STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK,

-against- DECISION AND ORDER
INDICTM ENT No.: 14-6340
Index No.: DA 263-00

ELLIOT HORSEY,

Defendant.

APPEARANCES

For the People

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For the Defendant

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LYNCH, J. Defendant was found guilty by jury verdict of Robbery in the First Degree, in violation of Penal Law sections160.15 (2), a Class B violent felony offense. On September 26, 2001, Defendant was sentenced (Hon. Lamont, J.) as a second felony offender, to a 25-year determinate term of imprisonment, and 5 years post release supervision. The sentence was upheld on appeal (304 A.D. 2d 852 [3d Dept. 2003]).

Defendant moved for an Order pursuant to CPL § 440.20 (1) and (4) to vacate his sentence, and to be resentenced to time-served followed by post release supervision[1].

The crux of defendant's argument is that based on the confluence of his serious health issues, his imprisonment for over 20 years, and the actual impact of COVID-19 on inmates at the subject correctional facility, the 25-year sentence is unconstitutional as "cruel and unusual punishment" (NY Const, art I, § 5; US Const 8th Amend).

By Affirmation in Response dated June 4, 2019, the People consent to the requested relief (see CPL §430.10). Notwithstanding consent, a full analysis is necessitated by the constitutional issue at hand (see People v. Broadie, 37 N.Y. 2d 100, 110 [1975], where the Court held, "while the courts possess the power to strike down punishments as violative of constitutional limitations, the power must be exercised with **especial restraint**"). (emphasis added)

STATEMENT OF FACTS

Defendant is an inmate at the Fishkill Correctional Facility (hereinafter "FCF"). He is a 49-year-old African American Male who suffers from hypertension[2]. He has been incarcerated for 20 years and is otherwise scheduled to go before the parole board in October 2021. Defendant does not have any significant disciplinary history while incarcerated. He has had direct experience with the COVID-19 pandemic due to the death of two (2) inmates residing within his 55-member housing unit. The 55 inmates share 5 toilets and 5 showers.

FCF has restricted visitors from coming to the facility. Signage warning about the dangers of COVID-19 were placed in common areas. While masks are provided to inmates,

1 Oral Argument was held via Skype on June 4, 2020.
2 Dr. Brie Williams 'Affidavit highlights the COVID-19 risk to inmates with underlying health conditions (see Williams Aff. ¶9).

wearing same is not mandatory. Defendant had a single mask to use from April 8, 2020 to May 7, 2020. Social distancing is not being enforced in the shower area, recreation yard, nor the dining hall.

As of May 12, 2020, FCF reported 89 positive COVID-19 cases, with 5 deaths (see Gray Aff. ¶ 14). Clearly, social distancing has not been properly implemented at FCF, evidenced by the record demonstration that FCF has 17% of all confirmed COVID-19 cases of all New York State correctional facilities. Protective gear has been marginal at best. In fine, Defendant is at high risk to contract COVID-19.

STATEMENT OF LAW

Initially, Defendant has properly raised the constitutional argument more fully discussed below by means of CPL 440.20 (c.f. The People of the State of New York ex rel. Nora Carroll, on Behalf of Jalil Muntaquim, Also Known as Anthony Bottom v. William Keyser, as Superintendent of Sullivan Correctional Facility, et al., __A.D. 3d __ [3d Dept. 6/4/2020]).

CPL 440.20 (1) and (4) provide, inter alia:

> 1. At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise **invalid as a matter of law**.
>
> **4.** An order setting aside a sentence pursuant to this section does not affect the validity or status of the underlying conviction, and after entering such an order the court must resentence the defendant in accordance with the law. (emphasis added)

Here, the issue distills to whether the sentence constitutes cruel and unusual punishment, and thus illegally imposed or invalid as a matter of law (see People v. Diaz, 179 Misc. 2d 946, 956 [N.Y. Sup. Ct. 1999], where the Court held the sentence was unconstitutional, stating, "CPL

440.20 authorizes setting aside a sentence which is unauthorized, illegally imposed, or otherwise invalid according to law. Accordingly, a constitutional violation under the aegis of "cruel and unusual punishment" would constitute an illegally imposed sentence").

Penal Law §1.05 provides, in relevant part,

> "The general purposes of the provisions of this chapter are:
>
> 5. To provide an appropriate public response to particular offenses, including consideration of the consequences of the offense for the victim, including victim's family, and the community; and
>
> 6. To insure the public safety by preventing the commission of offenses through the deterrent influence of the **sentences authorized**, the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society, and their confinement when required in the interests of public protection." (emphasis added)

There are four (4) recognized, and competing, factors which are relevant to sentencing: retribution, deterrence, isolation for the protection of society, and rehabilitation (People v. Farrar, 52 N.Y. 2d 302, 305-306, where the Court recognized, "the determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime charged, the particular circumstances of **the individual before the court** and the purpose of a penal sanction, i.e. societal protection, rehabilitation and deterrence" (emphasis added); People v. Suitte, 90 A.D. 2d 80, 83 [2d Dept. 1982]; People v. Strong, 152 A.D. 3d 1076, 1077 [2017] (Garry, J., dissenting).

