

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HASSAN CHUNN; NEHEMIAH McBRIDE;
AYMAN RABADI by his Next Friend Migdaliz
Quinones; JUSTIN RODRIGUEZ by his Next
Friend Jacklyn Romanoff; ELODIA LOPEZ; and
JAMES HAIR,

individually and on behalf of all others similarly
situated,

Petitioners,

-against-

WARDEN DEREK EDGE,

Respondent.

No. 20 Civ. 1590

**FIRST AMENDED CLASS
ACTION PETITION SEEKING
WRIT OF HABEAS CORPUS
UNDER 28 U.S.C. § 2241**

Hassan Chunn, Nehemiah McBride, Ayman Rabadi, Justin Rodriguez, Elodia Lopez, and James Hair (“Petitioners”), on behalf of themselves and others similarly situated, and by and through their attorneys, Emery Celli Brinckerhoff & Abady LLP, the Cardozo Civil Rights Clinic, and Alexander A. Reinert, allege as follows:

PRELIMINARY STATEMENT

1. New York City is the epicenter of the Country’s struggle with the novel COVID-19 virus and resulting coronavirus disease (“COVID-19”). As this disease ravages our City, infecting more than 147,000 and killing over 15,000 to date, the risks posed by COVID-19 to people confined in jails and prisons—in terms of transmission, exposure, and harm—are stark and alarming. For reasons beyond their control, people in jails and prisons cannot practice social distancing, control their exposure to large groups, practice increased hygiene, wear protective clothing, obtain specific products for cleaning or laundry, avoid high-touch surfaces, or sanitize their own environment. People in jails and prisons are more vulnerable and susceptible to the

risks of coronavirus because they are more likely to have chronic underlying health conditions, such as diabetes, heart disease, chronic lung and liver diseases, asthma, and lower immune systems from HIV. People have limited opportunities to access medical care under normal circumstances in jails; medical facilities are limited, and as staff become sick, fewer people are present to care for those who remain confined. The outbreak of a highly infectious, deadly virus in a closed detention setting is a disaster, calling for urgent and decisive action to protect the health of those confined in the jail, those who work there, and the medical professionals who will treat those who become infected.

2. On March 22, 2020, a person jailed at the Metropolitan Detention Center (“MDC”) in Brooklyn, New York tested positive for COVID-19, the first coronavirus case of a detainee in the federal prison system. As of April 22, 2020, 566 people held in BOP custody had tested positive, and 24 of them had died as a result. There have been 324 BOP staff who have tested positive, 23 at the MDC alone. And as of April 22, 2020, at least six people held at the MDC have tested positive. The coronavirus is spreading in the MDC and federal BOP system, fast.

3. Unfortunately, the Warden of the MDC has failed to respond to the urgent and serious threat to the health of people confined at the MDC. Although the Warden identified 537 medically vulnerable individuals confined in his facility according to CDC guidelines, the Warden has failed to release the vast majority of these highly vulnerable individuals. Instead, the facility has acted at a slow pace to respond to requests for emergency compassionate relief and to take other measures appropriate for a public health crisis.

4. Petitioners Hassan Chunn, Nehemiah McBride, Ayman Raybadi, Justin Rodriguez, Elodia Lopez, and James Hair are six of the 537 individuals identified by the Warden

as being at heightened risk of serious injury or death if exposed to COVID-19. Petitioners suffer variously from conditions such as chronic heart disease, asthma, high blood pressure, and respiratory problems. Because of their pre-existing chronic medical conditions and the nature of the jail environment, Petitioners cannot be adequately protected from contracting COVID-19 if they remain confined in the MDC. Instead, they face a risk of serious illness if they become infected.

5. The MDC has a terrible track record of neglecting individuals with serious health needs under ordinary circumstances. And the MDC is grossly ill-equipped to identify, monitor, and treat a COVID-19 epidemic. The combination of an epidemic striking a facility that houses 1,700 people and the MDC's inability to provide appropriate medical care under normal circumstances is likely to result in serious illness and death, if people remain confined there at current population levels and under current conditions.

6. According to The New York Times, cities around the country, including New York, are moving to release hundreds of high-risk individuals from jail to stem the spread of the virus among the incarcerated. Courts in this Circuit and around the country have also ordered the release of incarcerated and detained individuals due to their heightened risk of contracting COVID-19-related serious illnesses. *See infra* n.21. New York State has announced its intention to release at least 1,100 people from state prisons who are incarcerated on parole violations.¹

7. Petitioners and similarly situated medically vulnerable individuals must be released from the MDC in order to avoid serious harm to their health. Now is the time to act to

¹ Brendan J. Lyons, *NY to release 1,100 parole violators as coronavirus spreads*, Times Union (Mar. 27, 2020), <https://www.timesunion.com/news/article/Deaths-surge-again-in-New-York-from-coronavirus-15160973.php>

stop the spread of coronavirus to high-risk and older people confined at the MDC, and to protect them and the broader community from the serious risk to their health and safety.

PARTIES

8. Petitioner Hassan Chunn is a 46-year-old man. Mr. Chunn was in the custody of the Federal Bureau of Prisons (“BOP”) at the MDC until April 8, 2020.

9. Petitioner Nehemiah McBride is a 34-year-old man. Mr. McBride was in the custody of BOP at the MDC until April 7, 2020.

10. Petitioner Ayman Rabadi is a 59-year-old man who currently resides in Kings County, New York. At all times relevant to this Complaint, Mr. Rabadi was in the custody of BOP at the MDC.

11. Petitioner Justin Rodriguez is a 26-year-old man who currently resides in Kings County, New York. At all times relevant to this Complaint, Mr. Rodriguez was in the custody of BOP at the MDC.

12. Petitioner Elodia Lopez is a 55-year-old woman who currently resides in Kings County, New York. At all times relevant to this Complaint, Ms. Lopez was in the custody of BOP at the MDC.

13. Petitioner James Hair is a 29-year-old man who currently resides in Kings County, New York. At all times relevant to this Complaint, Mr. Hill was in the custody of BOP at the MDC.

14. Derek Edge (“Respondent”) is the Warden at the MDC. As Warden of the MDC, Respondent Edge is responsible for and oversees all day-to-day activity at the MDC. He is responsible for all aspects of the operation and function of the MDC. His responsibilities include ensuring the safety of all in the institution and ensuring the orderly running of the institution.

Approximately 1,700 people are detained at the MDC. Respondent Edge is aware of and has adopted and enforced a policy that leaves Petitioners and all those similarly situated exposed to infection, severe illness, and death due to COVID-19. Defendant Edge is the immediate physical custodian responsible for the detention of the Petitioners. He is sued in his official capacity.

JURISDICTION AND VENUE

15. The Petitioners bring this action pursuant to 28 U.S.C. § 2241 for relief from custody in violation of the Fifth and Eighth Amendments to the U.S. Constitution.

16. The Court has subject matter jurisdiction over this Petition pursuant to Article I, § 9, cl. 2 of the U.S. Constitution (Suspension Clause); the Fifth and the Eighth Amendments to the U.S. Constitution; 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1651 (All Writs Act); and 28 U.S.C. § 2241 (habeas corpus). In addition, the Court has jurisdiction to grant declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

17. Venue is proper in the Eastern District of New York pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events and omissions giving rise to these claims occurred and continue to occur in this district.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

18. Petitioners are all excused from 28 U.S.C. § 2241's prudential exhaustion requirement. The statutory exhaustion requirement of the Prison Litigation Reform Act does not apply to this action. *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 634 (2d Cir. 2001). In cases brought under 28 U.S.C. § 2241, courts may excuse failure to strictly comply with administrative procedures where good cause is found. Exhaustion can be excused where “(1) available remedies provide no genuine opportunity for adequate relief; (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be futile; and (4) in certain instances a party has raised a substantial constitutional question.” *Sanchez v. United*

States, No. 12 Civ. 01540 (CBA), 2012 WL 5987858, at *1 (E.D.N.Y. Nov. 29, 2012) (quoting *Beharry v. Aschcroft*, 329 F.3d 51, 62 (2d Cir. 2003)).

19. The only process ostensibly available to Petitioners is the BOP's Administrative Remedy Program ("ARP"), a lengthy process that does not purport to provide the requested relief of release to home confinement and that here would have been futile. *See* Ex. 1, Declaration of Deirdre von Dornum, dated March 27, 2020, ¶¶ 22, 23 ("von Dornum Decl."). As Deirdre von Dornum explains in her declaration, the Federal Defenders of New York, Inc. ("the Federal Defenders") has engaged in a prolonged effort to secure release of vulnerable clients and to advocate for the MDC to take steps to mitigate risk. *Id.* ¶¶ 3-7, 9-11, 20, 21, 23. The MDC has had ample opportunity to take appropriate action, but has failed to do so. Because the ARP does not provide the requested relief, because engaging in the ARP would have been futile given that seasoned advocates with far greater resources could not secure the requested relief, and because Petitioners are likely to experience irreparable injury while waiting for that process to unfold, they are excused from exhaustion.

STATEMENT OF FACTS

I. The Covid-19 Crisis

20. The novel coronavirus that causes COVID-19 has led to a global pandemic.² As of April 22, 2020, there were more than 2,600,000 reported COVID-19 cases throughout the world and more than 46,000 deaths in the United States. The number of COVID-19 cases in the United States continues to grow exponentially. Projections by the Centers for Disease Control and Prevention ("CDC") indicate that over 200 million people in the United States could be

² Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, WALL ST. J. (Mar. 11, 2020, 11:59 PM), <https://www.wsj.com/articles/u-s-coronavirus-cases-top-1-000-11583917794>.

infected with COVID-19 over the course of the epidemic without effective public health intervention, with as many as 1.5 million deaths in the most severe projections.³

21. The COVID-19 virus can cause severe damage to lung tissue, sometimes leading to a permanent loss of respiratory capacity, and can damage tissues in other vital organs, including the heart and liver. To date, the virus is known to spread from person to person through respiratory droplets, close personal contact, and from contact with contaminated surfaces and objects.

22. People over the age of fifty face greater chances of serious illness or death from COVID-19. In a February 29, 2020 WHO-China Joint Mission Report, the preliminary mortality rate analyses showed that individuals age 60-69 had an overall 3.6% mortality rate and those 70-79 years old had an 8% mortality rate. For individuals age 40-49, the mortality rate was 0.4%, and for individuals 40 years and younger, the mortality rate was as low as 0.2%.⁴

23. People of any age who suffer from certain underlying medical conditions, including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and asthma, are at elevated risk as well.⁵ The WHO-China Joint Mission Report provides that the mortality rate for those with cardiovascular

³ 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>.

⁴ *Age, Sex, Existing Conditions of COVID-19 Cases and Deaths Chart*, <https://www.worldometers.info/coronavirus/coronavirus-age-sex-demographics/> (data analysis based on WHO-China Joint Mission Report).

⁵ *Coronavirus disease (COVID-19) advice for the public: Myth busters*, World Health Organization, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/myth-busters> (“Older people, and people with pre-existing medical conditions (such as asthma, diabetes, heart disease) appear to be more vulnerable to becoming severely ill with the virus.”).

disease was 13.2%, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer.⁶

24. In many people, COVID-19 causes fever, cough, and shortness of breath. But for people over the age of fifty or with medical conditions that increase the risk of serious COVID-19 infection, shortness of breath can be severe. Most people in higher risk categories who develop serious illness will need advanced support. This level of supportive care requires highly specialized equipment that is in limited supply, and an entire team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians.

25. COVID-19 can severely damage lung tissue, which requires an extensive period of rehabilitation, and in some cases, can cause a permanent loss of respiratory capacity. COVID-19 may also target the heart muscle, causing a medical condition called myocarditis, or inflammation of the heart muscle. Myocarditis can affect the heart muscle and electrical system, reducing the heart's ability to pump. This reduction can lead to rapid or abnormal heart rhythms in the short term, and long-term heart failure that limits exercise tolerance and the ability to work.

26. Emerging evidence also suggests that COVID-19 can trigger an over-response of the immune system, further damaging tissues in a cytokine release syndrome that can result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury. These complications can manifest at an alarming pace. Patients can show the first

⁶ *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”).

symptoms of infection in as little as two days after exposure, and their condition can seriously deteriorate in as little as five days or sooner.

27. Even some younger and healthier people who contract COVID-19 may require supportive care, which includes supplemental oxygen, positive pressure ventilation, and in extreme cases, extracorporeal mechanical oxygenation.

28. The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 infection 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.⁷ For people in the highest risk populations, the fatality rate of COVID-19 infection is about 15 percent.

29. Patients who do not die from serious cases of COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurologic damage, loss of digits, and loss of respiratory capacity.

30. There is no vaccine against COVID-19 and there is no known medication to prevent or treat infection from COVID-19. Social distancing, or remaining physically separated from known or potentially infected individuals, and vigilant hygiene, including washing hands with soap and water, are the only known effective measures for protecting vulnerable people from COVID-19.

II. Incarcerated People and Staff in New York City Are Particularly Vulnerable

31. New York is currently at the epicenter of the coronavirus pandemic. On March 23, 2020, approximately six percent of confirmed coronavirus cases in the world were in New

⁷ Betsy McKay, *Coronavirus vs. Flu Which Virus is Deadlier*, WALL ST. J. (Mar. 10, 2020, 12:49 PM) <https://www.wsj.com/articles/coronavirus-vs-flu-which-virus-is-deadlier-11583856879>.

York State. Governor Cuomo declared a state of emergency in New York State on March 7, 2020. Mayor DeBlasio declared a state of emergency in New York City on March 12, 2020.

