board of Parole*, 198 AD2d 836, 837 (4th Dept 1993). Since the Court cannot issue a directive immediately releasing Petitioners to parole, the Court cannot grant habeas corpus relief. *See People ex rel. Kaplan v Commissioner of Correction*, 60 NY2d 648, 454 N.E.2d 1309 (1983).

11. All the Petitioners have started serving but have not reached the expiration of their sentences (See Exhibits "A" – "E") and, as a result, are not entitled to immediate release or habeas relief. *See People ex rel. Bernzott v. Murray*, 12 A.D.3d 1102 (4th Dept. 2004); *People ex rel. Beam v. Hodges*, 286 A.D.2d 936 (4th Dept. 2001) (holding that "prisoners have no right to be released prior to the expiration of their sentences" and thus habeas relief does not lie).

12. While the Court of Appeals has recognized that habeas corpus may be used to enforce the state's "duty to protect [inmates] from unlawful and onerous treatment, mental or physical" it has done so only when the release sought was "other than that of absolute discharge" *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485-86 (1961) (citations omitted). Thus, "[w]hile, in some special circumstances, habeas corpus is available to challenge the conditions of confinement, even where

immediate discharge is not the appropriate relief” (*People ex rel. Kalikow v. Scully*, 198 A.D.2d 250, 250-51 (2d Dept. 1993)), even “deliberate indifference to [petitioner’s] medical needs . . . would not entitle him to immediate release” *People ex rel. Barnes v. Allard*, 25 A.D.3d 893, 894 (3d Dept. 2006).

13. The Court stated in *People ex rel. Bernzott v. Murray*, 12 A.D.3d 1102 (4th Dept. 2004): “Prisoners have no right to be released prior to the expiration of their sentences” and, thus, because Petitioner is not entitled to immediate release, habeas corpus relief does not lie. *People ex rel. Sansalone v. Schriver*, 52 A.D.2d 605 (1998); *People ex rel. Gloss v. Costello*, 309 A.D.2d 1160 (2003), lv. denied 1 N.Y.3d 504 (2003); *Beam*, 286 A.D.2d at 937.

14. The issue was also addressed in *People ex rel. Daniel v. Beaver*, 303 AD2d 1025 (4th Dept. 2003): “Supreme Court properly dismissed the petition seeking a writ of habeas corpus because Relator is not entitled to immediate release even if his present contentions have merit.”

15. The issue was most recently addressed as it relates to COVID-19 in a Decision and Order in *People ex rel. Chaim Gottlieb*, Supreme Court, Orange County Index No. EF002321-2020 (decided on April 14, 2020) by the Honorable Sandra Sciortino, J.S.C. (a copy of the Decision and Order is annexed hereto as **Exhibit “F”**). This involved a Petition for Habeas Corpus by an inmate incarcerated with DOCCS for a non-violent felony conviction who has not completed his sentence and who allegedly suffered from severe diabetes. Like this Petition, it referenced numerous news articles and scholarly reports and predictions to justify his release from the correctional facility.

16. As in the Petition at bar, that petitioner alleged his medical condition and past medical history made him particularly susceptible to the virus. He further contended that his continued incarceration in an environment in which it was virtually impossible to institute recommended prevention, “constitutes deliberate indifference to serious medical harm in violation of the United States and New York State constitutions.” (See **Exhibit “F”**).

17. However, in *Gottlieb*, the Court found that despite the fact that the petitioner's well-being appeared to be in jeopardy and his concerns were valid, "he did not give the Court a vehicle by which the requested relief can be granted." (See Exhibit "F").

18. The Court held that it did not have the authority to release the petitioner from his incarceration pursuant to CPL §430.10 that states:

Except as otherwise specifically authorized by law, when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended or interrupted once the term or period of the sentence has commenced.

19. Like the Petitioners at bar, the Petitioner's sentence in *Gottlieb* had already commenced and as the Court clearly stated, "not one instance is cited or can be found where an inmate whose 'sentence has commenced' can be released."