In People v. Jones, 39 N.Y.2d 694, 697 [1976], the Court held,

> "Regardless of its severity, a sentence of imprisonment which is within the limits of a valid statute ordinarily is not a cruel and

> unusual punishment in the constitutional sense. There were present here no **exceptional circumstances** which would justify a variance from this general rule." (emphasis added)

Such rule begs the question of whether COVID-19 is an "exceptional circumstance" which renders the sentence cruel and unusual punishment.

The heightened threat of the COVID-19 virus to incarcerated individuals, standing alone, is an insufficient basis to sustain the requested relief (see People ex rel. Squirrell v. Langley, 2020 Misc. LEXIS 2211 [5/25/20]; People ex rel. Gregor v. Reynolds, 2020 N.Y. LEXIS 1467 [4/17/20]. The COVID-19 impact, however, must not be considered in a vacuum. Here, Defendant has presented evidence that COVID-19 inmate infections at the FCF appear to be out of control, as evidenced by multiple inmate deaths[3]. In context of defendant's 20-year period of incarceration to date and underlying health condition, the record evidences defendant is at a heighted risk (see United States v. Sims, 2020 U.S. Dist. LEXIS 93313 [SDNY 5/28/2020]; United States v. Harris, 2020 U.S. Dist. LEXIS 85227 [SDNY 4/8/2020]; United States v. Hernandez, 2020 U.S. Dist. LEXIS 56506 [SDNY 3/30/2020]. The question is whether such risk renders the sentence cruel and unusual punishment.

The determination of whether the sentence constitutes cruel and unusual punishment must be measured by the present conditions existing at FCF[4]. In Estelle v. Gamble, 429 U.S. 97, 104 [1976], the Court held, inter alia:

> "...the [Eighth] Amendment proscribes more than physically

3 Photos of the makeshift graveyard at the facility symbolize the devastating impact of COVID-19.

4 In The People of the State of New York ex rel. Nora Carroll, on Behalf of Jalil Muntaquim, Also Known as Anthony Bottom v. William Keyser, as Superintendant of Sullivan Correctional Facility, et al., supra., the Court issued stunning dicta, to wit: "It **is doubtful** that a sentence proper at the time of imposition can become grossly disproportionate as a result of changed prison or inmate conditions" (emphasis added). This Court will follow the rule established in Estelle v. Gamble, 429 U.S. 97, and its progeny, that Eighth Amendment considerations are not static, and must be considered in context of present conditions.

> barbarous punishments. The Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency..., against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with the **evolving standards** of decency that mark the **progress of a maturing society**, or which involve the unnecessary and wanton infliction of pain. **These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration.** An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical torture or a lingering death, the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the commonlaw view that it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself. **We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment"** (citations and internal quotations omitted; emphasis added)

; see Bucklew v. Precythe, 139 S. Ct. 1112, 1144 [2019], where the Court held, " we have repeatedly held that the Eighth Amendment is not a static prohibition that proscribes the same things that it proscribed in the 18th century. Rather, it forbids punishments that would be considered cruel and unusual **today**"; Brown v. Plata, 563 U.S. 493, 567 [2011], the Court held, The "deliberate indifference" needed to establish an Eighth Amendment violation must be examined "in light of the prison authorities' **current** attitudes and conduct," which means "their attitudes and **conduct at the time suit is brought** and persisting thereafter"; Hellis v. McKinney, 509 U.S. 25, 33 [1993], where the Court held, "Whether one characterizes the treatment received

by [the prisoner] as inhuman conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the "deliberate indifference" standard articulated in *Estelle*... "That the Eighth Amendment protects against **future harm** to inmates is not a novel proposition. The Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is reasonable safety. It is cruel and un-usual punishment to hold convicted criminals in **unsafe conditions"** (emphasis added); see also, People v. Broadie, 37 N.Y. 2d 100, 124-125 (appendix), which provides: "The courts have recognized that the cruel and unusual punishments clause is "progressive, and not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice". This evolutionary character was repeated in 1958...The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

In Farmer v. Brennan, 511 U.S. 825, 836 [19940, the Court, noting it had not defined the term "deliberate indifference" in Estelle, defined the term as follows:

> "It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of **recklessly** disregarding that risk." (emphasis added)

In Benjamin v. Pillai, 794 Fed. Appx. 8, 11 (2d. Cir. 2019), the Court described the Eighth Amendment violation standard as follows:

> "To establish an Eighth Amendment violation based on inadequate medical care, a prisoner must satisfy objective and subjective components. We apply a two-part inquiry to determine whether an alleged deprivation is objectively serious. First, with respect to the objective component, a prisoner must demonstrate that (1) he was actually deprived of adequate medical care, and (2) the inadequacy in medical care [wa]s sufficiently serious. Second, to satisfy the subjective component, a prisoner must show deliberate

> indifference, ***i.e.*, that the charged official possessed a state of mind that is the equivalent of criminal recklessness**" (internal citations and quotations omitted)