32. As of April 22, 2020, there are 263,754 positive cases in New York State (approximately 30% of the total US cases and 10% of the world's cases) with more than 147,000 of those cases being in New York City. To date, there have been 19,453 deaths from COVID-19 just in New York, with 15,074 of those deaths in New York City.⁸

33. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19, as already evidenced by the rapid spread of the virus in cruise ships and nursing homes. People who are confined in prisons, jails, and detention centers will find it virtually impossible to engage in the necessary social distancing and hygiene required to mitigate the risk of transmission, even with the best-laid plans. The CDC also warns of “community spread” where the virus spreads easily and sustainably within a community where the source of the infection is unknown.

34. On March 20, 2020, Governor Cuomo took the strictest measure yet to fight the virus's spread, issuing a “stay at home” executive order for all residents. In a statement to the public, Governor Cuomo explained that the order prohibits non-essential gatherings of any size, requires all non-essential businesses to close and 100 percent of their employees to work from home, and recommends that people stay at least six feet away from others. “We know the most effective way to reduce the spread of this virus is through social distancing and density reduction measures,” Governor Cuomo said.⁹

⁸ See <https://coronavirus.jhu.edu/map.html> (last accessed Apr. 23, 2020).

⁹ *Governor Cuomo Signs the 'New York State on PAUSE' Executive Order*, New York State (Mar. 20, 2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order>.

35. Correctional settings increase the risk of contracting an infectious disease, like COVID-19, due to the high numbers of people with chronic, often untreated, illnesses housed in a setting with minimal levels of sanitation, limited access to personal hygiene, limited access to medical care, and no possibility of staying at a distance from others. Ex. 2, Declaration of Jonathan Giftos, MD, dated March 27, 2020, ¶ 11 (Giftos Decl.”).

36. Correctional facilities house large groups of people together, and move people in groups to eat, do recreation, and go to court. They frequently have insufficient medical care for the population, and, in times of crisis, even those medical staff cease coming to the facility. Hot water, soap, and paper towels are frequently in limited supply. Incarcerated people, rather than professional cleaners, are responsible for cleaning the facilities and often are not given appropriate supplies. This means there are more people who are susceptible to getting infected all congregated together in a context in which fighting the spread of an infection is nearly impossible.

37. Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases. Giftos Decl. ¶ 12.

38. For this reason, correctional public health experts have recommended the release from custody of people most vulnerable to COVID-19. Release protects the people with the greatest vulnerability to COVID-19 from transmission of the virus, and also allows for greater risk mitigation for all people held or working in a prison, jail, or detention center. Release of the most vulnerable people from custody also reduces the burden on the region’s health care infrastructure by reducing the likelihood that an overwhelming number of people will become seriously ill from COVID-19 at the same time.

39. Internationally, governments and jail and prison staff have recognized the threat posed by COVID-19 and released detainees. In Iran, for example, more than 70,000 people were temporarily released from jails to curb the spread of coronavirus.¹⁰

40. In the United States, the stimulus package that became law during the pendency of this Petition included funding for federal prisons to purchase protective gear and test kits for COVID-19 and authorized the Justice Department to lengthen the maximum amount of time that a prisoner can be placed in home confinement during the pandemic.¹¹

41. On March 23, 2020, a bipartisan group of fourteen U.S. Senators sent a letter to U.S. Attorney General Barr and BOP Director Carvajal to express their “serious concern for the health and wellbeing of federal prison staff and inmates . . . especially those who are most vulnerable to infection.” The Senators wrote that they reviewed the BOP’s COVID-19 Action Plan, noting that it did not include any measures to protect the most vulnerable staff and inmates. The Senators urged DOJ and BOP to release to home confinement certain individuals who were elderly, ill, or incarcerated for non-violent offenses and are near release.

42. On March 26, 2020, Attorney General William Barr sent a memo to the Director of BOP “directing [him] to prioritize the use of [his] various statutory authorities to grant home confinement for inmates seeking transfer in connection with the COVID-19 pandemic.” The Attorney General specifically recognized that “there are some at-risk inmates who are non-

¹⁰ *Iran Temporarily Releases 70,000 Prisoners as Coronavirus Cases Surge*, Reuters (Mar. 9, 2020), <https://www.reuters.com/article/us-health-coronavirus-iran/iran-temporarily-releases-70000-prisoners-as-coronavirus-cases-surge-idUSKBN20W1E5>.

¹¹ Todd Ruger, *Prisons and Courts Get Coronavirus Help in Senate Relief Bill*, Roll Call (Mar. 25, 2020, 2:21PM) <https://www.rollcall.com/2020/03/25/prisons-and-courts-get-coronavirus-help-in-senate-relief-bill/>.

violent and pose minimal likelihood of recidivism and who might be safer serving their sentences in home confinement rather than BOP facilities.”¹²

43. Senator Dick Durbin has called on the federal government to take action to protect staff and people detained in federal prisons. “Federal prisons will inevitably be a hotspot for the spread of coronavirus, especially among vulnerable staff and inmates,” Durbin said. “It is imperative for BOP to take immediate action to protect staff and inmates at federal prisons throughout the country and ensure that facilities are prepared to address this threat.”¹³

44. Some jurisdictions, including Los Angeles and Chicago, have already taken steps to protect people in custody from the impending spread of COVID-19 by releasing people in an effort to reduce populations.¹⁴

45. In New York City, public officials, the jail oversight board, and even doctors working at Rikers Island have acknowledged that the City’s jails are simply unsafe and releasing people is the only humane option.¹⁵ See Statement of New York City Board of Correction,

¹² Memo from Attorney General to Director of Bureau of Prisons, March 26, 2020, <https://www.politico.com/f/?id=00000171-1826-d4a1-ad77-fda671420000>.

¹³ *Durbin Discusses Coronavirus Threat At Federal Prisons With Council Of Prison Locals*, Dick Durbin United States Senator Illinois (Mar. 24, 2020), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-discusses-coronavirus-threat-at-federal-prisons-with-council-of-prison-locals>.

¹⁴ Thirty-one district attorneys from around the country put out a joint statement calling for a reduction in jail populations. Jurisdictions in California, Illinois, and Ohio have already released people from jail, and officials in Louisiana, Oregon, Pennsylvania, and Virginia have made announcements that they will begin releasing people soon. Other cities are putting plans in place to do the same. See, e.g. Allen Kim, *Cities in the US Move to Lower Inmate Populations as Coronavirus Fears Grow*, CNN (Mar. 16, 2020), <https://www.cnn.com/2020/03/16/us/inmates-released-jail-coronavirus-trnd/index.html>; Megan Cassidy, *Coronavirus: San Francisco, Contra Costa Prosecutors Join National Call for Jail Releases*, San Francisco Chronicle (Mar. 17, 2020) <https://www.sfchronicle.com/crime/article/Coronavirus-San-Francisco-Contra-Costa-15137291.php>.

¹⁵ See Ross MacDonald (@RossMacDonaldMD), Twitter (March 18, 9:51 p.m.) <https://twitter.com/RossMacDonaldMD/status/1240455796946800641> (Dr. MacDonald is the Chief Medical Officer for Correctional Health Services (“CHS”), which provides healthcare to New York City’s Department of Corrections); Rachel Bedard, (@rachelbedard), Twitter (March 18, 8:34 a.m.) <https://twitter.com/rachaelbedard/status/1240255196644741120> (Dr. Bedard is the Director of Geriatrics and Complex Care for CHS); Jonathan Giftos (@JonGiftosMD), Twitter (March 18, 10:37 p.m.)

March 17, 2020 (calling on the City to release people from criminal custody, prioritizing people over 50, those with underlying health conditions, detained for administrative reasons, and those who have been convicted and sentenced to one year or less).¹⁶ On March 20, 2020, Dr. Robert Cohen, a member of New York City’s Board of Correction, said, “The most important thing we can do right now is discharge all of the people who are old and have serious medical issues — those people are likely to die from a coronavirus infection.”¹⁷

46. Several doctors working in New York City’s jails have echoed the calls to release vulnerable people. Dr. Rachael Bedard, senior director of the geriatrics and complex care service at Rikers Island, has described depopulation as “[t]he only meaningful public health intervention.”¹⁸ In correctional facilities, “if you think about how many excess human contacts [there are], even compared to something like a shelter setting, you can imagine why viral spread in this environment is extra dangerous.”

47. Incarcerated people in New York City have already begun to test positive for COVID-19. As of April 22, 2020, among the 3,900 people currently incarcerated by the New York City Department of Correction, 369 people in city custody have tested positive for coronavirus. This is a higher rate of infection than seen outside of detention facilities.

<https://twitter.com/JonGiftosMD/status/1240467288198873088> (until January 2020, Dr. Giftos was the Clinical Director of Substance Use Treatment for CHS).

¹⁶ *New York City Board of Correction Calls for the 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>

¹⁷ Jen Ransom and Alan Feuer, ‘*A Storm Is Coming*’: *Fears of an Inmate Epidemic as the Virus Spreads in the Jails*, N.Y. Times (March 20, 2020), <https://www.nytimes.com/2020/03/20/nyregion/nyc-coronavirus-rikers-island.html>.

¹⁸ Jennifer Gonnerman, *A Rikers Island Doctor Speaks Out to Save Her Elderly Patients From the Coronavirus*, New Yorker (Mar. 20, 2020), <https://www.newyorker.com/news/news-desk/a-rikers-island-doctor-speaks-out-to-save-her-elderly-patients-from-the-coronavirus>.

48. As of April 22, 2020, eleven people in BOP custody in New York City, including six at the MDC, have tested positive.¹⁹ This is almost certainly an underestimate of the prevalence of COVID-19 within BOP facilities, as the BOP has tested only 12 of the 1,700 people held at the MDC. And the virus is spreading like wildfire across the population held on Rikers Island. Giftos Decl. ¶ 15.

49. Numerous people working in the criminal justice system have also tested positive, increasing the likelihood of exposure to and by incarcerated people: a security officer and an agent in the U.S. Attorney's Office, SDNY; an NYC Department of Corrections investigator (who has since died from COVID-19)²⁰; a lawyer with an office in Midtown Manhattan (and his wife and son)²¹; a healthcare worker in Manhattan; an attorney and legal intern in local New York State courts; and an attorney at the Brooklyn Supreme Court.²²

50. New York City pledged to release at least 300 nonviolent inmates from Rikers Island, including people held on Rikers who are over 70 years-old or who have preexisting conditions that place them at heightened risk from the virus.²³

¹⁹ BOP Report Pursuant to EDNY Administrative Order No. 2020-14, April 21, 2020, available at <https://www.nyed.uscourts.gov/coronavirus> (last accessed April 23, 2020).

²⁰ Aliza Chasan, *NYC Corrections Officer Dies of Coronavirus*, Pix11, <https://www.pix11.com/news/coronavirus/nyc-correction-officer-dies-of-coronavirus>.

²¹ *Midtown Lawyer, Family and Friends Test Positive*, NBC New York (March 4, 2020), <https://www.nbcnewyork.com/news/local/nyc-attorney-in-critical-condition-city-works-to-trace-movements-awaits-more-tests/2311723/>.

²² *Information about Coronavirus and New York State Courts*, <https://www.nycourts.gov/whatsnew/covid.shtml>; *see also* Two People with Coronavirus were in Manhattan and Brooklyn Courts, <https://twonews.us/us-news/two-people-with-coronavirus-were-inmanhattan-brooklyn-courts>.

²³ Noah Higgins-Dunn, *Coronavirus: New York City to Release 300 Nonviolent Inmates from Rikers Island*, CNBC (Mar. 24, 2020, 7:25PM) <https://www.cnbc.com/2020/03/24/coronavirus-new-york-city-to-release-300-nonviolent-inmates-from-rikers-island.html>.

51. Over the past few weeks, judges in this circuit and across the country have granted habeas petitions and ordered the release of persons who are incarcerated or being detained.²⁴

52. On March 27, 2020, Governor Cuomo announced that the State of New York is immediately releasing 1,000 individuals confined on parole violations in state prisons and jails to supervised release in the community in order to stem the spread of coronavirus among incarcerated people.

