

**IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 70 MM 2020

In re: PETITION of PENNSYLVANIA PRISON SOCIETY, *et al.*

BRIEF FOR THE OFFICE OF ATTORNEY GENERAL

Response to Application for Extraordinary Relief Under the Court's King's Bench Jurisdiction, seeking release of criminal defendants held in all county jail facilities in the Commonwealth of Pennsylvania.

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INTRODUCTION

The real question presented by this petition is not whether some Pennsylvania prisoners should be released in response to the current crisis; the question is who should be making those decisions on the basis of what information.

There are 66 separate county detention facilities across this Commonwealth, from the most populous areas to the most rural. Some of these facilities have thousands of inmates, some have tens, and conditions in regard to the pandemic vary considerably. Yet petitioners ask this Court to impose a single statewide mandate that would force every institution to release exactly the same categories of inmates, without any information at all about the number of releases that would result, or the number necessary to secure safe conditions in any particular facility.

This is not how crucial policy decisions should be made in the age of the coronavirus. This Court has to date been working closely with the governor and other state and local officials to respond to the compelling challenges created by COVID-19. A “King’s Bench” petition based on declarations from advocates cannot properly substitute for that process. And, contrary to petitioners’ assertions, no other state supreme court is doing it that way. Petitioners do not know more about current conditions in the Huntington County jail than does the county’s president judge, nor more about the Philadelphia Department of Prisons than its commissioner. Neither

petitioners' allegations nor media reports about them can substitute for knowledge on the ground.

Any release mechanisms, moreover, must account for both public and prisoner safety, and petitioners' rigid mandate would do neither. Despite claims that only "nonviolent" inmates would be affected, petitioners' release categories do not in fact consider the nature of the crime – or, even more importantly, the inmate's prior record, even if it is full of violent behavior. Instead, many inmates would be released simply based on length of confinement, or age. And by age, petitioners mean *age 45*, twenty years younger than the presumptive age of vulnerability in the rest of the world. Even putting aside the potential danger to others, this unknown number of released prisoners would then return to communities in which their risk of exposure may be even greater, with less available medical care.

That is why these questions are so hard. The Office of Attorney General agrees that, in appropriate circumstances, prisoner releases must be considered as one part of the fight against spread of the virus. This is not the way to do it.

ARGUMENT

I. The management of the 66 different county jail facilities is not a King's Bench judicial function.

Petitioners, in the midst of a massive crisis that is transforming the world on a daily basis, claim that they – not local authorities and judges, not the governor or legislature – know best how to manage inmate population to respond to the danger of coronavirus in this Commonwealth's dozens of county jail facilities. They claim that the sole solution is for this Court to issue a one-size-fits-all decree that will release some unknown number (apparently in the thousands) of criminal defendants onto the street and back to their communities. These claims are not a proper basis for the exercise of this Court's King's Bench jurisdiction.

The Pennsylvania Department of Corrections compiles annual data on county jails. The most recent survey, for 2018, shows that Pennsylvania has 66 separate county detention facilities. Five are in Philadelphia; the remainder are scattered across the Commonwealth in 61 different counties. The largest house over 2,000 inmates, the smallest only a few dozen.¹ The Department does not operate these diverse facilities. They are governed independently by the officials of the county in which they are located.

¹ Pennsylvania Department of Corrections, County Statistics and General Information, 2018, <https://www.cor.pa.gov/Facilities/CountyPrisons/Pages/Inspection-Schedule,-Statistics-And-General-Info.aspx>.

Petitioners argue that King’s Bench authority is nonetheless appropriate because this Court possesses “every judicial power” over the “Unified Judicial System.” Petition at 20, 22. But the question here is not this Court’s authority over other courts; the question is whether it should displace all other government officials, at both the local and state levels, in addressing the confounding issues presented by the pandemic.