20. The *Gottlieb* Court further held that even in cases which alleged examples of the State's deliberate indifference to medical and safety needs, not one resulted in the release of the inmate. (See Exhibit "F").

21. Even if Petitioners' claim of deliberate indifference to his medical needs had merit, "it would not entitle him to immediate release, thus making the habeas corpus relief unavailable." *Gottlieb* citing *People ex rel. Barnes v. Allard*, 25 AD3d 893, 894 (3rd Dept. 2006).

22. Justice Sciortino also cited a recent decision by Hon. Jesse M. Furman, District Judge of the Southern District of New York that states: "[A]lthough the rational and right result is for [the inmate] to be temporarily released from custody until circumstances improve, the Court is powerless at this point to bring about that result." *United States v. Nkanga*, US Dist. Ct. (SDNY, March 31, 2020). Judge Furman went on to say that "The dangers of the moment . . . call for more systemic action than a judge can grant in any one case. Moreover, there are many cases where temporary release of an

inmate would be the rational and just course of action, but the law does not give a judge the authority to take it.” (*Id.*)

23. Also, in *People v. Burgan*, Supreme Court, Bronx County Indictment No. 2948/08 and 2922/11 (decided on April 22, 2020) by the Honorable Ralph Fabrizio, J.S.C. (a copy of the Decision and Order is annexed hereto as **Exhibit “G”**); the Court held that “in deciding writs brought on ‘due process’ and 8th amendment grounds, the remedy for a meritorious deliberate indifference claim has never been to release an inmate: there is no appellate authority that has ever been cited to support such a finding in any papers filed before this Court, and there is no such authority cited in defendant’s papers. See *People ex. rel. Moulter (Crockett) v. Brann and Annucci*, 2020 NY Slip Op 50536(u), April 16, 2020, Sup. Ct. Bronx County (Fabrizio, J.); *People ex. rel. Jackson (Pacheco) v. Brann*, Docket Nos. CR-0054232-20BX and CR-004533-20BX, April 8, 2020, Sup. Ct. Bronx County (Fabrizio, J.).”

24. Most recently this issue was addressed in Oneida County Supreme Court in *People ex rel. Goldberg v Reardon, et al.*, (Oneida County Index No. EFCA 2020-000900 Hon. David A. Murad, J.S.C.) by this Court on April 30, 2020. This Court also held that “no matter the risk, and even were the Court to find on the merits that respondents have acted with deliberate indifference toward petitioner’s serious medical needs, in violation of the Eighth Amendment, the relief to be afforded is not immediate release. The Court must dismiss the petition for failure to state a cause of action. The relief sought, that of release from custody, is not an available remedy for the alleged inhumane conditions of confinement under a lawful sentence.” (a copy of the Decision/Order is annexed hereto as **Exhibit “H”**).

25. As such, even if these Petitioners were correct on the merits (which respondents do not concede), their remedy would not lie in a Writ of Habeas Corpus because they are not entitled to immediate release, i.e., release before their Maximum Expiration date.

- B. Regardless of Petitioners' medical conditions, it cannot be shown that he would be safer released, where they have no known place to live, as DOCCS' health care system is well positioned to care for Petitioners.**

26. As of May 1, 2020, at 3:00 p.m., DOCCS is reporting that a total of 8 inmates at Marcy CF (where Petitioners Frateschi and Lopez are incarcerated) tested positive for COVID-19. Further, there have been no reported deaths. (See **Exhibit "I"** annexed hereto and <https://doccs.ny.gov/doccs-covid-19-report>).

27. As of May 1, 2020, at 3:00 p.m., DOCCS is reporting that a total of 14 inmates at Mid-State CF (where Petitioners Albert Jackson, Yancey and Thomas Jackson are incarcerated) tested positive for COVID-19. Further, there have been no reported deaths. (See **Exhibit "I"** annexed hereto and <https://doccs.ny.gov/doccs-covid-19-report>).