53. Nonetheless, BOP continues to transfer people from facility to facility, ignoring the pleas of government officials and public health experts, and increasing the likelihood that the virus will be transmitted within the incarcerated population.²⁵

²⁴ See *Coronel, et al., v. Decker et al.*, 20 Civ. 2472 (AJN) (S.D.N.Y. Mar. 27, 2020) (granting release of four petitioners with medical conditions that render them particularly vulnerable to severe illness or death if infected by COVID-19 from immigration detention); *Basank et al. v. Decker et al.*, 20 Civ. 2518 (AT) (S.D.N.Y. Mar. 26, 2020) (granting release of ten petitioners who “suffer[] from chronic medical conditions, and face[] an imminent risk of death or serious injury in immigration detention if exposed to COVID-19” from immigration detention); *U.S. v. Stephens*, 15 Cr. 95 (AJN), 2020 WL 1295155 (S.D.N.Y. Mar. 19, 2020) (granting motion for reconsideration of defendant’s bail conditions and releasing him from jail to home confinement, recognizing inmates may be at a heightened risk of contracting COVID-19); *Umana Jovel v. Decker et al.*, 20 Civ. 308 (GBD)(SN) (S.D.N.Y. Mar. 26, 2020) (granting emergency request for release of petitioner from immigration detention in light of the COVID-19 crisis); *People ex rel. Stoughton on behalf of Little et al. v. Brann*, Index No. 260154/2020 (Sup Ct, Bronx County Mar. 25, 2020) (releasing 106 individuals held at Rikers Island jail on parole violations who are particularly vulnerable to illness or death if infected by COVID-19); *People ex rel. Stoughton on behalf of Hogan et al. v. Brann*, (Sup Ct, NY County Mar. 27, 2020) (releasing 16 individuals held at Rikers Island jail on pre-trial detention who were particularly vulnerable to illness or death due to COVID-19); *Xochihua-Jaimés v. Barr*, No. 18-71460 (9th Cir. Mar. 24, 2020) (ordering, sua sponte, that petitioner be immediately released from immigration detention “[i]n light of the rapidly escalating public health crisis” related to COVID-19); *USA v. Garlock.*, No. 18 Cr 00418, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020) (ordering, sua sponte, extension of convicted defendant’s surrender date and noting “[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided”); *Castillo et al. v. Barr*, 20 Civ. 605 (C.D. Cal. Mar. 27, 2020) (ordering petitioners be released from immigration detention in light of COVID-19 and noting “the risk of infection in immigration detention facilities – and jails – is particularly high”); *U.S.A.v. Matthaei*, 19 Civ. 243 (D. Idaho Mar. 16, 2020) (granting convicted defendant additional time to self-surrender to prison in light of defendant’s health problems, which place him at greater risk of complications of COVID-19); *Jimenez et al.* . Wolf et al., 18 cv 10225 (D. Mass. Mar. 26, 2020) (ordering release of petitioner from immigration detention due to COVID-19 concerns); *In re Request to Commute or Suspend County Jail Sentences*, Dkt. No. 084230 (N.J. Mar. 22, 2020) (ordering, based on the dangers posed by COVID-19, release of any inmate in New Jersey serving a county jail sentence as a condition of probation or as a result of a municipal court conviction).

²⁵ Luke Barr, *Despite Coronavirus Warnings, Federal Bureau of Prisons Still Transferring Inmates: Sources*, ABC News (Mar. 23, 2020, 1:22PM) <https://abcnews.go.com/Health/warnings-bureau-prisons-transporting-inmates-sources/story?id=69747416>.

III. MDC is Failing to Take Proper Precautions, Placing People at an Increased Risk

54. The conditions at the MDC pose a heightened public health risk for the spread of COVID-19 that is even greater than in non-carceral institutions. People live and work in close quarters and cannot achieve the “social distancing” needed to effectively prevent the spread of COVID-19. They may be unable to maintain the recommended distance of 6.5 feet from others, and may share or touch objects used by others. Toilets, sinks, and showers are shared, without disinfection between each use. Food preparation and service is communal with little opportunity for surface disinfection. Staff arrive and leave on a shift basis, and there is limited ability to adequately screen staff for new, asymptomatic infection.

55. Since March 4, 2020, the Federal Defenders has engaged in extensive efforts to get the MDC to address the risks associated with the spread of COVID-19 at the MDC, to little avail. von Dornum Decl. ¶¶ 3-7, 9-11, 20, 21, 23.

56. The Federal Defenders initially requested that the BOP put in place the following measures at the MDC:

- a. Make public the MDC’s plans and policies for preventing a coronavirus outbreak and responding to detained people who contract coronavirus;
- b. Put in place a comprehensive testing protocol for incarcerated people and staff;
- c. Increase sanitation and hygiene in the facility, including increased cleaning of the housing units and making soap and tissues freely available to incarcerated people;
- d. Provide for isolating anyone who tests positive for the coronavirus at a hospital or other medical facility, not at the jail;

- e. Ensure that the jail is not locked down to social and legal visitors in response to the epidemic so that lawyers and family members can have continued access to their clients and loved ones;
- f. Coordinate with the Courts and U.S. Attorneys' Offices in advance to ensure that only in extraordinary circumstances should any new arrestee be detained at the jails during the epidemic, and no one should be admitted without testing. von Dornum Decl. ¶ 4.

57. On March 11, 2020, for the first time, MDC officials responded to these concerns, when, at the request of the Chief Judge of the Eastern District of New York, Attorney Holly Pratesi and Associate Warden Andy Cruz attended a special meeting of the EDNY Facilities Security Committee focused on coronavirus issues. At that meeting Associate Warden Cruz indicated that the MDC was still receiving guidance from national BOP leadership as to how to handle the coronavirus epidemic. In response to specific questions, Associate Warden Cruz stated:

- a. the facility could not make public its plans or protocols for coronavirus because of security considerations;
- b. there was no testing protocol in place, except for the temperature readings of those people being brought to court (by order of the Chief Judge) and the facility did not anticipate having a testing protocol;
- c. Staff were being asked to self-report if they had traveled to what were then the designated hotspot countries or had been exposed to someone known to have coronavirus;

- d. It was unclear if staff who presented with risk factors and were sent home would be on paid or unpaid leave, because that is a national BOP decision;
- e. the MDC had placed soap in the lobby bathroom for visitors, intended to provide a bar of soap to each inmate and to ask the inmate orderlies to increase cleaning, but could not provide hand sanitizer to inmates, and neither staff nor visitors would be allowed to bring in hand sanitizer;
- f. the MDC did not yet know where any incarcerated person who tested positive would be placed;
- g. the MDC did not believe it would be feasible to use the empty floors in the East (or “old”) building of the MDC to house people who were symptomatic or who tested positive;
- h. the MDC did not intend to do a lockdown on social or legal visitation;
- i. the MDC would continue to accept new arrests;
- j. the MDC would screen new arrests for symptoms of COVID-19 and would ask newly arriving inmates if they had traveled recently outside the United States;
- k. the MDC had no plans to move vulnerable inmates but would make an effort to identify which inmates fell under the CDC’s definition of vulnerable. *Id.* ¶ 6.

58. On March 13, 2020, the MDC cancelled all legal and social visitation. *Id.* ¶ 8.

This visitation ban remains in effect for the foreseeable future.

59. Between March 14, 2020 and March 19, 2020, Federal Defenders spoke to over a hundred clients by telephone. The clients uniformly observed that:

- a. there had been no change in sanitation practices at the facility;
- b. only some of the units had received the bars of soap;
- c. education on the symptoms of COVID-19 or how to curb its spread is limited to posters on the walls and a 10-minute presentation on each unit to large groups of inmates that consisted of reading from a CDC pamphlet that largely advised to “Stay at home” and “Avoid gatherings”;
- d. no doctors came to the units to check on anyone;
- e. inmates understand that staff are being given temperature checks as they entered the facility, but staff on the unit were not wearing gloves, masks, or other protective gear in the facility. *Id.* ¶ 9.

60. The MDC lacks adequate medical infrastructure to address the spread of infectious disease and treat the people most vulnerable to COVID-19.

61. Approximately 1,700 people are held at the MDC. The Warden of the MDC has identified 537 of these individuals as falling into the high-risk groups identified by the CDC. *Id.* ¶ 11(a).

62. New people arrive at the MDC from all over the world each week. These new arrivals are screened only for fever and recent travel to designated hotspot countries.

63. Correctional officers who live in New York, New Jersey, and Pennsylvania come in and out of the facility each day without sufficient medical screening. Staff being screened only for elevated temperatures as they entered the facility and sent home if they had a temperature over 100.4 degrees Fahrenheit based on a temporal thermometer. *Id.* ¶ 11(e).

64. Significantly, in a March 18, 2020 CDC report, an epidemiological investigation revealed that coronavirus-infected staff members contributed to the outbreak in a nursing home

facility with ineffective infection control and prevention and staff members working in multiple facilities.

IV. MDC Has Failed to React to Tests Confirming the Virus Is Within Its Walls

65. On March 21, 2020, the Federal Defenders learned that an inmate at the MDC had tested positive for COVID-19. *Id.* ¶ 12.

66. The inmate who tested positive had been housed on the “intake” unit on the 4th floor of the institution for approximately one week before testing positive. *Id.* ¶ 13. At the time the inmate was admitted to the institution he had been asymptomatic; he developed symptoms within three days of his admission. *Id.*

67. Between the time the inmate was admitted to the MDC and when he tested positive for COVID-19, he was in contact with many inmates and staff on the intake unit. *Id.* New inmates from other institutions who are in transit to their designated facilities were added to the intake unit on March 20, 2020, the day before the inmate on that unit tested positive. *Id.* Inmates from the intake unit, who would have been exposed to the positive inmate, were subsequently transferred into other units within the facility. *Id.*

68. Others who were housed on the unit with the individual who was recently diagnosed with coronavirus are now themselves showing symptoms, according to a person confined on that unit.

69. People housed in the MDC are terrified and panicked. Some are placing socks over the phone when they call family members to prevent infection from the phones, which are not sanitized or cleaned.

70. No professional or staff cleaners sanitized the intake unit where the inmate who tested positive had been housed, but, instead the inmate orderlies on the adjacent unit were sent

to clean the intake unit with the same cleaning supplies they regularly use and were provided insufficient gloves and masks. *Id.*

71. Staff is providing people with industrial hand soap in diluted form to “clean” their own cells.

72. Since, inmates have been directed by executive staff to report other inmates who they believed might be symptomatic, but, inmates were fearful of reporting their own or others’ symptoms because they had heard that if you were symptomatic you would be placed in “the box.” *Id.*

73. Federal Defenders has not been informed how many inmates are symptomatic, quarantined or isolated, in addition to the inmate who tested positive. *Id.* ¶ 14.

74. As of April 22, 2020, at least 23 staff members at the MDC have tested positive and a number of others are symptomatic.

75. Despite the arrival of COVID-19 at the MDC, the MDC continued to implement practices that put inmates and staff at risk of contracting COVID-19. For example:

- a. Female inmates continued to be asked to launder all inmate uniforms, including from the intake unit, where the inmate tested positive. *Id.* ¶ 16(a).
- b. The phones and computers on the units were not being cleaned. *Id.* ¶ 16(c).
- c. At mealtime, the inmates were directed to line up shoulder to shoulder. *Id.* ¶ 16(d).
- d. Inmates at the MDC continued to be housed either in small two-man cells (designed to hold a single inmate) with a single shared toilet and sink or in

large open dormitory units housing up to 70 inmates with shared toilets and sinks and sharing a large sleeping space and beds spaced only 3 to 5 feet apart. *Id.* ¶ 26. Windows in the units do not open. Inmates cannot go outside.

- e. No hand sanitizer has been made available to inmates at the MDC.
- f. Tissues are not readily available. Inmates use toilet paper to blow their noses. Each inmate is provided only one roll of toilet paper per week.
- g. Each inmate is given one small bar of soap a week, at most. Some units at the MDC have received no soap since the lockdown of the facility began on March 13, 2020. Access to additional soap is limited to those inmates who have sufficient commissary funds to purchase it, and dependent on the commissary being open; it is routinely closed during lockdowns.
- h. Inmates prepared all inmate meals. Meal preparation, with the exception of kosher and halal meals, was performed in a single kitchen.
- i. Inmates ate meals in large groups.
- j. Inmates were responsible for sanitizing the housing unit common areas, and frequently lacked adequate cleaning supplies to do so.

76. Inmates were not informed of the symptoms of COVID-19, or of how to prevent the spread of the infection except through posters on the walls of the units and general exhortations (delivered in groups) to wash their hands and practice social distancing. *Id.* ¶ 35.

77. Inmates who are at lower risk of becoming seriously ill from the virus were not separated from those who are at higher risk (because of age and/or pre-existing medical

conditions). Instead, they were mixed together in small two-man cells and locked together in those cells for at least 10 out of every 24 hours.

78. No doctors have come to the units during the pandemic. Medical professionals only visit inmates if the inmates volunteer that they have symptoms. *Id.* ¶ 16(b).

79. The facility did not inform the inmate population of what the protocol will be for symptomatic inmates; absent a transparent protocol, inmates in correctional settings often fear they will be confined in solitary if they volunteer that they are symptomatic.

80. Since April 1, 2020, inmates at the MDC have been locked down in their cells and not permitted to leave except for brief periods of time. This lockdown will remain in effect until at least May 18, 2020.

V. MDC is Not Prepared to Treat to Individuals Who Contract Coronavirus

81. Inmates who do contract COVID-19 are at higher risk for developing acute symptoms than if they were in the community, because the MDC lacks the medical resources to care for symptomatic inmates.

82. Now that COVID-19 is inside the facility, the MDC will be unable to stop the spread of the virus throughout the facility given long-documented inadequacies in BOP's medical care and in light of how these facilities function. Giftos Decl. ¶ 14.

83. There is no separate medical unit or facility for ill inmates. Unlike many Federal Correctional Institutions and even Rikers' Island, the MDC has no physical space in which an ill inmate can convalesce that is separate from other inmates, warm, clean and has access to fresh water and regular hand-washing. von Dornum Decl. ¶ 41.

84. As of March 20, 2020, MDC had only 9 nasal swab COVID-19 test kits and only one inmate had been tested at the facility. *Id.* ¶ 11. MDC currently has no ventilators and cannot

intubate inmates on-site. *Id.* ¶¶ 39, 40. MDC does not have any specialized equipment or medical providers. *Id.* ¶ 42.

85. There are only three doctors available at MDC to care for all 1,700 inmates. *Id.* Even this highly limited number is likely to decrease as doctors themselves go into quarantine. None of these doctors specialize in infectious diseases.

86. People who contract COVID-19 can deteriorate rapidly, even before a test result can be received. They need constant monitoring. Most people in the higher risk categories will require more advanced support: positive pressure ventilation, and in extreme cases, extracorporeal mechanical oxygenation. Such care requires specialized equipment in limited supply as well as an entire team of specialized care providers. MDC does not have that specialized equipment or specialized providers.

