

Testimony

of

Bridget G. Brennan
Special Narcotics Prosecutor

Before

The New York City Council
Committees on the Justice System and Criminal Justice

COVID-19 in City Jails and Juvenile Detention Facilities

May 19th, 2020

OFFICE OF THE SPECIAL NARCOTICS PROSECUTOR

COVID-19 in City Jails and Juvenile Detention Facilities

I thank the New York City Council's Committee on the Justice System and Committee on Criminal Justice, under Chairpersons Rory Lancman and Keith Powers, for providing this opportunity to discuss the strategies, processes and programs the Office of Special Narcotics has used to reduce the population at City jails in response to the COVID-19 pandemic.

In the face of an unprecedented public health emergency in New York City (NYC), the Special Narcotics Prosecutor's Office (SNP) has joined the five District Attorneys' offices in working with the Mayor's Office of Criminal Justice, the defense bar and the courts to reduce the City's jail population and prevent the spread of COVID-19. These collaborative efforts have reduced the NYC jail population by 1,647 inmates as of May 16, 2020, which constitutes a 29 percent reduction in the prison population that existed on March 16, 2020. With a current population below 4,000 inmates, it has been almost 75 years since the New York City jails have housed so few people.

Compassionate release of prisoners who are at high risk of serious complications from the virus is a priority, so long as the release will not jeopardize public safety, and those who are released return to court. Due to criminal justice reforms, which eliminated bail or remand for the vast majority of narcotics offenses, relatively few individuals facing prosecution by our office were confined at the onset of the pandemic. Seventy-three (73) incarcerated defendants faced charges brought by our office at the start of the crisis in mid-March, most charged with Operating as a Major Trafficker, or weapons and assault charges.

We have worked closely with the Mayor's Office of Criminal Justice (MOCJ) to identify defendants ap-

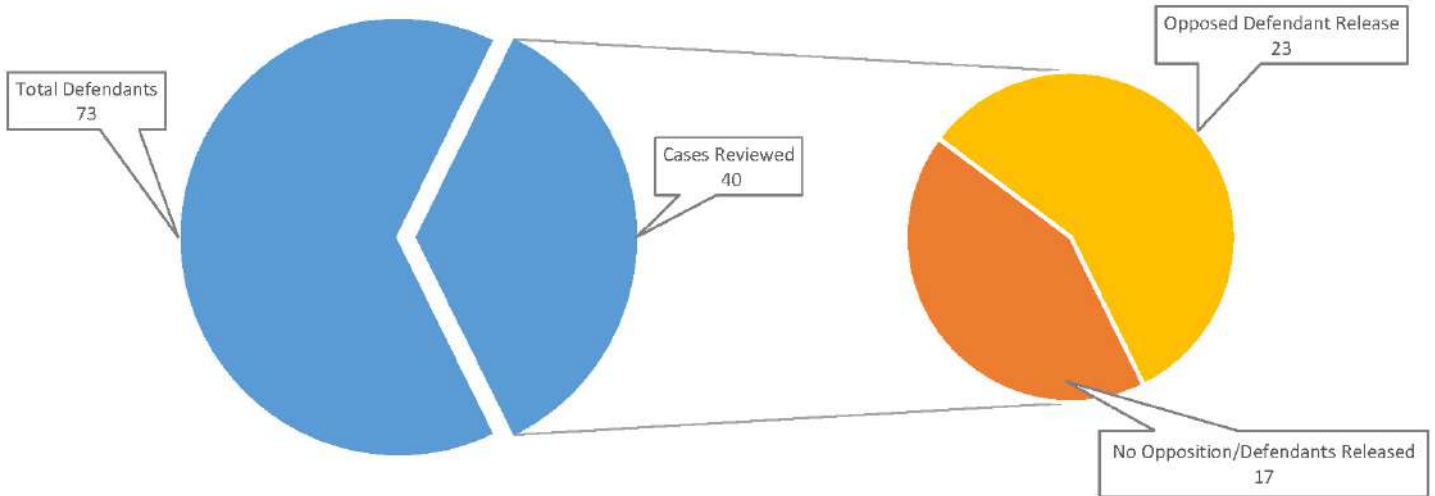
propriate for release. We continually track and update information on all incarcerated defendants, including information from reports or letters relevant to a defendant's heightened health risk. This system, in the form of a spreadsheet, is circulated among our Executive staff and used to initially evaluate requests for release. Each case is then reviewed by the individual Assistant District Attorney assigned to the matter, and by Bureau Chiefs. We are also able to see if defendants whose release we have agreed to are still incarcerated, and we then follow up with the Mayor's Office.