; see The People of the State of New York ex rel. Nora Carroll, on Behalf of Jalil Muntaquim, Also Known as Anthony Bottom v. William Keyser, as Superintendent of Sullivan Correctional Facility, et al., supra.). In Abreu v. Lipka, 778 Fed. Appx. 28, 31 [2d Cir.2019], the court held, inter alia: **Deliberate indifference requires allegations of the defendants' subjective state of mind**: that the prison official "kn[ew] of and disregard[ed] an excessive risk to inmate health or safety. (internal citations and quotations omitted) (emphasis added)

Penal Law §15.05 (3) defines "recklessly", inter alia, as follows:

> "Recklessly. A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

Here, it is manifest that FCF is aware of the COVID-19 pandemic. The issue is whether FCF, by its limited action or inaction, disregarded a substantial and unjustifiable risk that Defendant would contract COVID-19, and whether its actions or inaction constitutes a gross deviation from the standard of conduct that a reasonable person would do considering COVID-19.

The devastating impact that COVID-19 has already had on FCF inmates, including defendant, is an extremely serious event. FCF has provided some masks and sanitizer on a limited basis, as well as provided some signage warning of the dangers of COVID-19. It is manifest that such efforts are di minimis in relation to the risk. This is demonstrated by the fact

that as of May 12, 2020, FCF reported 89 positive COVID-19 cases, with 5 deaths.

In People ex rel. Gregor v. Reynolds, the Court denied the 26 year old prisoner's release under the Eighth Amendment because he did not "have any particular medical or physical condition which renders him more susceptible than other members of the general jail population to becoming infected by the COVID-19 virus". In so doing, however, the Court recognized the facility's failure to meet CDC guidelines to deduce the risk of COVID-19.

> "The Sheriff has not taken, however, the most important, scientifically-based, **best practices recommended by the United States Center for Disease Control (CDC) to reduce the risk that the jail will be infiltrated by the virus and contracted by the inmates and staff, namely, social distancing.** The Sheriff is not requiring that all individuals within the jail — including **inmates and staff**, and regardless of whether those individuals are exhibiting symptoms of the COVID-19 virus — **observe social distancing**. Instead, inmates and staff are left to decide on their own whether to practice social distancing. Social distancing lowers the risk of infection by decreasing the chance that small liquid droplets from the cough or sneeze of an infected individual will be inhaled by others or land on their hands, eyes, nose or mouth. ***In addition to not enforcing social distancing, other CDC-recommended*** **measures** not being instituted at the jail include: **staggering** meal and recreation times so as to limit the number of inmates present for those activities at any one time to insure social distancing; **limiting** meal seating to a single side of each table while also removing every other chair; providing **no-touch receptacles** for trash; **periodically during the day providing hand sanitizer to inmates and staff** rather than furnishing it on request; **providing consistent reminders** to inmates and staff about best hygiene practices for preventing infection and transmission. Additionally, pursuant to New York State Executive Order 202.17, all individuals who can so medically tolerate must cover their nose with a **face mask** or other cloth covering when in a public setting commencing at 8:00 p.m. on April 17, 2020. ...Also, missing from the virus precautions currently taken at the jail is the **verbal screening of staff for off-duty conduct** before entering the facility to insure that they have not engaged in behaviors which may have exposed them to contracting the virus. ...**Jails are now a known hot-bed of infection**." (emphasis

added)

Here, it is undisputed that FCF failed to meet CDC guidelines to reduce the COVID-19 risk. Unlike the Petitioner in People ex rel. Gregor v. Reynolds, Defendant, herein, does have an underlying medical condition which makes him a high-risk candidate, more susceptible to COVID-19 than the general population. By its lackluster efforts to account for COVID-19 at its facility, FCF has acted recklessly, manifesting its deliberate indifference to Defendant's medical needs and safety (c.f. The People of the State of New York ex rel. Nora Carroll, on Behalf of Jalil Muntaquim, Also Known as Anthony Bottom v. William Keyser, as Superintendent of Sullivan Correctional Facility, et al., where the Court recognized the facility's CDC compliance; c.f. People v. Brann, 2020 N.Y. App. Div. LEXIS 2873 [2d Dept. 5/13/20], where Court recognized the inmate contracted COVID-19 but failed to present evidence that prison officials were "deliberately indifferent" to his needs).

In fine, the current direct impact of COVID-19 on this high-risk Defendant renders the sentence "grossly disproportionate" to the crime he was convicted of, and unconstitutional as cruel and unusual punishment (NY Const, art I, § 5; US Const 8th Amend; c.f. People v. Broadie, 37 N.Y.2d 100 [1975]).

Accordingly, the Defendant's motion to vacate his sentence is Granted. Defendant is hereby resentenced to time-served effective immediately, together with a 5-year period of post release supervision.

This memorandum constitutes both the decision and order of the Court.

Dated: Albany, New York
June 5, 2020

PETER A. LYNCH, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause with Supporting Affirmation of David Gray, Esq. dated May 26, 2020;
2. Affidavit of Dr. Brie Williams dated March 27, 2020;
3. Affidavit of Elliot Horsey dated May 18, 2020;
4. Affirmation in Response of Jonathan Catania and Christopher Horn, Assistant District Attorneys dated June 4, 2020 (consenting to the requested relief).