28. Petitioner Frateschi has not provided in admissible form, any evidence of where he will go if released. His counsel has provided an unsupported statement that "he will return to Janesville, New York where he would live with his wife and children." (See **Petition, paragraph no. 27**). A search conducted revealed no Janesville, New York. For the purpose of this motion, Respondents are assuming this was an error and meant to be Jamesville, Onondaga County New York as indicated on his Pre-Sentence Report. (See **Pre-Sentence Investigation Face Sheet as part of Exhibit "A"**).

28. Petitioner Albert Jackson has not provided any information as to where he would go if he was to be released. Petitioner was arrested and convicted in New York County and his Pre-Sentence Investigation Report from 2018, lists his address in New York City. (See **Pre-Sentence Investigation Face Sheet as part of Exhibit "B"**).

29. Petitioner Thomas Jackson also has not provided in admissible form, any evidence of where he will go if released. His counsel has provided an unsupported statement that "he will return home to Harlem where he would live with his wife." (See **Petition, paragraph no. 32**). Petitioner was

also arrested and convicted in the New York County and his Pre-Sentence Investigation Report from 2019, lists his address in New York City. (See **Pre-Sentence Investigation Face Sheet as part of Exhibit “C”**).

30. Petitioner Ricardo Lopez also has not provided in admissible form, any evidence of where he will go if released. His counsel has provided an unsupported statement that “he *plans* to live with his brother and sister-in-law. *emphasis added*. (See **Petition, paragraph no. 35**). But he has not provided any information as to where that is located. It is worth noting, that Petitioner was arrested and convicted in the New York County and his Pre-Sentence Investigation Report from 2017, lists his address in The Bronx, New York. (See **Pre-Sentence Investigation Face Sheet as part of Exhibit “D”**).

31. Petitioner Michael Yancey again has not provided in admissible form, any evidence of where he will go if released. His counsel has provided an unsupported statement that “he is *in the process* of securing housing with Catholic Charities in Albany or the Albany mission.” *emphasis added*. (See **Petition, paragraph no. 37**). Petitioner was arrested and convicted in Albany, New York County and his Pre-Sentence Investigation Report from 2016, lists his address in Albany, New York. (See **Pre-Sentence Investigation Face Sheet as part of Exhibit “E”**).

32. As of midnight on May 2, 2020, New York City had 174,331 people tested positive out of 465,803 tested for a 37.4% positive result with 1977 new cases reported on that one day. Further, there have been 13,064 fatalities reported in the City. (See **Exhibit “J”** annexed hereto and <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-TableView?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n>).

33. As of midnight on May 2, 2020, Onondaga County had 952 people tested positive out of 12,027 tested for 7.9% positive result with 49 new cases reported on that one day. Further, there have been 42 fatalities reported in that County. (See **Exhibit “J”** annexed hereto and

<https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-TableView?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n>.

34. As of midnight on May 2, 2020, Albany County had 1,258 people tested positive out of 11,563 tested for 10.9% positive result with 20 new cases reported on that one day. Further, there have been 61 fatalities reported in that County. (See **Exhibit “J”** annexed hereto and <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Map?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n>).

35. In significant contrast, in all of Oneida County, there are only 489 positive tests out of 3909 tested for COVID-19 with a 12.5 percentage rate and 15 new cases reported in that one day. Further, only 14 related deaths during the same time frame in the entire County. *Id.*

36. In sum, despite Petitioners’ best efforts, it is impossible to argue that they would be safer from COVID-19 if released than they would be in a DOCCS’ correctional facility in Oneida County, given the known statistics. As “[t]here is currently no specific treatment for or vaccine to prevent COVID-19, the best way to prevent illness is to avoid being exposed to this virus.” <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/asthma.html>.