87. MDC is already short-staffed.²⁶ Now that three staff members have tested positive and several more are symptomatic, correctional officers are understandably hesitant to come to work. This staffing shortage will only increase as employees need to stay home to care for children whose schools are closed, elderly family members, and other personal health situations. With fewer staff, correctional officers are less able to monitor inmates' health. Giftos Decl. ¶ 18.

VI. Petitioners Are Particularly Vulnerable

88. Petitioners in this case are individuals who are particularly vulnerable to serious illness or death if infected by COVID-19.

89. Hassan Chunn. Mr. Chunn is 46 years old. Mr. Chunn was incarcerated for approximately three years. Mr. Chunn has been diagnosed with Coronary Heart Disease. As of

²⁶ "Review and Inspection of Metropolitan Detention Center Brooklyn Facilities Issues and Related Impact on Inmates," OIG Report (Sept. 2019).

2005, he was diagnosed with chronic heart failure. He has two stents in his heart. He is pre-diabetic. He also suffers from high blood pressure, seizures, hypertension and high cholesterol. During his incarceration at MDC, he was hospitalized on at least two occasions at outside hospitals for extreme high blood pressure. He takes a number of medications including Plavix, Losapril, Norvax, and Lipitor. Mr. Chunn is critically vulnerable to COVID-19 because of his significant health problems. Mr. Chunn was released to home confinement on April 8, 2020.

90. Nehemiah McBride. Mr. McBride is 34 years old. Mr. McBride was incarcerated since December 17, 2019, and subsequently was sentenced to 4 months' incarceration. Mr. McBride has been diagnosed with asthma, which is severe, and he suffers from respiratory problems. Mr. McBride is critically vulnerable to COVID-19 because of his significant health problems. Mr. McBride was released from the MDC on April 7, 2020.

91. Ayman Rabadi. Mr. Rabadi is 59 years old. Mr. Rabadi has been incarcerated for approximately 1 year, after being sentenced to 24 months for a wire fraud-related conviction of which he has served approximately 14 months. Mr. Rabadi has been diagnosed with a serious heart condition, anxiety and diabetes. Mr. Rabadi suffered a heart attack approximately six years ago, and thereafter he had several stents placed in his heart. He has a tumor on one of his kidneys which is being monitored via ultrasound. He takes medication for high blood pressure, cholesterol, and blood thinners. He also suffers from severe anxiety and depression. Mr. Rabadi is critically vulnerable to COVID-19 because of his significant health problems.

92. Justin Rodriguez. Mr. Rodriguez is 26 years old. Mr. Rodriguez is scheduled to be released on June 9, 2020. Mr. Rodriguez suffers from asthma. Mr. Rodriguez is critically vulnerable to COVID-19 because of his significant health problems. Mr. Rodriguez requested an inhaler from BOP staff but as of this filing has not received one.

93. Elodia Lopez. Ms. Lopez is 55 years old. She is scheduled to be released on July 28, 2020. Ms. Lopez is serving a 15-month sentence in connection with a conviction for selling marijuana. Ms. Lopez has a number of serious medical issues that make her particularly vulnerable to COVID-19. She has a lung infection that was discovered in approximately November 2019, which makes it difficult for her to breathe, causes her throat to close, and causes her high fever and chills. She is supposed to be taking medication for the infection, but she has not received her medicine since she arrived at the MDC four months ago. In response to her medical requests, she has been given Vitamin D and told to buy medicine to manage the pain. Ms. Lopez also has type 2 diabetes, for which she takes insulin; high blood pressure; and high cholesterol. As a woman at the MDC, Ms. Lopez is housed in a dormitory where she shares a bathroom, tables, and chairs with other women. One woman in her dorm, who sleeps only feet away from Ms. Lopez, has recently been displaying COVID-19 symptoms. Ms. Lopez is given a mask and a small bar of soap once a week. She does not receive gloves or hand sanitizer.

94. James Hair. Mr. Hair is 29 years old. He is scheduled to be released on August 15, 2026. Mr. Hair was diagnosed with multiple sclerosis in or around 2018. The disease causes him headaches, numbness, and tingling, and has caused him to have approximately 4 seizures in the past approximately two years. Mr. Hair has also been experiencing severe pain in his left kidney. Doctors told him in late 2019 that they believed he had cancerous cells in his left kidney. He has extreme pain—9 out of 10 on the pain scale—on the lower left side of his back. Approximately seven weeks ago, he began noticing blood in his stool; it is present about 90% of the time. In late 2019, he began vomiting multiple times per week, on average, and frequently seeing blood in his vomit. He shows the blood in his vomit to the staff at the MDC. Mr. Hair also suffers from asthma and uses an inhaler. He had an asthma attack in late 2019 and was taken to the hospital.

Over the roughly 3 months Mr. Hair has been at the MDC, he has lost approximately 16 pounds. Once a week, Mr. Lopez receives a mask and a small bar of soap—enough for approximately two washings. He does not receive any gloves or hand sanitizer.

LEGAL ALLEGATIONS

I. Section 2241 is an Appropriate Vehicle to Address Unconstitutional Conditions of Confinement

95. Section 2241(c)(3) authorizes courts to grant habeas corpus relief where a person is “in custody in violation of the United States.” The Second Circuit has “long interpreted § 2241 as applying to challenges to the execution of a federal sentence, including such matters as . . . prison conditions.” *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) (internal quotation marks omitted). This includes challenges to detention where conditions pose a threat to Petitioners’ medical wellbeing. *See Roba v. United States*, 604 F.2d 215, 218–19 (2d Cir. 1979) (approving the use of Section 2241 to challenge a prisoner’s transfer where that transfer created a risk of fatal heart failure).

96. The Second Circuit’s decision in *Roba* is instructive. In that case, Petitioner alleged that an imminent transfer from New York to face charges in California would create a substantial risk of death because of his precarious heart condition. The Second Circuit held that there was Section 2241 jurisdiction to challenge his contemplated transfer, where such custody would threaten his life, citing *Estelle v. Gamble*, the Supreme Court’s seminal case establishing the Eighth Amendment’s deliberate indifference standard. 604 F.2d at 218–19. Critically, the court held that habeas jurisdiction was appropriate even though the transfer, and hence custody, was imminent: “Petitioner need not wait until the marshals physically lay hands on him; he is entitled now to challenge the allegedly unlawful conditions of his imminent custody.” *Id.* at 219.

97. In this case, the unconstitutional threat to Petitioners' health and life posed by being held in Respondent's custody is ongoing, not simply imminent. Every hour that Petitioners are held in the MDC, they are at a significantly elevated risk of contracting coronavirus, and because of their age and/or medical conditions, their risk of dying from coronavirus is significant. For similar reasons, Judge Analisa Torres recently ordered the release of several individuals from federal immigration detention. *See* Memorandum and Order, *Basank et al. v. Decker, et al.*, No. 20 Civ. 2518 (S.D.N.Y. March 26, 2020) (ECF No. 11).

II. Respondent Edge's Failure to Take Steps to Mitigate Transmission of Coronavirus Constitutes Deliberate Indifference to the Serious Medical Needs of Plaintiffs

98. Respondent is violating Petitioners' Fifth and Eighth Amendment rights by continuing to incarcerate them in conditions where it is virtually impossible to take steps to prevent transmission of an infectious disease that will prove deadly because of Petitioners' vulnerable condition.

99. All people held in the MDC, whether convicted or not, are entitled to be protected from condition of confinement that create a serious risk to health or safety, including through release from custody when necessary. *Brown v. Plata*, 563 U.S. 493, 531-32 (2011) (upholding lower court's order releasing people from state prison even though release was based on prospect of future harm caused by prison overcrowding); *see also Farmer v. Brennan*, 511 U.S. 825, 834 (correctional official violates Eighth Amendment by consciously failing to prevent "a substantial risk of serious harm"); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) ("deliberate indifference" to serious medical needs violate the Eighth Amendment).²⁷ The risk of exposure to a deadly

²⁷ Named Petitioners are convicted and therefore their treatment is governed by the Eighth Amendment. Class members who are detained for pretrial purposes, however, are protected from deliberate indifference by the Fifth Amendment. Although pretrial class members may be entitled to even greater protection from unsafe conditions than convicted class members, *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) ("Due process requires that a pretrial

infectious disease such as COVID-19 constitutes a serious risk to health, particularly for the Petitioners and the vulnerable class members described herein. *Helling v. McKinney*, 509 U.S. 25, 34 (1993) (noting with approval Eighth Amendment claims based on exposure to serious contagious diseases). Under the MDC's current conditions, Respondent has not and cannot protect Petitioners and the class from this risk of serious harm. In these circumstances, release is the only means of protecting Petitioners and the class they seek to represent from unconstitutional treatment.

100. Government officials act with deliberate indifference when they “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,” even when “the complaining inmate shows no serious current symptoms.” *Helling*, 509 U.S. at 33. This Court need not “await a tragic event” to find that Respondent is maintaining unconstitutional conditions of confinement. *Id.* Instead, showing that the conditions of confinement “pose an unreasonable risk of serious damage to [Petitioners’] future health” is sufficient. *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002) (quoting *Helling*, 509 U.S. at 35) (alteration omitted); *see also Jabbar v. Fischer*, 683 F.3d 54, 57 (2d Cir. 2012) (incarcerated people “may not be exposed to conditions that pose an unreasonable risk of serious damage to [their] future health.”) (citation and internal quotation marks omitted).

101. The reach of the Fifth and Eighth Amendments includes “exposure of inmates to a serious, communicable disease.” *Helling*, 509 U.S. at 33; *see also 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”).

detainee not be punished.”), for present purposes the distinction is immaterial because Respondent’s continued detention of the class plainly violates the Eighth Amendment.

102. In this case, as established by the facts above, Petitioners face a significant risk of exposure to coronavirus, with the attendant risk of death that follows given their vulnerable conditions. Respondent is well aware of this risk, having been alerted to it by the CDC, the Attorney General, and advocates such as the Federal Defenders. Indeed, the Second Circuit Court of Appeals, unprompted, acknowledged the “grave and enduring” risk posed by COVID-19 in the correctional context. *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, No. 19-1778, ___ F.3d ___, 2020 WL 1320886, at *12 (2d Cir. Mar. 20, 2020); see also *Jovel v. Decker*, No. 20 Civ. 308, 2020 WL 1467397, at *1 (S.D.N.Y. Mar. 26, 2020) (finding “extraordinary circumstances” of COVID-19 pandemic justified release of immigration detainee from federal detention); *United States v. Little*, No. 20 Cr. 57, 2020 WL 1439979, at *4 (S.D.N.Y. Mar. 24, 2020) (“As additional people are arrested who have been out in the community as the coronavirus spreads, if they are not symptomatic, they will be brought into the MCC and MDC, and held with the existing population, potentially bringing COVID-19 into this population held in large numbers, close quarters, and low sanitary conditions.”)

103. Finally, as established above, Respondent has not taken steps sufficient to protect Petitioners from the grave risks that are present every moment they are in detention in the MDC. Respondent simply is not capable of managing the risk to Petitioners in the MDC’s current environment. Whether judged under the Fifth or Eighth Amendment, Respondent is holding Petitioners in violation of the Constitution by detaining them in the face of significant threats to their health and safety without taking sufficient steps to prevent that harm.

III. Next Friends Have Standing to Assert the Interests of Real Parties In Interest

104. Migdaliz Quinones is the life partner of Petitioner Ayman Rabadi and brings this action on his behalf to seek his release from custody. Ms. Quinones and Mr. Rabadi have known each other for 36 years.

105. Jacklyn Romanoff is the mother of Justin Rodriguez.

106. In the habeas context, a “next friend” may assert the interest of an incarcerated person so long as they have a sufficient personal connection to the real-party-in-interest and there are barriers that prevent the real-party-in-interest from asserting his rights directly. In *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the Supreme Court recognized that “next friend” standing “has long been an accepted basis for jurisdiction in certain circumstances,” usually “on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves.” *Id.* at 162.

107. The requirement of inaccessibility is met here, where Petitioners Rabadi and Rodriguez cannot easily communicate with counsel because of the current lockdown at the MDC. *See Warren v. Cardwell*, 621 F.2d 319, 321 n.1 (9th Cir. 1980) (finding next friend standing met where petitioner “could not sign and verify the petition because the prison was locked down”) (internal quotation marks omitted); *cf. Padilla v. Rumsfeld*, 352 F.3d 695, 703 (2d Cir. 2003), *rev'd and remanded on other grounds*, 542 U.S. 426, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004) (holding that inaccessibility can be established when the petitioner is being held “incommunicado”).

108. The requirement of a close personal relationship is met here as well. *See Smith ex rel. Missouri Public Defender Comm’n v. Armontrout*, 812 F.2d 1050, 1053 (8th Cir.1987) (sufficiency of brothers' relationship for “next friend” standing undisputed); *Hays v. Murphy*, 663 F.2d 1004, 1009 (10th Cir.1981) (no dispute that defendant's mother proper party to seek

“next friend” action); *see also Padilla*, 352 F.3d at 703-04 (finding that attorney who had represented petitioner could serve as next friend).

CLASS ACTION ALLEGATIONS

109. Petitioners bring this representative habeas action pursuant to 28 U.S.C. § 2241 and, alternatively, as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their own behalf and on behalf of all persons similarly situated.

110. Petitioners seek to represent a class consisting of all current and future detainees in custody at the MDC during the course of the COVID-19 pandemic (the “Class”).

111. The members of the Class are too numerous to be joined in one action, and their joinder is impracticable. Upon information and belief, the class exceeds 1,700 individuals.

