

EMERY CELLI BRINCKERHOFF & ABADY LLP

RICHARD D. EMERY
ANDREW G. CELLI, JR.
MATTHEW D. BRINCKERHOFF
JONATHAN S. ABADY
EARL S. WARD
ILANN M. MAAZEL
HAL R. LIEBERMAN
DANIEL J. KORNSTEIN
O. ANDREW F. WILSON
ELIZABETH S. SAYLOR
KATHERINE ROSENFELD
DEBRA L. GREENBERGER
ZOE SALZMAN
SAM SHAPIRO

ATTORNEYS AT LAW
600 FIFTH AVENUE AT ROCKEFELLER CENTER
10TH FLOOR
NEW YORK, NEW YORK 10020

TEL: (212) 763-5000
FAX: (212) 763-5001
www.ecbalaw.com

DIANE L. HOUK
EMMA L. FREEMAN
DAVID BERMAN
HARVEY PRAGER
SCOUT KATOVICH
NICK BOURLAND
ANDREW K. JONDAHL
ANANDA BURRA
MAX SELVER

April 7, 2020

Hon. Rachel P. Kovner
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Hassan Chunn et al. v. Warden Derek Edge, 20 Civ. 1590 (RPK) (RLM)

Dear Judge Kovner:

Along with the Cardozo Civil Rights Clinic, and Alexander A. Reinert, we represent Petitioners in the above the above-referenced case. We write to update the Court on the status of the four Petitioners, to briefly respond to Respondent's April 7, 2020 submission, and to bring to the Court's attention recent decisions that bear on Petitioners' request for relief in this action.

With respect to the status of Petitioners' request for compassionate release, we can report that each Petitioner has filed a motion with his respective sentencing Court seeking compassionate release pursuant to 18 U.S.C. § 3582. Today, the United States agreed that Mr. McBride satisfies the requirements for compassionate release and he is no longer in custody. As Respondent reported to the Court earlier today, the Government has not yet taken a position regarding the motions filed by each of the remaining Petitioners.

Petitioners' request for a Temporary Restraining Order, seeking both release and appointment of a special master, is still pending before this Court. In light of this, we also wish to bring to the Court's attention three recent decisions that bear on those requests. First, in *Jones v. Wolf*, No. 20 Civ. 361, 2020 WL 1643857 (W.D.N.Y. April 2, 2020), the court found that holding immigration detainees in federal detention, when they were particularly vulnerable to COVID-19 infection, amounted to deliberate indifference, and required the government to demonstrate how it would permit petitioners to practice the "social distancing" necessary to mitigate the risk of infection. Most relevant to this case, the court found that the petitioners were likely to succeed in showing that respondents exhibited deliberate indifference to the risk of harm posed by COVID-19 even though they admittedly had taken some steps to protect

EMERY CELLI BRINCKERHOFF & ABADY LLP

Page 2

immigration detainees from harm. *Id.* at 10-12. In particular, just as in this case, the respondents in *Jones* had taken no specific steps to protect those most vulnerable to COVID-19 infection. *Id.* at *12 (“In other words, the respondents have actual knowledge of serious risks to the health and well-being of individuals with the vulnerabilities identified by the CDC and have not taken adequate steps to protect the petitioners who have such vulnerabilities against those risks.”). Although the court found that the petitioners were likely to be able to show that they experienced unconstitutional conditions of confinement, it stopped short of release because the detention center in question was operating at half its total capacity, creating the possibility that the government could ameliorate the risk by dispersing people throughout the facility to practice social distancing. *Id.* at *14. The same cannot be said for the MDC, which as of April 2, 2020 was at or beyond capacity with 1734 incarcerated people.¹

Second, in *Hope v. Doll*, No. 20 Civ. 562 (M.D Pa. April 7, 2020), the court granted petitioners’ request for a temporary restraining order and ordered that petitioners be released from immigration custody. That case, like *Jones*, also rested on deliberate indifference standards and specifically found that petitioners were likely to succeed in showing that the conditions violated both the Fifth and Eighth Amendments. *Id.* at 11 n.11.

Along similar lines, in *Malam v. Adducci*, No. 20 Civ. 10829, 2020 WL 1683453 (E.D. Mich. April 6, 2020), the court granted release to an immigration detainee pursuant to 28 U.S.C. § 2241 because there were no conditions under which petitioner could be constitutionally housed. As in *Jones*, the court found that even though respondents had taken precautionary measures, the petitioner was still likely to succeed in showing that the respondents acted with deliberate indifference by holding in confinement a person who was particularly vulnerable to COVID-19 infections. The court made this finding even though there had not yet been any confirmed positive cases at the facility where the petitioner was held.