Over the past two months, 40 defendants have sought review of their incarceration status in our cases. These reviews were brought on in a number of ways, including by requests for review of vulnerable individuals by MOCJ, writs of habeas corpus, and individual requests and bail applications for release by individual defense counsel. In addition, recently, we were presented with a request for electronic monitoring.

Of these 40 defendants, approximately 42 percent (17) have been released with our consent as part of our review process. We have opposed applications for bail or writs of habeas corpus as to 23 defendants (58 percent). In these cases, our opposition was based on concerns for public safety or flight risks posed by a prisoner. None of the applications for release which we have opposed have been judicially granted. We have also closely analyzed information provided in individual cases and publicly available data to assess the risk to the prisoner in custody.

To demonstrate how we factor in these considerations, I will review an application pending for a defendant, who is indicted on the crimes of Attempted

SNP Applications for Release: COVID-19 Defendants on Bail or Remand Status

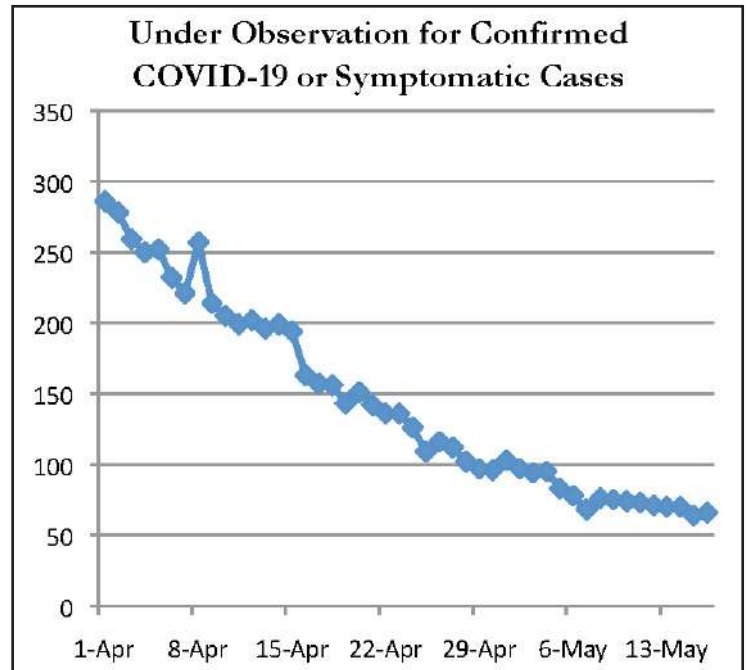


Assault in the First Degree, Reckless Endangerment in the Second Degree, Criminal Possession of a Weapon in the Second Degree (10 counts), Conspiracy and other related charges. Many of these charges stem from his alleged participation in two shootings captured on video surveillance. In telephone calls intercepted on a wiretap, the defendant and his family members discussed the purchase of bulletproof vests which would be sewn into hooded-sweatshirts. Multiple firearms were recovered during the investigations. Shortly before these incidents, the defendant was released from federal prison after having served a 20-year sentence following a conviction for Conspiracy to Distribute Heroin. Under the current charges, as a predicate felon he faces up to 15 years' incarceration if convicted on a Class C violent felony with which he is charged. In this application, we have argued against release for public safety reasons, but only after a review of available health records indicated that the health care received while incarcerated protected this defendant's well-being, and that he may have had better access to appropriate care while incarcerated, than he would have if he were at liberty.