112. Common questions of law and fact exist as to all Class members and predominate over questions that affect only the individual members. These common questions of fact and law include but are not limited to: (1) whether the conditions of confinement described in this Petition amounts to Constitutional violations; (2) what measures Respondent took in response to the COVID-19 Crisis; (3) whether Respondent implemented an adequate emergency plan during the COVID-19 Crisis; (4) whether Respondent’s practices during the COVID-19 Crisis exposed people at the MDC to a substantial risk of serious harm; (5) whether the Respondent knew of and disregarded a substantial risk of serious harm to the safety and health of the Class; and (7) what relief should be awarded to redress the harms threatened to members of the Class as a result of the conditions.

113. Absent class certification, individuals detained at the MDC during the COVID-19 pandemic would face a series of barriers in accessing the relief sought. The MDC has suspended visitation and MDC detainees have limited access to communication with the outside world, impeding their ability to obtain legal representation and pursue litigation. A large portion of the

Class has limited educational backgrounds. And a significant percent of them suffer from physical or mental impairments.

114. Respondent's practices and the claims alleged in this Petition are common to all members of the Class.

115. The claims of Petitioners are typical of those of the Class. Petitioners are threatened with imminent inhumane conditions of confinement at the MDC.

116. The legal theories on which Petitioners rely are the same or similar to those on which all Class members would rely, and the harms suffered by them are typical of those suffered by all the other Class members.

117. Petitioners will fairly and adequately protect the interests of the Class. The interests of the Class representatives are consistent with those of the Class members. In addition, counsel for Petitioners are experienced in class action and civil rights litigation.

118. Counsel for Petitioners know of no conflicts of interest among Class members or between the attorneys and Class members that would affect this litigation.

119. Use of the class action mechanism here is superior to other available methods for the fair and efficient adjudication of the claims and will prevent the imposition of undue financial, administrative, and procedural burdens on the parties and on this Court, which individual litigation of these claims would impose.

120. This class action is superior to any other method for the fair and efficient adjudication of this legal dispute, as joinder of all Class members is impracticable.

121. There will be no extraordinary difficulty in the management of this class action.

FIRST CAUSE OF ACTION
(Declaratory and Injunctive Relief for
Violation of the Fifth and Eighth Amendments)

122. Petitioners incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

123. Petitioners bring this claim on their own behalf and on behalf of the Class.

124. The Due Process Clause guarantees pretrial detainees the right to be detained in a safe situation, free from punitive conditions of confinement. See U.S. Const. Amend V. The government violates that guarantee where a widespread outbreak of a contagious disease subjects detainees to inhumane conditions without adequate protection.

125. The Eighth Amendment guarantees post-conviction detainees the right to necessary and adequate medical care. See U.S. Const. Amend VIII. The Government's failure to provide adequate medical care in response to a widespread outbreak of a contagious disease constitutes deliberate indifference to the serious medical needs of detainees, thereby establishing a violation of the Eighth Amendment of the United States Constitution.

126. Because of the conditions at the MDC, Petitioners are not able to take steps to protect themselves—such as social distancing, using hand sanitizer, or washing his hands regularly—and the government has not provided adequate protections. As COVID-19 rapidly spreads, the already deplorable conditions at the MDC will be exacerbated, and the ability to protect oneself will become even more impossible.

127. Respondent's failure to adequately protect Petitioners from these punitive conditions, or release them from the conditions altogether, constitutes an egregious violation of Petitioners' due process rights and deliberate indifference to the serious medical needs of Petitioners, and all members of the Class, thereby establishing a violation of the Eighth Amendment of the United States Constitution.

128. Respondent was aware or should have been aware of these conditions, which were open and obvious throughout the entire jail.

129. Respondent knew of and disregarded an excessive risk to health and safety.

130. Respondent failed to act with reasonable care to mitigate these risks.

131. Because Respondent failed to act to remedy Petitioners' and the Class's degrading and inhuman conditions of confinement in violation of their Fifth and Eighth Amendment rights, Petitioners seek relief under this Writ of Habeas Corpus.

132. Because of the unlawful conduct of Respondent, Petitioners and the Class are threatened with immanent physical injury, pain and suffering, emotional distress, humiliation, and death.

PRAYER FOR RELIEF

WHEREFORE, Petitioners and the Class members respectfully request that the Court enter a class-wide judgment:

- A. Ordering immediate release of vulnerable persons, with appropriate precautionary public health measures, including Petitioner Rabadi (scheduled to be released on 7/19/2020); Petitioner Rodriguez (scheduled to be released on 6/9/2020); Petitioner Lopez (scheduled to be released on 7/28/20); Petitioner Hair (scheduled to be released on 8/15/26); and all others confined at the MDC who Respondent has identified as medically vulnerable due to underlying health conditions or age ("Vulnerable Persons")—and therefore at higher risk of developing serious COVID-19 illness;
- B. Ordering Respondent to mitigate the serious risk of illness, death, and harm from COVID-19 to those who remain confined at the MDC;
- C. Certifying this Petition as a Class Action;

- D. Appointing a Special Master on an emergency basis to Chair a Coronavirus Release Committee to evaluate Vulnerable Persons and make recommendations for ameliorative action for other persons at the MDC; and
- E. Ordering such other and further relief as this Court deems just, proper and equitable.

Dated: New York, New York
April 23, 2020

EMERY CELLI BRINCKERHOFF
& ABADY LLP

By: /s/ Katherine R. Rosenfeld
Katherine R. Rosenfeld
O. Andrew F. Wilson
Samuel Shapiro
Scout Katovich
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Attorneys for Petitioners and Putative Class

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HASSAN CHUNN; NEHEMIAH McBRIDE;
AYMAN RABADI, by his Next Friend
MIGDALIZ QUINONES; and JUSTIN
RODRIGUEZ, by his Next Friend JACKLYN
ROMANOFF,

individually and on behalf of all others similarly
situated,

Petitioners,

-against-

WARDEN DEREK EDGE,

Respondent.

20 Civ. 1590

**DECLARATION OF
DEIRDRE D. VON DORNUM**

I, Deirdre D. von Dornum, an attorney duly admitted to practice in the Eastern District of New York, declare under penalty of perjury and pursuant to 28 U.S.C. § 1746:

1. I am the Attorney-in-Charge for the Eastern District of New York at the Federal Defenders of New York, Inc. (the “Federal Defenders”).
2. I submit this declaration upon personal knowledge in connection with this Class Action Petition Seeking Writ of Habeas Corpus.

Efforts of the Federal Defenders to Address Impact of Coronavirus on Our Clients

3. Starting on March 4, 2020 and continuing to date, my office has engaged in extensive efforts to address the serious health risk posed by the spread of COVID-19 to medically vulnerable individuals confined at the Metropolitan Detention Center in Brooklyn (“MDC”) and other federal jails.

4. My office has consulted at length with representatives of the Federal Bureau of Prisons (“BOP”) to address how it will respond to the coronavirus outbreak and protect people at MDC and MCC. We initially requested that the BOP take the following measures:

- a. Make public the MDC’s plans and policies for preventing a coronavirus outbreak and responding to detained people who contract coronavirus;
- b. Put in place a comprehensive testing protocol for inmates and staff;
- c. Increase sanitation and hygiene in the facility, including increased cleaning of the housing units and making soap and tissues freely available to inmates;
- d. Provide for isolating anyone who tests positive for the coronavirus at a hospital or other medical facility, not at the jail;
- e. Ensure that the jail is not locked down to social and legal visitors in response to the epidemic so that lawyers and family members can have continued access to their clients and loved ones; and
- f. Coordinate with the Courts and U.S. Attorneys’ Offices in advance to ensure that only in extraordinary circumstances should any new arrestee be detained at the jails during the epidemic, and no one should be admitted without testing. (Attached hereto as Exhibit A is a true and complete copy of a string of email correspondence including the March 8, 2020 Email of David Patton, Executive Director, Federal Defenders of New York to Nicole McFarland, Supervisory Attorney, MDC Brooklyn, and MDC Associate Warden Andy Cruz).

5. For four days after these specific requests were made and repeated efforts were undertaken to engage the MDC in substantive discussion on this issue, the only response the

Federal Defenders received was that our requests were “under consideration.” (*See* Exhibit A including a copy of the March 9, 2020 Email of Holly Pratesi, Attorney, MDC Brooklyn to David Patton).

6. On March 11, 2020, at the request of the Chief Judge of the Eastern District of New York, MDC Attorney Holly Pratesi and MDC Associate Warden Andy Cruz attended a special meeting of the EDNY Facilities Security Committee focused on coronavirus issues and discussed, for the first time, some of the issues raised by Federal Defenders. At that meeting Associate Warden Cruz indicated that the MDC was still receiving guidance from national BOP leadership as to how to handle the coronavirus epidemic. In response to specific questions, Associate Warden Cruz stated that:

- a. the facility could not make public its plans or protocols for coronavirus because of security considerations;
- b. there was no testing protocol in place, except for the temperature readings of those inmates being brought to court (by order of the Chief Judge) and the facility did not anticipate having a testing protocol;
- c. staff were being asked to self-report if they had traveled to what were then the designated hotspot countries or had been exposed to someone known to have coronavirus;
- d. it was unclear if staff who presented with risk factors and were sent home would be on paid or unpaid leave, because that is a national BOP decision;
- e. the MDC had placed soap in the lobby bathroom for visitors, intended to provide a bar of soap to each inmate and to ask the inmate orderlies to

increase cleaning, but could not provide hand sanitizer to inmates, and neither staff nor visitors would be allowed to bring in hand sanitizer;

- f. the MDC did not yet know where any inmate who tested positive would be placed;
- g. the MDC did not believe it would be feasible to use the empty floors in the East (or “old”) building of the MDC to house symptomatic or positive inmates;
- h. the MDC did not intend to do a lockdown on social or legal visitation;
- i. the MDC would continue to accept new arrests;
- j. the MDC would screen new arrests for symptoms of COVID-19 and would ask newly arriving inmates if they had traveled recently outside the United States; and
- k. the MDC had no plans to move or segregate vulnerable inmates but would make an effort to identify which inmates fell under the CDC’s definition of vulnerable.

7. On March 12, 2020, the Federal Defenders followed up with additional questions to Ms. Pratesi and Associate Warden Cruz concerning the availability of professional sanitization, any effort to “cohort” vulnerable inmates, and whether the City or State Departments of Health would be contacted if an inmate was symptomatic for COVID-19.

8. On March 13, 2020, the Federal Defenders learned from an associated press report (<https://www.nytimes.com/aponline/2020/03/13/us/politics/ap-us-virus-outbreak-federal-prisons.html>) that all BOP facilities would be closed to legal and social visitation for the next 30 days. The Federal Defenders and other defense counsel were subsequently specifically informed

by email from Supervisory Attorney McFarland that MDC would be closed to legal visitation for this 30-day period. (Attached hereto as Exhibit B is a true and complete copy of a March 13, 2020 email from Seth D. Eichenholtz, Deputy Chief, Civil Division, United States Attorney's Office forwarding the email from Supervisory Attorney McFarland.)

9. Beginning on March 14, 2020 and continuing through March 19, 2020, Federal Defenders spoke to over a hundred clients by telephone. The clients uniformly observed that:

- a. there had been no change in sanitation practices at the facility;
- b. only some of the units had received the bars of soap;
- c. education on the symptoms of COVID-19 or how to curb its spread is limited to posters on the walls and a 10 minute presentation on each unit to large groups of inmates that consisted of reading from a CDC pamphlet that largely advised to "Stay at home" and "Avoid gatherings";
- d. no doctors came to the units to check on anyone; and
- e. inmates understand that staff are being given temperature checks as they entered the facility, but staff on the unit were not wearing gloves, masks, or other protective gear in the facility.

10. On March 16, 2020, Federal Defenders made a formal request to the MDC that David Patton and I be allowed to tour the facility (and MCC New York) on a twice-weekly basis during the 30-day lockdown to monitor conditions, given the lack of legal and social access. We expressed concern about inaccurate information regarding inmate conditions that had been provided to Federal Defenders and the courts by the MDC during the prolonged lockdown during the blackout of the facility in the winter of 2019. (Attached as Exhibit C is a true and complete copy of a letter from David Patton to Nicole McFarland.) On March 17, 2020, the Warden of MCC

denied this request as to both facilities. (Attached as Exhibit D is a true and complete copy of a March 17, 2020 letter from Warden M. Licon-Vitale to David Patton.)

11. On March 20, 2020, at a special teleconference regarding COVID-19 convened by the Chief Judge of the Southern District of New York, the Warden of MDC, Derek Edge stated that:

- a. 537 inmates at the MDC fell into categories identified by the CDC as particularly vulnerable to COVID-19;
- b. the facility had 9 nasal swab test kits;
- c. one inmate had been swabbed at the facility and his test results came back negative;
- d. two inmates had been sent to the hospital for testing: one was sent back without being tested; the other was back in the facility and test results were awaited; and
- e. staff were being screened for elevated temperatures as they entered the facility and sent home if they had a temperature over 100.4 degrees Fahrenheit based on a temporal thermometer.

12. On March 21, 2020, Federal Defenders learned from Twitter that an inmate at the MDC had tested positive; this was subsequently confirmed on the national BOP website. (<https://twitter.com/bradlander/status/1241545847994753026>; https://www.bop.gov/resources/news/20200326_statement_from_director.jsp.) We immediately asked the MDC to inform us whether the inmate was hospitalized or being held at the facility and what steps were being taken to identify inmates and staff who had been exposed to the inmate who tested positive. The MDC informed Federal Defenders that the inmate was back at the facility in isolation in an unspecified

location and that appropriate steps were being taken to identify inmates and staff who had been exposed to the inmate. The MDC stated that the unit on which the inmate who had tested positive had been housed would be locked down over the weekend, as would several other units, and the intake unit would undergo a “deep clean” before being re-opened to inmate movement.