At the very least, before taking such a step the Court must be satisfied that the petitioners have established a clear entitlement to the radical relief they seek. “The King’s bench power is ‘exercised with extreme caution.’” *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014). Even “the presence of an issue of immediate public importance is not alone sufficient.... [W]e will not invoke extraordinary jurisdiction unless the record clearly demonstrates [the] petitioner’s rights.” *Commonwealth v. Morris*, 771 A.2d 721, 731 (2001) (citations omitted).

Other than a passing reference to various constitutional amendments, however, the application for extraordinary relief consists of sweeping but unsupported assertions about the current status of county facility responses to the virus. The central premise of the petition is that, with one or two exceptions, every county jail in Pennsylvania is in precisely the same position in dealing with COVID-19. The evidence presented for this proposition is a set of “declarations” attached to the petition. Two are from “experts” who, as far as can be gathered from their

declarations, Exhibits A and C, have never set foot in any Pennsylvania detention facility. Five are from criminal defendants in just four different institutions, Exhibits E-I, out of the roughly 30,000 current inmates in Pennsylvania's 66 jails. Three are from prisoner advocates, Exhibits J-L, none of whom, according to their statements, have been in any jail since March 3, well before the crisis hit Pennsylvania.

Such allegations cannot describe the changing conditions around the state, and do not justify the indiscriminate releases petitioners demand. As the Governor's emergency orders demonstrate, the situation is not the same everywhere, and the costs and benefits of drastic action shift accordingly. In the last two weeks the Governor has issued a variety of stay-at-home directives. As of this writing, 26 counties are covered, and the effects have been far-reaching. But in 41 other counties, in the Governor's judgment, such extreme measures are not yet warranted.

And in the most affected counties, officials are taking action. In Allegheny County, as petitioners admit, the jail has already released over 500 inmates – 25% of the total population. In Philadelphia, the First Judicial District issued orders two weeks ago suspending weekend sentencing and creating an expedited but orderly process for lifting detainees.² Since March 16, almost 600 inmates have been

² Administrative Order No. 12 of 2020, In re: Weekend and Other Short Term Prison Sentences, March 18, 2020, <https://www.courts.phila.gov/pdf/regs/2020/12-of-2020-MC-PJ-ORDER.pdf>; Administrative Order No. 13 of 20, In re: Emergency Motions to Lift Detainers When Defendant is in Custody, March 20, 2020, <https://www.courts.phila.gov/pdf/regs/2020/13-of-2020-AGB-ORDER.pdf>.

released; the net population decrease is close to 300. Prison officials are continuously cleaning housing units every three hours. All newly admitted inmates are quarantined for 14 days and kept in cohorts to limit exposure. Sanitizing stations have been installed throughout all facilities and are regularly refilled. Special housing units have been prepared for any inmates who may become infected.³

Meanwhile in smaller counties such as Union, where the total inmate population normally averages around 30, different measures may be appropriate. Indeed, contrary to the impression fostered by the petition, most county jails – 62 out of 66 – are somewhat *under* capacity, not overpopulated.⁴ Of course, the numbers vary, and current bed capacity in itself will not be enough to meet the challenge. The point is that circumstances diverge greatly from one institution to another.

Yet petitioners seek an order that would apply equally everywhere, in Allegheny and Armstrong, from Philadelphia to Fayette, without regard to local conditions or the judgment of elected officials and county judges. There is no basis for the exercise of extraordinary jurisdiction on such grounds. This Court has a vital

³ See Philadelphia Department of Prisons, COVID-19 Frequently Asked Questions, attached as Exhibit A.

⁴ According to the most recent DOC figures, only four facilities had average daily populations greater than their bed capacity: Cambria, Clearfield, Delaware, and Luzerne. The total average daily population for all county jails in Pennsylvania was 30,731; the total bed capacity was 38,341 – 25% above actual population levels. <https://www.cor.pa.gov/Facilities/CountyPrisons/Pages/Inspection-Schedule,-Statistics-And-General-Info.aspx>.

role to play in combatting the current crisis, and has already taken decisive steps. But it has acted responsibly, in coordination with civil authorities who must address impacts on every institution in our society. The times require concerted effort, not the cumbrous mallet of a statewide mass release order in the name of the King's Bench.