In his application, the defendant says that his preexisting health conditions escalate risk of serious complications from the virus and support his request for release. We evaluate his claims, using reliable statistical data, and compare the health risks related to COVID-19 in City jails to the risks faced by an ordinary New York City citizen. Our review of his medical records indicates that this particular defendant may have had better access to virus testing and follow up care than available to the ordinary citizen. He received two COVID-19 tests at a time when most of New York was unable to obtain a test. Because the virus was identified through early testing, he immediately received supportive care and was transferred to a unit dedicated to inmates exposed to COVID-19 who become ill. This suggests a level of care that the severely strained city health care system could not have provided during that same period of time. There is no reason to believe he will not continue to receive appropriate care while incarcerated. We balance all of these relevant factors in determining whether we should consent to release.

Our ability to respond is enhanced by public reporting of relevant information by the Department of Corrections (DOC). The DOC reports daily on the number of inmates who are under observation, either because they are symptomatic or because they have tested positive for COVID-19, and that number has steadily declined from April 1 to May 16, 2020, from 286 to 66 inmates—a 76% reduction. The number of deaths in jails stands at 3 as of May 16, which translates to a 0.82% Case Fatality Rate compared to the New York City Case Fatality Rate, which is 8.34%, likely reflecting the enormous strain on the city’s health care system during this epidemic.

One concern we do have regarding those who have been released is the inability to supervise them in a meaningful way while we are in the grips of this pandemic. Our concern is best exemplified by a defendant who was released to the community by the DOC Commissioner under Article 6-A, which pertains to convicted prisoners who are granted early release with the proviso that they must seek employment and obey the law. The released prisoner was serving a City sentence with a release date of August 30, 2020 for selling drugs. While we consented to the majority of Article 6-A releases, this was one of the few where we made an objection because this



Source: New York City Department of Correction

Correctional Health Services (CHS) and Department of Correction (DOC) Updates to the Board of Correction (BOC)	
As of 7:00 am on Saturday, May 16, 2020	
Incarcerated Patients (Inmates)	
Number of patients under observation by CHS (confirmed COVID-19 patients and symptomatic patients in DOC facilities, excludes hospitalized patients)	66
Number of <u>currently</u> incarcerated patients with confirmed COVID-19 This metric includes hospitalized patients. A proportion of currently incarcerated patients with confirmed COVID-19 are also represented in the 'under observation' metric above.	364
Number of deaths while in custody (in hospital)	3

Source: New York City Board of Correction Daily Covid-19 Update, Saturday, May 16, 2020

individual had three prior felony convictions, two of which were for violent crimes. We were concerned that he was unlikely to obey the law and conditions of release. Almost immediately after his release, my office was contacted by a lawyer for the landlord of the building who said the defendant immediately resumed drug dealing from his home while still wearing corrections clothes upon release, and a steady stream of strangers entered the building to purchase drugs which put other residents at great risk.

It became apparent that there was no meaningful mechanism in place for supervising or sanctioning the defendant, besides conducting an NYPD investigation, and making a new arrest. This is what we were told when we passed complaints along to officials. Under the present circumstances, the police cannot use their limited resources to address this. However, the lawyer pointed out that neighbors should not be subject to increased risk of infection, not to mention the other risks posed by this early release. I am in complete agreement that we want to get away from a system that incarcerates people for low level nonviolent offenses, but instead of arrest and incarceration, we must have an effective means of protecting the public. In this instance, it was clear that neighbors felt their safety was compromised solely to benefit the released prisoner, who immediately flouted the law.

It does not appear that the proposal by the Committee on Criminal Justice to create a local conditional release commission is designed to address these concerns. My understanding is that this commission would not take the place of the DOC Commissioner's authority to release sentenced inmates, but rather add another entity tasked with performing the same or similar functions. This duplicative structure opens up the possibility of conflicting decisions with respect to individual inmates. Such a commission has previously existed in New York City and developed a tarnished record involving allegations of political favoritism and a lack of transparency. It was ultimately eliminated. It is not clear how the proposed commission would avoid these pitfalls. It

is also not clear how it would improve upon the system currently in place, or how it would interface with other Mayoral agencies on critical services such as supervised release and other support necessary to make release possible.

We need an effective system of supervision and accountability, so that our citizens will believe that their voices are heard and their interests are protected and will support our continued effort to balance reducing incarceration levels with maintaining public safety.

We are committed to continuing to do our part in limiting the spread of COVID-19 through the City's jails, while at the same time fulfilling our obligation to provide a sense of safety to the people of New York City. Thank you for holding this hearing to focus attention on this critical issue.