13. From speaking to correctional staff and inmates housed on the unit adjacent to the one in which the inmate who tested positive had been housed, Federal Defenders has learned that:

- a. the inmate who tested positive had been housed on the “intake” unit on the 4th floor of the institution for approximately one week before testing positive;
- b. at the time the inmate was admitted to the institution he had been asymptomatic;
- c. the inmate developed symptoms within three days of his admission;
- d. during that time the inmate had been in contact with many inmates and staff on the intake unit, as well as inmates from the MCC whom he had come into contact with at the courthouse when first arrested;
- e. during that time other inmates from the intake unit, who would have been exposed to the positive inmate, were transferred into other units within the facility;
- f. no professional or staff cleaners sanitized the intake unit after the inmate tested positive, but, instead the inmate orderlies on the adjacent unit were sent to clean the intake unit with the same cleaning supplies they regularly use and were provided insufficient gloves and masks;
- g. new inmates from other institutions who are in transit to their designated facilities were added to the intake unit on March 20, 2020, the day before the

- inmate on that unit tested positive;
- h. inmates had been directed by executive staff to report other inmates who they believed might be symptomatic;
- i. inmates were fearful of reporting their own or others' symptoms because they had heard that if you were symptomatic you would be placed in "the box";
and
- j. no doctors had come to the unit adjacent to the intake unit to check on inmates.

14. Federal Defenders has asked the MDC how the inmate who tested positive is being cared for, and how other symptomatic inmates are being checked on. Few details have been provided, but the facility has stated that the positive inmate and other symptomatic inmates are being held in single cells on a separate unit; doctors are checking on the positive inmate and other symptomatic inmates twice a day, taking temperature readings, and providing Tylenol. Federal Defenders has not been informed how many inmates are symptomatic, quarantined or isolated, in addition to the inmate who tested positive.

15. On March 24, 2020, MDC stated that it will continue to accept new inmates.

16. On March 25 and 26, 2020, Federal Defenders spoke to inmates from various units in the facility and learned that:

- a. the female inmates are continuing to be asked to launder all inmate uniforms, including those of the male inmates, and are concerned that this may include uniforms from the intake unit, where the inmate tested positive;
- b. no doctors have come to the female or male units. Medical staff only visit inmates if the inmates volunteer that they have symptoms;

- c. the phones and computers on the units are not being cleaned;
- d. at mealtime, the inmates are directed to line up shoulder to shoulder;
- e. a correctional officer who works on unit 62 was removed from the unit by a supervisor after repeatedly coughing; and
- f. inmates have heard that staff who work in the medical unit at MDC have tested positive, but have not been officially notified of that.

17. On March 26, 2020, the Federal Defenders was informed by Congresswoman Nydia Velazquez's office that three staff members at the MDC have tested positive and a number of others are symptomatic.

18. My office has submitted numerous bail applications in recent weeks to request that individuals confined at MDC be released to protect them from COVID-19 exposure and lessen the health risks to the jail population as the virus spreads.

19. On March 23, 2020, at the request of Chief Judge Mauskopf, we received a list generated by the facility of approximately 537 individuals confined at MDC whom the facility classified as "vulnerable" to COVID-19 within the CDC's definition. As of March 27, 2020, Federal Defenders will have notified the lawyer for each of the 537 vulnerable inmates that the inmate has been so identified. A number of the inmates on the list are sentenced inmates designated to serve their sentence at the MDC; most of those inmates no longer have court-appointed lawyers. Federal Defenders is directly assisting these inmates.

20. On March 26, 2020, Federal Defenders wrote to the MDC Legal Department, identifying 11 vulnerable inmates who are already eligible for home confinement (because they are almost done serving their sentences) and urging the MDC to immediately evaluate these 11 vulnerable inmates for release to the community, consistent with their statutory authority to do so

and the urging of Attorney General Barr to the BOP to exercise this authority to prioritize inmates deemed vulnerable to COVID-19. (Attached as Exhibit E is a true and complete copy of a March 26, 2020 Memorandum of The Attorney General, Regarding Prioritization of Home Confinement As Appropriate Response to COVID-19 Pandemic.)

21. No response has yet been received from the MDC.

22. I am familiar with the administrative remedy procedure at the MDC, which requires an inmate to obtain a “cop-out” (BP-8) form from the unit manager, complete and submit it, wait 20 days to receive a response, then obtain a BP-9 form, complete and submit it, wait an additional 20 days to receive a response, then obtain a BP-10 form, complete and submit it, wait 30 days to receive a response, and finally obtain a BP-11 form, complete and submit it and wait 40 days to receive a response. Given the rapidity with which COVID-19 is spreading in New York City and the vulnerability of so many of the inmates held at MDC Brooklyn, pursuing this lengthy process would be futile at best, in my view, particularly since, although it may be suited for resolving more administrative issues such as the calculation of telephone charges or the inability to access a Corrlinks email account, I have never seen it effectively used to obtain release of an inmate.

23. As detailed above, Federal Defenders has taken extensive and extraordinary measures in order to effect the release of vulnerable persons confined at MDC, and to mitigate the potential impact of a coronavirus outbreak in the facility. We have explored and attempted all the available avenues to protect our clients. However, Federal Defenders remains deeply concerned that our clients will be exposed, sickened, or potentially face serious illness or death because of MDC’s inadequate and slow response to this public health crisis, and its lack of medical facilities.

Conditions at MDC that Create Risk of a Widespread Outbreak

24. I have been inside MDC on numerous occasions, including visiting each of the housing units, and am familiar with its physical layout and the living conditions in the facility.

25. There are approximately 1,700 people confined in MDC at this time.

26. Many people confined at MDC share small two-person cells originally designed for one person, with a shared toilet and sink. People continue to be double-celled as of today. Some people are confined in large, dormitory style settings with as many as 70 people sharing a large sleeping space and beds spaced only 3 to 5 feet apart.

27. People confined at MDC must frequently share or touch objects used by others. Toilets, sinks, and showers are shared, without disinfection between each use.

28. Phones and computer terminals are all shared by numerous people, without disinfection between each use.

29. Food preparation (by inmates) and service (by inmates) is communal with little opportunity for surface disinfection. Meals are eaten together in large groups.

30. No hand sanitizer is available to inmates at MDC.

31. Tissues are not readily available. Inmates use toilet paper to blow their noses.

32. Inmates are responsible for sanitizing the housing unit common areas, and frequently lack adequate cleaning supplies to do so. This practice continues to date.

33. Correctional staff who live in New York, New Jersey, and Pennsylvania are entering and leaving the facility every day and arrive and leave on a shift basis. Hand sanitizer is not available to staff even in non-inmate accessible areas. Each staff member can choose whether or not to wear gloves or a mask during his or her work with inmates. Not all are choosing to do so.

34. New inmates continue to arrive at MDC as recently as this week. These new inmates are screened only for fever and recent travel to designated hotspot countries.

MDC is Not Educating or Sharing Information with People Confined at the Facility

35. The BOP has not informed people who are confined at MDC of the symptoms of COVID-19, or of how to prevent the spread of the infection, except through posters on the walls of the units and general exhortations to wash their hands and practice social distancing.

36. People who are at lower risk of becoming seriously ill from the virus are not separated from those who are at higher risk (because of age and/or pre-existing medical conditions). Instead, they are mixed together in open dorms or small two-man cells and locked together in those cells for at least 10 out of every 24 hours.

37. The facility has not informed the inmate population of what the protocol will be for symptomatic inmates. Absent a transparent protocol, inmates in correctional settings often fear they will be confined in solitary if they volunteer that they are symptomatic.

MDC is Not Medically Equipped to Address a Coronavirus Outbreak

38. As of March 20, 2020, MDC had only nine COVID-19 test kits.

39. MDC currently has no ventilators.

40. MDC cannot intubate inmates on-site.

41. There is no separate medical unit or facility for ill inmates. Unlike many Federal Correctional Institutions and even Rikers' Island, MDC has no physical space in which an ill inmate can convalesce that is separate from other inmates, warm, clean and has access to fresh water and regular hand-washing. MDC has declined to create a separate medical unit in the facility.

42. There are only three doctors available at MDC to care for all 1700 inmates. None of these doctors specialize in infectious diseases.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 27, 2020
Brooklyn, New York



Deirdre D. von Dornum

Exhibit A

 Reply all |   Delete  Junk |  ...



From: Holly Pratesi <hpratesi@bop.gov>
Sent: Monday, March 09, 2020 5:42 PM
To: David Patton <David_Patton@fd.org>
Subject: Re: FW: Coronavirus Planning

Good afternoon,

I understand you sent the below email to Associate Warden Cruz. Your email has also been provided to the remainder of the executive staff for consideration.

Thank you,
Holly

----- Original message -----

From: David Patton <David_Patton@fd.org>
Date: 3/8/20 1:46 PM (GMT-05:00)
To: Andy Cruz <a1cruz@bop.gov>, Nicole McFarland <nmcfarland@bop.gov>
Cc: Deirdre Vondornum <Deirdre_Vondornum@fd.org>, Jennifer Brown <Jennifer_Brown@fd.org>
Subject: Coronavirus Planning

>>> "David Patton" 03/08/2020 13:46 >>>
Nicole and Andy,

I'm asking that you make public the MCC and MDC plans and policies for preventing a coronavirus outbreak and responding to detained people who contract coronavirus. Let us know your availability to discuss the issues. We believe that at a minimum, those plans and policies should include:

1. A comprehensive testing protocol;
2. Much greater precautionary measures with respect to sanitation and hygiene, including frequent cleaning, ready availability of soap, and tissues (the opposite of what is occurring at the MCC right now);
3. A provision for quarantining anyone who tests positive for the coronavirus at a hospital, not at the jail;

 Reply all |   Delete Junk |  ...



5. Coordination with the Courts and U.S. Attorneys' Offices to ensure that only in extraordinary circumstances should any new arrestee be detained at the jails, and no one should be admitted without testing.

Thanks,
David

Exhibit B

Reply all | Delete | Junk | ...



RE: information from MCC re coronavirus protocols



Eichenholtz, Seth (USANYE) <Seth.Eichenholtz@usdoj.gov>

Sat 3/14, 6:13 AM

Deirdre Vondornum; Holly Pratesi <hpratesi@bop.gov>; a1cruz@bop.gov; Cheryl I

Reply all |

Inbox

Label: Purge Old Mail (20 years) Expires: 3/9/2040 7:13 AM

Document1.pdf

39 KB



Show all 1 attachments (39 KB) Download

Hi all,

To the extent it is helpful, attached please find a copy of the notification e-mail that Nicole sent out about this policy, along with the bulletin that will be sent to inmates. The MDC bulletin is identical, except it will say MDC Brooklyn on top.

---Seth

>>> Nicole McFarland 3/13/2020 2:29 PM >>>

Effective immediately legal visits will be suspended for 30 days, at which time the suspension will be re-evaluated. Case -by-case approval at the local level and confidential legal calls will be allowed in order to ensure access to counsel.

This applies to MDC Brooklyn and MCC NY and across the BOP.

I am attaching a copy of the message going to inmates at both institutions.

Seth D. Eichenholtz
Deputy Chief, Civil Division
United States Attorney's Office
Eastern District of New York
271 Cadman Plaza East, 7th Floor

Brooklyn, New York 11201
Telephone: (718) 254-7036
Fax: (718) 254-7489

From: Deirdre Vondornum <Deirdre_Vondornum@fd.org>

Sent: Friday, March 13, 2020 12:22 PM

To: Eichenholtz, Seth (USANYE) <SEichenholtz@usa.doj.gov>; Holly Pratesi <hpratesi@bop.gov>; a1cruz@bop.gov;

Reply all |  Delete | Junk | 



Subject: Re: information from MCC re coronavirus protocols

Seth - thanks. One more immediate request: Can we arrange for the videoconferencing equipment at MDC to be tested today or Monday to see if it will connect with the courthouse and with probation? On the courthouse end I think Doug Palmer would be person to coordinate through and then Rob Capers at Probation.

Deirdre D. von Dornum
Attorney-in-Charge
Federal Defenders of New York
(718) 330-1210

On Fri, Mar 13, 2020 at 10:46 AM -0400, "Eichenholtz, Seth (USANYE)" <Seth.Eichenholtz@usdoj.gov> wrote:

Thanks for this list Deidre. I've already discussed some of these issues with BOP, will look into the others, and we'll have an update for our call on Tuesday.

Thanks,
Seth

Seth D. Eichenholtz
Deputy Chief, Civil Division
United States Attorney's Office
Eastern District of New York
271 Cadman Plaza East, 7th Floor

Brooklyn, New York 11201
Telephone: (718) 254-7036
Fax: (718) 254-7489

From: Deirdre Vondornum <Deirdre_Vondornum@fd.org>

Sent: Friday, March 13, 2020 10:42 AM

To: Eichenholtz, Seth (USANYE) <SEichenholtz@usa.doj.gov>; Holly Pratesi <hpratesi@bop.gov>; a1cruz@bop.gov;
Cheryl Pollak <Cheryl_Pollak@nyed.uscourts.gov>; Lifshitz, Allon (USANYE) <ALifshitz@usa.doj.gov>

Cc: Michelle Gelernt <Michelle_Gelernt@fd.org>; David Patton <David_Patton@fd.org>

Subject: information from MCC re coronavirus protocols

Just flagging differences between what Andy and Holly indicated were the current MDC plans as of our meeting, and what the MCC warden and Nicole McFarland indicated to CJ McMahon are the current MCC plans as of yesterday:

- An outside sanitation company has been hired to sanitize the entire first floor of the facility this weekend.
- Goggles, gloves and masks have been ordered for particular staff. (Unclear when these will arrive)
- They have ordered two spray sanitizing machines to use in social and legal visiting areas once a day. (Starting next week)
- They have been authorized by BOP to order alcohol based sanitizer for visitors and inmates. (On backorder)

 Reply all |   Delete  Junk |  



- They are cohorting all high-risk (older than 55, those with chronic illnesses) on the 11th floor.