II. Other jurisdictions are addressing the problem largely through cooperation among all government officials, not by judicial fiat.

Petitioners contend that this Court should mandate these mass releases because that is what high courts around the country are doing. But petitioners' own examples illustrate the contrary. In most jurisdictions, efforts to confront the coronavirus represent a collaborative venture between judges and county and state officials. Most of the releases mentioned by petitioners, in Cleveland, Los Angeles, Oakland, and suburban Denver, Petition at 24-25, were executed by local wardens, not statewide supreme court orders. And most of the supreme court actions cited by petitioners, in Montana, Washington, and Maine, Petition at 23-24, were not release orders at all, but guidance on handling hearings or outstanding fines and fees.⁵

⁵ Letter to Montana Courts of Limited Jurisdiction Judges, Mike McGrath, Chief Justice, March 20, 2020 ("we ask that you review your jail rosters and release, without bond, as many prisoners as you are able") <https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges%20re%20COVID-19%20032020.pdf?ver=2020-03-20-115517-333>; Amended Order No. 25700-B-607, In The Matter Of Statewide Response By Washington State Courts To The Covid-19 Public Health Emergency, ¶ 12(b) ("a finding of changed circumstances in any given case is left to the sound discretion of the trial court"), <http://www.courts.wa.gov/content/publicUpload/Supreme>

Petitioners actually cite just two state supreme court release orders, in South Carolina and New Jersey, but neither is what they appear from petitioners' description. In South Carolina, releases have increased, but not in wholesale fashion under mandated criteria; rather, individualized pre-trial release hearings have continued as before, with judges exercising discretion in light of the changed circumstances presented by the virus.⁶ In New Jersey – a much smaller state than Pennsylvania, with only a fraction of the county jails, and where all judges and county prosecutors are directly appointed by the governor – the order issued by the state supreme court simply memorialized the results of mediation between law enforcement and defense bar representatives.⁷ New Jersey and Pennsylvania county jails, moreover, do not encompass equivalent populations: New Jersey jails house less serious offenders serving much shorter sentences than those in Pennsylvania.⁸

[%20Court%20Orders/Supreme%20Court%20Emergency%20Order%20re%20CV19%20031820.pdf](#); Emergency Order Vacating Warrants For Unpaid Fines, Unpaid Restitution, Unpaid Court-Appointed Counsel Fees, And Other Criminal Fees, March 17, 2020, <https://www.courts.maine.gov/covid19/emergency-order-vacating-warrants-fines-fees.pdf>.

⁶ “Dozens of inmates released from Greenville jail amid growing COVID-19 concerns,” GREENVILLE NEWS, March 20, 2020, <https://www.greenvilleonline.com/story/news/local/south-carolina/2020/03/20/dozens-released-greenville-south-carolina-jail-due-covid-19-fears/2883854001/>.

⁷ Consent Order, Docket No. 084230, In the Matter of the Request to Commute or Suspend County Jail Sentences, <https://www.njcourts.gov/notices/2020/n200323a.pdf>.

⁸ See N.J.S.A. 2C:43-10 (place of imprisonment).

State and local officials across the nation are grappling with the intractable problems the pandemic presents for detention facilities. Indeed, recent media reports reveal that, in Pennsylvania, the Governor and General Assembly are now in negotiations for legislation to address prison releases at the state level. That is the kind of process that is appropriate at the county level as well. No jurisdiction, however, has attempted to solve these problems with the sort of sweeping, inflexible judicial edict proposed by petitioners.

III. The requested relief may well create more danger, not less, for both inmates and others.

The issue in this proceeding is not inmate release in itself; releases have been and will continue to be a significant step in protecting detention facilities from virus spread. The issue is whether this Court should unilaterally impose the binding, across-the-board mandates devised by prisoner advocates. Petitioners insist that only their proposals can provide the necessary protection. But it is unclear that petitioners' demands would best protect even inmates, let alone the rest of society.