37. About “half of state and federal prisoners and local jail inmates reported ever having a chronic condition”, including “cancer, high blood pressure, stroke-related problems, diabetes, heart-related problems, kidney-related problems, arthritis, asthma, and cirrhosis of the liver.” <https://www.bjs.gov/content/pub/pdf/mpsfpjil112.pdf>. Therefore, if every inmate in the DOCCS’ system with a chronic condition was to be released as a result of the COVID-19 pandemic, nothing short of chaos could result in the community. See e.g., *Sacal-Micha v. Longoria*, No. 1:20-CV-37, 2020 U.S. Dist. LEXIS 53474, at *15 (S.D. Tex. Mar. 27, 2020) (“Sacal’s age and medical condition render him particularly vulnerable to serious complications from the virus. But the fact that ICE may be unable to implement the measures that would be required to fully guarantee Sacal’s safety does not

amount to a violation of his constitutional rights and does not warrant his release.”); *United States v. Gabelman*, No. 2:20-CR-19 JCM (NJK), 2020 U.S. Dist. LEXIS 52773, 2020 WL 1430378, at *1 (D. Nev. Mar. 23, 2020); (“The court acknowledges that the spread of COVID-19 may be acutely possible in the penological context, but the court cannot release every detainee at risk of catching COVID-19 because the court would be obligated to release every detainee.”).

38. Petitioners have submitted an Affirmation from Robert B. Greifinger, MD in support of their Petition. Dr. Greifinger concedes that he has not been employed by DOCCS in the last 25 years. As such, it does not appear that he has any knowledge or experience with how DOCCS is currently handling medical issues at DOCCS facilities in general and the COVID-19 virus in particular.

39. Dr. Greifinger’s affirmation indicates that he is currently “monitoring” 3 county jails for federal courts. He has not demonstrated any recent experience with conditions at DOCCS facilities. Dr. Greifinger’s conclusions improperly include “correctional and detention sites around the country”.

40. Any data, statements or conclusions about correctional facilities such as Rikers or other NYC facilities, other than DOCCS in general and the facilities where these Petitioners’ are currently incarcerated, in particular are irrelevant and should not be considered by this Court in deciding this Petition.

41. Further, the statistics as provided by the Respondents, do not support Dr. Greifinger’s conclusory and unsupported opinions that “[t]he conditions of DOCCS prisons pose a heightened public health risk to the spread of COVID-19.” Looking at the DOCCS statistics and comparing them to the DOH statistics for the New York population at large, clearly demonstrates that DOCCS facilities do not pose the alleged heightened risk.

42. Dr. Greifinger’s affirmation does not demonstrate any knowledge of the steps that DOCCS has taken in accordance with the current CDC recommendations for correctional facilities.

He recommended that the Petitioners be released “to a place where they can maintain the social distance required” and be “self-quarantined for 14 days” following release. However, he fails to address the issue of where the Petitioners will be released to; their ability to be self-quarantined or even their access to medical intervention should they become infected after their release.

43. Finally, Dr. Greifinger opined of the Petitioners’ higher risks of severe complications or death from COVID-19 based upon his review of the Petition. However, the Petition only contains conclusory statements of the Petitioners’ alleged medical conditions and does not contain any admissible medical proof to support those opinions. Therefore, they should be given no weight in support of this Petition.

C. Petitioners have failed to show that DOCCS is indifferent to their safety or medical needs.

44. DOCCS is not indifferent to the inmates’ safety; but is in fact, taking aggressive steps to minimize their risk. As can be seen by the annexed Affirmation of Charles J. Quackenbush, Deputy Counsel of DOCCS, DOCCS has historically successfully managed infectious outbreaks such as tuberculosis, AIDS, and Hepatitis C. Furthermore, DOCCS has a comprehensive Pandemic Flu protocol that has been modified for COVID-19.

45. In fact, DOCCS takes the spread of any infectious disease very seriously and has protocols in place to promote the health and safety of staff, incarcerated individuals, visitors and volunteers in the event that such a spread should take place. Each facility maintains an emergency control plan that is reviewed annually and is uniquely designed to meet the facility's needs, including preparedness measures, response mechanisms and short- and long-term recovery provisions.