Deirdre D. von Dornum
Attorney-in-Charge | EDNY
Federal Defenders of New York
(718) 330-1210
Deirdre_Vondornum@fd.org

Exhibit C

Federal Defenders
OF NEW YORK, INC.

52 Duane Street - 10th Floor, New York, NY 10007
Tel: (212) 417-8700 Fax: (212) 571-0392

David Patton
*Executive Director and
Attorney-in-Chief*

March 16, 2020

VIA EMAIL

Nicole McFarland
Holly Pretasi
MCC/MDC Legal Counsel

Re: Federal Defender Access to the MCC and MDC

Dear Nicole and Holly:

I write in response to Friday's announcement that the BOP was immediately instituting a 30-day suspension of social and legal visiting at all federal detention facilities, including the MCC in Manhattan and the MDC in Brooklyn, with the possibility of a renewed suspension in 30 days' time. As you know, the Federal Defenders have tried to engage with the BOP about its plans to prevent and contain a COVID-19 outbreak at the MCC and MDC, and expressed specific concerns about treating those facilities entirely as places of "quarantine" and cutting inmates off from their lawyers and loved ones as a result. The BOP's recently announced plans are exactly what we feared. Although we appreciate the severity of the health risks that COVID-19 poses, it appears that the BOP has not considered alternative ways in which it can protect the health of inmates and facility staff while respecting inmates' constitutional rights.

Shutting down visitation not only directly burdens these rights, but also puts inmates at risk of additional harm. During recent lockdown periods, inmates have been denied warm food, fresh drinking water, adequate medical treatment, and the ability to engage in even minimal hygiene. And without regular access to their counsel, inmates lose the primary means of addressing these issues in real time.

The BOP has further frustrated the Federal Defenders' efforts to help their clients through such crises by providing the Defenders' and other stakeholders inaccurate or incomplete information. For instance, less than two weeks ago, after shutting down the MCC in response to a tip that a corrections officer had smuggled a gun into the facility, the BOP moved more than 150 inmates to FCI Otisville. Warden Licon-Vitale informed both the Federal Defenders and Chief Judge McMahon that none of the transferred inmates was a pre-trial detainee, but rather all were designated inmates who were in holding status at the MCC. In fact, the majority of the transferees were pre-trial detainees, and several had impending court appearances that had to be cancelled as a result of their transfer.

Nicole McFarland/Holly Pratesi

March 16, 2020

Re: Federal Defenders' Access to MCC/MDC

In addition, BOP officials informed the Federal Defenders that inmates were receiving necessary medical treatment, provided one hot meal a day, and permitted to shower, in line with BOP policy. Yet, scores of inmates with no relationship to one another reported the exact opposite. Certain inmates did not receive medications, including for anemia, AIDS and diabetes, many reported receiving only cold (and in some cases frozen) food for days on end, and others went almost a week without fresh drinking water, a shower or change of clothing. For twelve days, menstruating women had one pair of underwear and no hygiene products, and were told by corrections officers to “stuff tissue up there.”

The Federal Defenders uncovered similar misstatements by BOP leadership in the aftermath of the electrical fire that resulted in the cancellation of visiting at the MDC in February 2019. Then-Warden Herman Quay represented to court officials that inmates had not been confined to their cells, that neither heat nor hot water had been impacted, that inmates continued receiving hot meals, and that there had been no disruption of medical care. Yet when Chief Judge Irizarry issued an administrative order permitting Deirdre von Dornum, Attorney-in-Charge for the Federal Defenders in the Eastern District, to access the facility, the reality that Ms. von Dornum and U.S. Attorney Investigator John Ross discovered was markedly different than what Warden Quay had reported. Cells were pitch black, and a guard informed Ms. von Dornum that some inmates had not been allowed outside of their cells for a week. Other inmates had not received hot food for days, and the facility was painfully cold, causing BOP officers to wear multiple layers while inmates suffered in short-sleeved shirts and light cotton pants. Many inmates reported not receiving prescriptions, and others said that they had requested, but not received, medical attention, including for open wounds, which Ms. von Dornum and Mr. Ross observed first-hand.

We have deep concerns about what the over 2000 inmates at the MCC and MDC are experiencing. We intend to play a constructive role in helping the BOP navigate the challenges that COVID-19 presents, while continuing to demand that the rights of our clients and other inmates at the MCC and MDC are respected. It is our understanding that this is exactly what the BOP expects of us. In fact, the government has represented to at least one Southern District judge that it thinks that it “makes sense to have [the Federal Defenders] continue to be . . . the point people for discussion” about the BOP’s plans relating to COVID-19. Tr. at 15, *United States v. Holloway*, No. 20 Cr. 126 (S.D.N.Y. Mar. 12, 2020) (conference before Hon. Laura Taylor Swain).

Nicole McFarland/Holly Pratesi

March 16, 2020

Re: Federal Defenders' Access to MCC/MDC

To perform this role effectively, the Federal Defenders request that Deirdre von Dornum and I be permitted to tour the MCC and MDC, and speak with inmates in all units, on a twice-a-week basis, for the duration of the current 30-day shutdown. We are prepared to take the same health precautions as corrections officers who continue to work in the facilities, as well as any additional measures medically necessary to protect the health of inmates and staff, as well as our own health.

I ask that you respond to this request no later than noon on Tuesday, March 17.

Yours truly,

/s

David E. Patton

cc: Jeff Oestericher, Chief, Civil Division (SDNY)
Seth Eichenholtz, Deputy Chief, Civil Division (EDNY)
Adam Johnson, BOP Regional Counsel


Exhibit E



Office of the Attorney General
Washington, D. C. 20530

March 26, 2020

MEMORANDUM FOR DIRECTOR OF BUREAU PRISONS

FROM: THE ATTORNEY GENERAL 

SUBJECT: Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic

Thank you for your tremendous service to our nation during the present crisis. The current situation is challenging for us all, but I have great confidence in the ability of the Bureau of Prisons (BOP) to perform its critical mission during these difficult times. We have some of the best-run prisons in the world and I am confident in our ability to keep inmates in our prisons as safe as possible from the pandemic currently sweeping across the globe. At the same time, there are some at-risk inmates who are non-violent and pose minimal likelihood of recidivism and who might be safer serving their sentences in home confinement rather than in BOP facilities. I am issuing this Memorandum to ensure that we utilize home confinement, where appropriate, to protect the health and safety of BOP personnel and the people in our custody.

I. TRANSFER OF INMATES TO HOME CONFINEMENT WHERE APPROPRIATE TO DECREASE THE RISKS TO THEIR HEALTH

One of BOP's tools to manage the prison population and keep inmates safe is the ability to grant certain eligible prisoners home confinement in certain circumstances. I am hereby directing you to prioritize the use of your various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic. Many inmates will be safer in BOP facilities where the population is controlled and there is ready access to doctors and medical care. But for some eligible inmates, home confinement might be more effective in protecting their health.

In assessing which inmates should be granted home confinement pursuant to this Memorandum, you are to consider the totality of circumstances for each individual inmate, the statutory requirements for home confinement, and the following non-exhaustive list of discretionary factors:

- The age and vulnerability of the inmate to COVID-19, in accordance with the Centers for Disease Control and Prevention (CDC) guidelines;

Memorandum from the Attorney General

Page 2

Subject: Department of Justice COVID-19 Hoarding and Price Gouging Task Force

- The security level of the facility currently holding the inmate, with priority given to inmates residing in low and minimum security facilities;
- The inmate's conduct in prison, with inmates who have engaged in violent or gang-related activity in prison or who have incurred a BOP violation within the last year not receiving priority treatment under this Memorandum;
- The inmate's score under PATTERN, with inmates who have anything above a minimum score not receiving priority treatment under this Memorandum;
- Whether the inmate has a demonstrated and verifiable re-entry plan that will prevent recidivism and maximize public safety, including verification that the conditions under which the inmate would be confined upon release would present a lower risk of contracting COVID-19 than the inmate would face in his or her BOP facility;
- The inmate's crime of conviction, and assessment of the danger posed by the inmate to the community. Some offenses, such as sex offenses, will render an inmate ineligible for home detention. Other serious offenses should weigh more heavily against consideration for home detention.

In addition to considering these factors, before granting any inmate discretionary release, the BOP Medical Director, or someone he designates, will, based on CDC guidance, make an assessment of the inmate's risk factors for severe COVID-19 illness, risks of COVID-19 at the inmate's prison facility, as well as the risks of COVID-19 at the location in which the inmate seeks home confinement. We should not grant home confinement to inmates when doing so is likely to increase their risk of contracting COVID-19. You should grant home confinement only when BOP has determined—based on the totality of the circumstances for each individual inmate—that transfer to home confinement is likely not to increase the inmate's risk of contracting COVID-19.

II. PROTECTING THE PUBLIC

While we have an obligation to protect BOP personnel and the people in BOP custody, we also have an obligation to protect the public. That means we cannot take any risk of transferring inmates to home confinement that will contribute to the spread of COVID-19, or put the public at risk in other ways. I am therefore directing you to place any inmate to whom you grant home confinement in a mandatory 14-day quarantine period before that inmate is discharged from a BOP facility to home confinement. Inmates transferred to home confinement under this prioritized process should also be subject to location monitoring services and, where a court order is entered, be subject to supervised release.

We must do the best we can to minimize the risk of COVID-19 to those in our custody, while also minimizing the risk to the public. I thank you for your service to the country and assistance in implementing this Memorandum.

Exhibit D



U.S. Department of Justice

Federal Bureau of Prisons

Metropolitan Correctional Center

*150 Park Row
New York, NY 10007*

March 17, 2020

David Patton
Executive Director
Federal Defenders of New York, Inc.
52 Duane Street – 10th Floor
New York, NY 10007

RE: Federal Defender Access to the MCC and MDC

Dear Mr. Patton:

We are writing in response to your March 16, 2020, letter in which you request that you and Ms. Deirdre von Dornum be permitted to tour MCC New York and MDC Brooklyn.

In accordance with the Federal Bureau of Prisons' March 13, 2020, National Measures, your request to tour the institutions was sent to the Federal Bureau of Prisons' Central Office for review. After review, your request to tour the institutions was denied.

MCC New York and MDC Brooklyn will continue to keep your office apprised of any appropriate developments concerning their COVID-19 response. Your request to tour the institutions may be revisited at a later date.

Sincerely,

M. Licon-Vitale
Warden
MCC New York

D. Edge
Warden
MDC Brooklyn

EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HASSAN CHUNN; NEHEMIAH McBRIDE;
AYMAN RABADI, by his Next Friend
MIGDALIZ QUINONES; and JUSTIN
RODRIGUEZ, by his Next Friend JACKLYN
ROMANOFF,

individually and on behalf of all others similarly
situated,

Petitioners,

-against-

WARDEN DEREK EDGE,

Respondent.

20 Civ. 1590

**DECLARATION OF
JONATHAN GIFTOS, M.D.**

I, Jonathan Giftos, hereby declare as follows:

1. I am a doctor duly licensed to practice medicine in the State of New York. I am board certified in internal medicine and addiction medicine.

2. I am currently the Medical Director of Addiction Medicine & Drug User Health at Project Renewal and a Clinical Assistant Professor in the Department of Medicine at Albert Einstein College of Medicine. I was previously the Clinical Director of Substance Use Treatment for NYC Health & Hospitals, Division of Correctional Health Services at Rikers Island. In that capacity I was responsible for the diversion, harm reduction, treatment and reentry services for incarcerated patients with substance use disorders. I further served as the medical director of the Key Extended Entry Program (KEEP), the nation's oldest and largest jail-based opioid treatment program that provides methadone and buprenorphine to incarcerated patients with opioid use

disorders. I successfully led an effort to remove non-clinical barriers to opioid treatment program enrollment in 2017, which dramatically expanded treatment access from 25% to over 80%, while also reducing post-release mortality for people with opioid use disorder.

3. I have extensive experience working with vulnerable populations such as the incarcerated and those experiencing homelessness.

4. I submit this Declaration in support of the Plaintiffs' Petition for Habeas Corpus seeking release of incarcerated people at the Brooklyn Metropolitan Detention Center ("MDC") who meet the CDC's definition of vulnerable and seeking other relief to mitigate risk for the remaining population of the MDC during the COVID-19 pandemic.

I. Coronavirus Epidemic in New York City

5. On March 11, 2020, the World Health Organization declared that the rapidly spreading outbreak of COVID-19, a respiratory illness caused by a novel coronavirus, is a pandemic, announcing that the virus is both highly contagious and deadly.¹ To date, the virus is known to spread from person-to-person through respiratory droplets, close personal contact, and from contact with contaminated surfaces and objects.² The CDC also warns of "community spread" where the virus spreads easily and sustainably within a community where the source of the infection is unknown.³ Experts are still learning how it spreads.

6. As of March 27, 2020, novel coronavirus has infected over 586,140 people, leading to 26,865 deaths worldwide.⁴ In the United States, there are at least 97,226 confirmed cases and

¹ World Health Organization, Media Briefing on March 11, 2020: <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

² Centers for Disease Control and Prevention, Coronavirus Disease 2019: *How it Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html>

³ *Id.*

⁴ *Johns Hopkins University Coronavirus COVID-19 Global Cases by the Center for Systems Science and Engineering*, <https://coronavirus.jhu.edu/map.html>.

there have been at least 1,478 deaths.⁵ There are confirmed coronavirus cases in every state, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.