What is clear is that the requested relief does not adequately balance the interests of public health and public safety. The suggested standards completely ignore inmates' prior records, no matter how violent or threatening, even though it is the prior record that typically distinguishes those who are detained or incarcerated in a county facility from those who are released on bond or probation. At the same time, petitioners claim "vulnerable" status for any inmate over the age of 45 – a full

two decades below CDC guidelines.⁹ These “elderly” inmates, along with any convicted prisoners three months from what should be their earliest possible parole date, would be automatically eligible for release, regardless of their criminal history, and regardless even of the nature of the crime for which they are currently in jail. Petition at 29-30.¹⁰

Many may assume that, with so few people out on the streets, criminal behavior will necessarily plummet, and jail releases would carry little risk to the public. But the virus brings no promise of a holiday from violence. In the 48 hours before this writing, three people have been shot to death in Philadelphia; another five, including a one-year-old baby, were shot and wounded in a single incident.¹¹ COVID-19 policies that protect both inmates and the public at large demand a delicate balance, shared decision-making, and a sizable measure of discretion. These are lacking in the extraordinary relief requested by petitioners.

⁹ Centers for Disease Control and Prevention, People Who Are at Higher Risk for Severe Illness, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019ncov%2Fspecific-groups%2Fhigh-risk-complications.html.

¹⁰ The requested relief mechanism includes a so-called objection opportunity for prosecutors, but it is utterly ineffective. Every objection, for every defendant in every jail around the state, would have to be lodged within 24 hours of this Court’s order granting relief, and there is no stay or appeal provision. As a result, prosecutors would have little if any real role in the release process, and virtually every defendant in the mandated release categories would in fact be released.

¹¹ PHILADELPHIA INQUIRER, “Mayor Jim Kenney calls out DA Larry Krasner after gunman shoots five people, including 1-year-old boy, at North Philadelphia rowhouse,” March 31, 2020, <https://www.inquirer.com/news/five-shot-strawberry-mansion-philadelphia-police-darrell-clarke-gunman-violence-20200331.html>.

Indeed, petitioners cannot even tell this Court how many releases will result from their new procedures, or how many releases would be needed to render jails measurably safer. We have no idea which populations will decrease by what percentage in which facilities. In effect, petitioners wish to run a Pennsylvania-sized social experiment in “decarceration.” We may surmise they would be keen to run that experiment even if there had never been a coronavirus. But that is no basis for King’s Bench relief.

The mass release sought by petitioners, moreover, may fail to increase safety even for those inmates who are put at liberty. Procedures followed in closed institutions like the Philadelphia Department of Prisons are considerably more rigorous than those practiced by some people in general society. If released solely because of the pandemic, some number of prisoners will be exposed who would not have been otherwise. This is precisely the dilemma policy makers have faced in considering whether to depopulate elder care facilities. Residents in these homes often share rooms, and routinely come into direct physical contact with aides. Will they be safer if discharged into the outside world?

The only answer is that it is hard to say. These are wrenching problems, arising in a world that a few weeks ago did not exist. The current King’s Bench petition is ill-suited to their proper resolution.

CONCLUSION

For these reasons, the Office of Attorney General respectfully requests that this Court deny the application for extraordinary relief, while continuing to work with government officials and county judges to address the challenges posed by the pandemic.

Respectfully submitted,

/s/ Ronald Eisenberg

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**CERTIFICATE OF COMPLIANCE
WITH RULE 2135**

This brief complies with Pa. R. App. P. 2135(d) (certificate of compliance for word limitations).

**CERTIFICATE OF COMPLIANCE
WITH RULE 127**

This brief complies with Pa. R. App. P. 127(a) and the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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Exhibit A

COVID-19 Frequently Asked Questions (FAQ) - PDP

What precautions has the Department of Prisons (PDP) put in place to mitigate the spread of COVID-19 inside of the facilities?