46. Additionally, at all times, DOCCS retains supplies, equipment and other resources that can be readily available, if needed, to those impacted in correctional facilities during the spread of an infectious disease. As with the occurrence of any widespread public health threat, DOCCS is involved

in ongoing discussions and preparations - including protocol review and emergency supply inventory - to ensure that DOCCS' policies and procedures are as up to date as possible.

47. Also, DOCCS has medical staff specially trained in infection control employed in facilities across the state. DOCCS also has negative air flow isolation rooms, and Regional Medical Units.

48. DOCCS has been conducting table top exercises and has developed plans for facilities to implement, should there be significant staff absences. For security reasons, DOCCS cannot give specific details on plans and provisions.

49. Both staff and incarcerated individuals have received information on preventative measures to stay healthy, including the top recommendation by the CDC and State Department of Health - the regular use of soap and water, which is readily available throughout DOCCS correctional facilities. DOCCS has also implemented several other measures, such as, but not limited to:

- Temporarily suspending all intake of incarcerated individuals from county facilities;
- Internal transfers of incarcerated individuals has been stopped except for medical, disciplinary and other exigent circumstances to ensure the continued health and safety of DOCCS staff and incarcerated population;
- Temporarily suspending visitations;
- Requiring non-security and many other civilian staff to remain home until directed to return;
- Implementing a health/travel questionnaire for staff entering facilities;
- Regularly distributing guidance from the Department of Health to all staff and the inmate population about the important steps to take to combat the virus;
- Displaying posters with information on COVID-19 and safety tips throughout DOCCS facilities;
- Regularly showing a video to the incarcerated population and staff at the facilities on proper handwashing entitled "Put your hands together.";
- Issued enhanced cleaning/sanitizing measures, consistent with CDC guidelines, for office surfaces, devices and disinfecting procedures. <https://doccs.ny.gov/suspensions-restrictions-cancellations-response-covid-19>.

50. Upon information and belief, these measures are all in line with the Centers for Disease Control and Prevention's ("CDC") recommendations for correctional facilities in the United States. See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>. ("Cases of COVID-19 have been documented in all 50 US states. Correctional and detention facilities can prevent introduction of COVID-19 from the community and reduce transmission if it is already inside by reinforcing good hygiene practices among incarcerated/detained persons, staff, and visitors (including increasing access to soap and paper towels), intensifying cleaning/disinfection practices, and implementing social distancing strategies.).

51. In light of the foregoing, the Petition lacks merit and should be dismissed in its entirety. See *Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 U.S. Dist. LEXIS 47891, at *6 (W.D. Wash. Mar. 19, 2020) ("Here, there is no evidence that anyone at NWDC has COVID-19, and Plaintiffs do not address the measures Defendants are taking to prevent such a spread from occurring.").

CONCLUSION

52. It is respectfully submitted that as Petitioners' remedies do not lie in a Writ of Habeas Corpus, as they are not entitled to immediate release, i.e., release before their Maximum Expiration date, the Petition must be denied.

53. It is further respectfully submitted that as Petitioners have not submitted any evidence in admissible form to demonstrate that they have medical conditions that place them at more risk for COVID-19 in general or at more risk in DOCCS custody than they would be if released.

54. It is further respectfully submitted that as Petitioners have not provided any evidence in admissible form that DOCCS has failed to take measures to prevent the spread of the virus or take appropriate action to protect the inmates' health and safety, the Petition must be denied. Each of these deficiencies alone would be sufficient to require denial of the Petition.

WHEREFORE, it is respectfully requested that this Honorable Court issue an Order denying Petitioners' application and granting Respondents' motion dismissing the above-captioned Petition pursuant to CPLR §§ 3211 (a)(7), on the ground that it fails to state a cause of action; together with such other and further relief as this Court deems just and proper.

Dated: Utica, New York
May 4, 2020

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York



By: Thomas P. Carafa,
Assistant Attorney General