7. Governor Cuomo declared a State of Emergency in New York State on March 7, 2020. Mayor De Blasio declared a State of Emergency in New York City on March 12, 2020. On March 20, 2020, Governor Cuomo issued an Executive Order entitled “New York State on PAUSE,” requiring businesses to close and banning gatherings. As of March 27, 2020, there are 44,745 positive cases in New York State with more than 25,000 of those cases being in New York City.⁶ To date, there have been 519 deaths from COVID-19 just in New York, with 366 of those deaths in New York City. Among the positive cases in New York City are incarcerated people, as well as people who work in courthouses, law enforcement, legal offices, and the medical field, increasing the likelihood of further exposure to and by incarcerated people.

8. There is currently no vaccine or cure. The primary focus is on preventing the spread of the virus at this juncture. To prevent new infections, the Centers for Disease Control and Prevention strongly recommend the following actions: thorough and frequent handwashing, cleaning surfaces with EPA approved disinfectants, keeping at least 6 feet of space between people, and avoiding group settings.¹¹ Social distancing has also been strongly recommended to slow the rate of COVID-19 infections so that hospitals have the resources to address infected individuals with urgent medical needs.¹² The President’s *Coronavirus Guidelines for America*, to slow the spread of the coronavirus, warns that social gatherings in groups of more than 10 people should be

⁵ *Id.*

⁶ *Id.*

¹¹ *How to Protect Yourself*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html>.

¹² *Coronavirus, Social Distancing, and Self-Quarantine*, Johns Hopkins Medicine, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-social-distancing-and-self-quarantine>.

avoided.¹³ In correctional settings, such sanitation, social distancing, and self-quarantining measures are nearly impossible especially when inmates are routinely shackled and escorted with other prisoners.¹⁴

Certain Identifiable Populations Are Far More Vulnerable To COVID-19 Than The Population At Large Is.

9. The Centers for Disease Control have identified two groups of people at higher risk of contracting and succumbing to COVID-19: adults over 60 years old and people with chronic medical conditions.¹⁵

10. COVID-19 is more dangerous to persons in these high-risk groups than to the general population. Older people who contract COVID-19 are more likely to die than people under the age of 60. In a February 29th WHO-China Joint Mission Report, the preliminary mortality rate analyses showed that individuals age 60-69 had an overall 3.6% mortality rate and those 70-79 years old had an 8% mortality rate.¹⁶ For individuals 40 years and younger, the mortality rate was as low as .2%. It has been found that older people diagnosed with COVID-19 are more likely to be very sick and require hospitalization to survive because the acute symptoms include respiratory distress, cardiac injury, arrhythmia, septic shock, liver dysfunction, kidney injury and multi-organ failure. Access to a mechanical ventilator is often required, as is the ability to be intubated quickly. . People with chronic medical conditions (no matter their age) are also at significantly greater risk

¹³ *The President's Coronavirus Guidelines for America*, https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

¹⁴ *See We Are Not a Hospital: A Prison Braces for the Coronavirus*, New York Times, March 18, 2020, <https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html>.

¹⁵ *If You Are at Higher Risk*, Centers for Disease Control and Prevention, <https://tinyurl.com/vtbebz>; *see also Report of the WHO-China Joint Mission on Coronavirus Disease (COVID-19)*, <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> at 12.

¹⁶ *Age, Sex, Existing Conditions of COVID-19 Cases and Deaths Chart*, <https://www.worldometers.info/coronavirus/coronavirus-age-sex-demographics/> (data analysis based on WHO-China Joint Mission Report, *supra*).

from COVID-19 because their already-weakened systems are less able to fight the virus. These chronic medical conditions include lung disease, cancer, heart failure, cerebrovascular disease, renal disease, liver disease, diabetes, immunocompromising conditions, and pregnancy. Those with pre-existing medical conditions have a higher probability of death if infected. The WHO-China Joint Mission Report provides that the mortality rate for those with cardiovascular disease was 13.2%, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer.¹⁷

In a March 17th *Washington Post* article tracking the 100 United States COVID-19 deaths, it is reported that many of the fatalities had underlying medical conditions, which made it harder for their bodies to fight off COVID-19. And nearly all — about 85 percent — were older than 60; about 45 percent were older than 80.¹⁸

Correctional Settings Increase The Risk Of Transmission

11. Correctional settings increase the risk of contracting an infectious disease, like COVID-19, due to the high numbers of people with chronic, often untreated, illnesses housed in a setting with minimal levels of sanitation, limited access to personal hygiene, limited access to medical care, and no possibility of staying at a distance from others. Correctional facilities house large groups of people together, and move them in groups to eat, do recreation, and go to court. They frequently have insufficient medical care for the population, and, in times of crisis, even those medical staff cease coming to the facility. Hot water, soap and paper towels are frequently in limited supply. Incarcerated people, rather than professional cleaners, are responsible for

¹⁷ *Report of the WHO-China Joint Mission on Coronavirus Disease (COVID-19)*, <https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf> at 12.

¹⁸ *U.S. Coronavirus Death Toll Reaches 100*, *The Washington Post*, March 17, 2020, at https://www.washingtonpost.com/national/us-coronavirus-death-toll-reaches-100/2020/03/17/f8d770c2-67a8-11ea-b313-df458622c2cc_story.html.

cleaning the facilities and often not given appropriate supplies. This means there are more people who are susceptible to getting infected all congregated together in a context in which fighting the spread of an infection is nearly impossible.

12. Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.¹⁹

13. In New York, one of the areas of early spread in the U.S., multiple correctional officers and individuals detained in jails and prisons have become infected with COVID-19. The medical leadership in the NYC jail system has announced that they will be unable to stop COVID from entering their facilities and have called for release as the primary response to this crisis. Staff are likely to bring COVID-19 into a facility, based solely on their movement in and out every day.

14. Once COVID-19 is inside a facility, MDC will be unable to stop the spread of the virus throughout the facility given long-documented inadequacies in BOP's medical care and in light of how these facilities function. Incarcerated people in New York City have already begun to test positive for COVID-19. Among the 5,200 people incarcerated by the New York City Department of Correction, seventy-five people in city custody have tested positive for coronavirus.²⁰ This is a higher rate of infection than seen outside of detention facilities and is consistent with my opinion that correctional settings create a heightened risk. As of March 26, 2020, at least four people in BOP custody in New York City, including one at MDC, have tested positive.²³ At least four BOP staff members in New York City, including three at MDC, have also tested positive. Specific Conditions At MDC Brooklyn

¹⁹ *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, The Verge (Mar. 7, 2020) at <https://bit.ly/2TNcNZY>.

²⁰ <https://abcnews.go.com/US/releases-infections-fear-us-coronavirus-crisis-jails-prisons/story?id=69803066>

²³ <https://www.bop.gov/coronavirus/>

15. Based on my understanding of the specific conditions at the federal pre-trial detention center in Brooklyn (“MDC Brooklyn”) as contained in published reports and communicated to me by Deirdre D. von Dornum, Attorney-in-Charge of the Federal Defenders of New York, these conditions pose heightened risks to already vulnerable inmates of contracting the novel coronavirus and of developing acute symptoms from the virus.

16. The size of the population and the conditions of confinement at MDC Brooklyn increase the risk of infection substantially because it is impossible for inmates to maintain a 6-foot distance from others, to avoid large groups, or to implement sufficient hand-washing and sanitization of surfaces.

a. Approximately 1700 people are incarcerated at the MDC. I have learned that 537 of them were identified by MDC as being particularly vulnerable as that has been defined by the CDC.²⁴

b. New people are brought into custody at MDC Brooklyn from all over the world each week. They are screened only for fever and recent travel to designated hotspot countries.²⁵

c. Correctional officers who live in New York, New Jersey, and Pennsylvania come in and out of the facility each day.²⁶ Significantly, in a March 18th CDC report, an epidemiological investigation revealed that coronavirus-infected staff members contributed to the outbreak in a nursing home facility with ineffective infection control and prevention and staff

²⁴ See “Review and Inspection of Metropolitan Detention Center Brooklyn Facilities Issues and Related Impact on Inmates,” OIG Report (Sept. 2019), at 1 (MDC Brooklyn houses approximately 1700 pretrial and designated inmates); Communication with Deirdre von Dornum (confirming 537 people identified as a heightened risk).

²⁵ Federal Defenders of N.Y. Telephone Conversation With MDC Legal (March 17, 2020).

²⁶ *Id.*

members working in multiple facilities.²⁷ The Seattle nursing home outbreak demonstrates that individuals with underlying health conditions and advanced age, in a shared location, are at a high risk of death, especially when resources and staffing become inadequate.²⁸

d. At MDC Brooklyn, people are housed either in small two-man cells (designed to hold a single person) with a single shared toilet and sink or in large open dormitory units housing up to 70 people with shared toilets and sinks.²⁹ Windows in the units do not open. Incarcerated people cannot go outside.

e. No hand sanitizer is available to people incarcerated at MDC Brooklyn.³⁰

f. Tissues are not readily available. People at MDC use toilet paper to blow their noses.

g. Everyone is given one small bar of soap a week, at most. Some units at MDC have received no soap since the lockdown of the facility began on March 13, 2020. Access to additional soap is limited to those individuals who have sufficient commissary funds to purchase it, and dependent on the commissary being open; it is routinely closed during lockdowns.

h. Incarcerated people prepare all the meals and this meal preparation, with the exception of kosher and halal meals, is performed in a single kitchen.³¹

i. Incarcerated people at MDC eat meals in large groups.³²

²⁷ *COVID-19 in a Long-term Care Facility—King County Washington, February 27-March 9, 2020*, <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6912e1-H.pdf>.

²⁸ *Id.*

²⁹ See “Review and Inspection of Metropolitan Detention Center Brooklyn Facilities Issues and Related Impact on Inmates,” *OIG Report* (Sept. 2019) (describing housing units).

³⁰ Statement of Associate Warden Andy Cruz at EDNY Security Committee Meeting (March 11, 2020).

³¹ “Review and Inspection of Metropolitan Detention Center Brooklyn Facilities Issues and Related Impact on Inmates,” *OIG Report* (Sept. 2019), at 4 (all meals are prepared by inmates who work for Food Services in a central kitchen area).

³² “Review and Inspection of Metropolitan Detention Center Brooklyn Facilities Issues and Related Impact on Inmates,” *OIG Report* (Sept. 2019).

j. Incarcerated people are responsible for sanitizing the housing unit common areas, and frequently lack adequate cleaning supplies to do so.

k. Individuals who are at lower and higher risks (because of age and pre-existing medical conditions) of contracting the virus are not separated.³³

l. The facility has not informed the population of what the protocol will be for symptomatic inmates;³⁵ absent a transparent protocol, individuals in correctional settings often fear they will be confined in solitary if they volunteer that they are symptomatic.

m. MDC Brooklyn currently has no more than nine COVID-19 test kits.

17. People at MDC Brooklyn who do contract COVID-19 are at higher risk for developing acute symptoms than if they were in the community, because MDC Brooklyn lacks the medical resources to care for symptomatic inmates.

a. There is no separate medical unit or facility for ill people.³⁶ Unlike many Federal Correctional Institutions and even Rikers' Island, MDC Brooklyn has no physical space in which someone who is ill can convalesce that is separate from others, warm, clean and has access to fresh water and regular hand-washing.

b. On weekdays, there are only three doctors available at MDC Brooklyn to care for all 1700 people held in custody there. Even this highly limited number is likely to decrease as doctors themselves go into quarantine. None of these doctors specialize in infectious diseases.

³³ Statement of Associate Warden Andy Cruz at EDNY Security Committee Meeting (March 11, 2020).

³⁵ *Id.*

³⁶ Statement of Associate Warden Andy Cruz at EDNY Security Committee Meeting (March 11, 2020).

c. People who contract COVID-19 can deteriorate rapidly, even before a test result can be received. They need constant monitoring. Most people in the higher risk categories will require more advanced support: positive pressure ventilation, intubation and in extreme cases, extracorporeal mechanical oxygenation. Such care requires specialized equipment in limited supply as well as an entire team of specialized care providers. MDC Brooklyn does not have that specialized equipment or specialized providers.

18. MDC Brooklyn is already short-staffed.³⁷ This staffing shortage will only increase as employees need to stay home to care for children whose schools are closed, elderly family members, and other personal health situations. This has already been observed in other law enforcement settings and will inevitably occur at MDC. There will be far more work to be done inside MDC than before, and the lack of available staffing will impact basic operations, as well as the ability to cohort high risk and symptomatic patients (in different areas) as well as provide care inside the facility and even conduct escort for emergency room evaluation and inpatient hospitalization. With fewer staff, correctional officers are less able to monitor inmates' health.


Reducing Population Size At Specific Correctional Facilities Is A Crucial Public Health Measure

19. Every effort should be made to reduce chances of exposure to the novel coronavirus; however given the proximity and high number of incarcerated people, correctional staff, and healthcare workers at pre-trial detention facilities, it will be extremely difficult to sustain such efforts. Reducing population, therefore, is an urgent priority in detention facilities during this national public health emergency.

³⁷ "Review and Inspection of Metropolitan Detention Center Brooklyn Facilities Issues and Related Impact on Inmates," OIG Report (Sept. 2019).

I declare under penalty of perjury declare and pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Dated: Brooklyn, New York
March 27, 2020

 3/27/2020

Dr. Jonathan Giftos