The PDP's standing operating procedure is to process newly admitted inmates into the system by placing them in quarantine for a five day period to assess for routine and communicable diseases. Quarantine is standard language used to identify newly admitted inmates that must be kept separate from the general population until medically cleared. Since COVID-19, the PDP has extended the quarantine period from 5 days to 14 days to assess for COVID-19 related symptoms based on the guidelines from the CDC and the Philadelphia Health Department.

Any inmate exhibiting symptoms or self-reporting exposure are removed from the standard intake quarantine area and housed separately at another facility on campus for presumed or possible confirmed cases.

Further, new admissions are separated into "cohorts" and cohorts are kept separate from each other to limit exposure if an infected inmate is admitted unknowingly.

Inmates in the intake quarantine area are issued masks when they must leave the housing area for medical services or official visits.

Staff assigned to intake quarantine area are issued personal protective equipment (gloves, masks).

The frequency of thorough sanitation of all spaces inside of the facilities and administrative offices has been increased, with housing units being cleaned continuously every three hours.

Sanitizing stations exist throughout all facilities and are refilled frequently. Sanitizing soap must be at least 60% alcohol.

PSA's and signage which demonstrate proper hand washing technique and social distancing are being shown on all housing units. A COVID-19 PSA FAQs is also being shown on PDP-TV. Posters promoting regular hand washing and social distancing have been mounted throughout all facilities.

Special housing units have been prepared should PDP need to separate infected inmates. Procedures are in place for immediate review of any suspected cases with the Philadelphia Department of Health disease control specialists.

What happens if a case of COVID-19 is suspected in an inmate?

All suspected cases will be reviewed with the PDP's Infectious Disease specialist and with Philadelphia Department of Public Health (PDPH) Disease control specialists. The medical intake screening process, in addition to including vigilant surveillance for virus symptoms, includes CDC-recommended questions to help identify inmates at particular risk of exposure prior to incarceration.

How are staff and inmates being protected from exposure to COVID-19?

The PDP has instituted routine symptom screening measures for COVID-19 at each point of entry into every facility.

Before entry, every employee/vendor/attorney/etc. will be screened at each point of entry, every time he/she enters a PDP facility. When entering a PDP facility, employees will be asked to tell medical personnel if they have a fever, dry cough or shortness of breath- the significant symptoms of COVID-19.

Medical personnel will also check each employee's temperature. No physical contact is needed to check temperatures. If an employee is symptomatic, they will be sent home and instructed to contact their health care provider immediately.

Attorneys will not be permitted entry if they are symptomatic. The Chief Defender will be notified to instruct their staff accordingly. Non-PDP City staff will not be permitted entry if they are symptomatic and will be referred to their respective Department Head.

Medical staff will be screening at each facility 24 hours a day, 7 days a week through this emergency.

Would the PDP communicate to friends and family if there was a disturbance during visiting suspension?

If a significant event inside an institution impacted current operations, the PDP would issue a press release, which is standard procedure.

How can I contact my loved one if I can't visit?

Since civilian visits have been canceled, we are now providing additional free phone call minutes for all inmates. You may also write to your loved one in care of the holding facility. The PDP does not have video call capability.

How will programing and services be affected by this crisis?

Official visits with attorneys will proceed as normal. Inmates will be provided with a mask for official visits, bail reviews, and any court related hearings.

Early bail reviews and related Court services are occurring as usual, except that no more than five inmates are in the designated area awaiting virtual court hearings at a given time, to ensure social distancing.

Bail services have not been interrupted.

PDP medical, psychological, social services, food and security services are being provided as usual.

Volunteer services and religious services have been suspended. PDP Chaplains of all denominations will be recording religious services to be broadcast on PDPTV to the inmate population and will continue providing religious counsel on a 1 to 1 basis.

If you have additional concerns, contact:

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