Although all of these cases concerned people held on immigration violations, their reasoning applies to the instant case. The cases were premised on the fact, never disputed by Respondent here, that correctional facilities cannot adequately protect people vulnerable to COVID-19 without taking additional precautions. They focused on whether the respondents were acting with deliberate indifference to the risks of harm presented to older people and those who suffer from specific medical conditions heightening their risk of harm from a COVID-19 infection. And they all accepted the premise (and in two cases, acted on the premise) that Section 2241 is a valid means of obtaining release where petitioners are being held in unconstitutional conditions of confinement.

Finally, we wish to briefly respond to Respondent’s submission filed earlier today. First, although Respondent frames Petitioners’ current action as an attempt to “compel the Warden to reach a decision regarding their [compassionate release] requests,” it is quite the opposite. As Petitioners have steadfastly maintained, the existence of a potential compassionate release process has no bearing on their request for habeas corpus, because the existence of an alternative remedy for release is not a barrier to obtaining habeas relief. It is Respondent Edge who has

¹ https://www.bop.gov/mobile/about/population_statistics.jsp

EMERY CELLI BRINCKERHOFF & ABADY LLP

Page 3

sought to compel Petitioners to pursue the compassionate release remedy.

Second, as Respondent's submission today demonstrates, the compassionate release process is not an alternative to the relief Petitioners are seeking through habeas and the pending motion for a temporary restraining order.² It is clear that the process cannot provide the prompt relief sought by Petitioners in this action, inasmuch as it contemplates a delay of 30 days before Petitioners know whether they have satisfied the exhaustion requirement. It is thus no surprise that Judge Torres rejected the government's exhaustion argument in a similar case on the grounds that it would be futile and impose undue prejudice given the COVID-19 pandemic. *See United States v. Perez*, No. 17 Cr. 513, 2020 WL 1546422, at *3 (S.D.N.Y. Apr. 1, 2020). Of course, Respondent's extended disquisition on the law of exhaustion is of no relevance to this case, where no exhaustion argument has been raised in opposition to Petitioners' habeas claims – if the government wishes to assert exhaustion in Petitioners' pending filings seeking compassionate release, it may brief the matter there.

Finally, we note that the updated information provided by the MDC continues to show that they are failing to mitigate risk and to follow accepted correctional health practices, despite increasing numbers of reported positive cases and almost certainly increased positive cases amongst those who are not being tested and/or are asymptomatic. As of today, the BOP website reports two new positive cases in the MDC jail population and 6 positive cases for MDC staff members. As one court noted, “the MDC is no place for someone considered to be high risk for COVID-19,” going on to state that “by the warden's own admission, the MDC ‘has not isolated its ‘at risk’ population at this time because the number of inmates who fall into this category is too large to contain and isolate on one or even two units.” *United States v. Nkanga*, No. 18 Cr. 713 (JMF), 2020 WL 1529535, at *2 (S.D.N.Y. March 31, 2020).

Petitioners have presented the Court with expert declarations that make clear that isolating and monitoring people with known risk factors is critical to mitigating their risk of death or serious illness. Dkt. 26-4 (Declaration of Dr. Homer Venters ¶ 6(e)). Furthermore, these experts have stated that everyone who has COVID-19 symptoms *must also be tested* in order to mitigate that risk. *Id.* ¶ 6(b); Dkt. 26-6 (Declaration of Dr. Robert L. Cohen ¶ 10). Dr. Cohen noted that the New York City jails are testing everyone with symptoms as well as some proportion of asymptomatic people with known exposure, a measure necessary to ensure the health and safety of incarcerated people, “because unlike nonincarcerated people, one cannot self-quarantine while incarcerated” *Id.* Contrary to that accepted standard, MDC has to date tested only seven incarcerated people, despite widespread reports of individuals with COVID-19 symptoms at MDC. *See* Letter Report to Chief Judge Mauskopf from MCC Warden Licon-Vitale dated April 7, 2020 (reporting that only seven people incarcerated at MDC have been tested); Dkt. 1 (Pet.) ¶ 66; Dkt. 12-2 (Rosenfeld Decl. dated March 30, 2020) ¶ 7; Dkt. 12-12 (Suppl. von Dornum Decl. ¶ 7) (reporting several symptomatic incarcerated people throughout the MDC).

² For the first time, Respondent asserts in its letter that no Petitioner has appealed the Warden's adverse determination of their compassionate release even though Petitioner's counsel and the Court specifically asked Respondent's counsel on Saturday, April 4, to consider each Petitioner to have filed an administrative appeal. If Respondent intended to ignore that request, it should have informed the parties and the Court prior to this evening.

EMERY CELLI BRINCKERHOFF & ABADY LLP
Page 4

Respectfully submitted,
/s
Katherine Rosenfeld

c.: All Counsel (via ECF)