

**SUPREME COURT MINUTES
MONDAY, FEBRUARY 1, 2021
SAN FRANCISCO, CALIFORNIA**

S040704**PEOPLE v. JOHNSEN (BRIAN
DAVID)**

Opinion filed: Judgment affirmed in full
Majority Opinion by Liu, J.

-- joined by Cantil-Sakauye, C. J., Corrigan, Cuéllar, Kruger, Groban, and Ikola*, JJ.

* Associate Justice of the Court of Appeal, Fourth Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

S170280**PEOPLE v. BAKER (PAUL
WESLEY)**

Opinion filed: Judgment affirmed as modified

The superior court is directed to amend the abstract of judgment to reflect the basis for defendant's convictions on counts 7, 10, and 16; and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

Majority Opinion by Cantil-Sakauye, C. J.

-- joined by Corrigan, Liu, Cuéllar, Kruger, Groban, and Hull*, JJ.

Concurring Opinion by Liu, J.

* Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

S265912**SHAH (JAY) ON H.C.**

The petition for writ of habeas corpus is denied.

This denial is without prejudice to petitioner filing in the Solano County Superior Court a petition for writ of habeas corpus challenging his current conditions of confinement. This court recognizes that the reported number of active COVID-19 cases at the California Medical Facility has increased substantially since December 4, 2020, when the instant petition for writ of habeas corpus was filed with this court, including nearly 700 cases in December and January, and 8 inmate deaths in January. (Evid. Code, § 452, subs. (c), (h); Cal. Dept. of Corrections and Rehabilitation, Population COVID-19 Tracking (Feb. 1, 2021)

<<https://www.cdcr.ca.gov/covid19/population-status-tracking/>> [as of Feb. 1, 2021].)

If such a petition is filed, the superior court is hereby reminded that, as set forth in prior orders of this court, it is to engage all available procedural tools to ensure the timely and fair resolution of

the issues that may be presented. (See *Marshall v. Superior Court*, S263043, Supreme Ct. Mins., July 15, 2020, p. 908; *National Association of Criminal Defense Lawyers v. Newsom*, S261827, Supreme Ct. Mins., May 4, 2020, pp. 592-593.)

Liu, Cuéllar, and Jenkins, JJ., are of the opinion an order to show cause should be issued.

Dissenting Statement by Justice Liu

I join Justice Cuéllar’s dissenting statement in full. His statement persuasively explains why the confluence of (1) petitioner Jay Shah’s medical vulnerabilities, (2) inadequate precautionary measures by prison officials at the California Medical Facility, and (3) surging COVID-19 case counts warrants the issuance of an order to show cause.

I continue to adhere to the views expressed in my dissenting statements in California Attorneys for *Criminal Justice v. Newsom*, S261829, Supreme Court Minutes, May 13, 2020, pages 632-639 (California Attorneys), and *Marshall v. Superior Court*, S263043, Supreme Court Minutes, July 15, 2020, pages 909-914 (*Marshall*), underscoring the need to address conditions in our jails and prisons, and urging this court’s intervention. I believed then, as I believe now, that without this court’s involvement, the troubling allegations in these petitions will not be addressed with a level of urgency befitting the current crisis. The spread of the virus throughout our prisons has been entirely foreseeable; public health authorities, among others, have sounded the warning from the earliest weeks of the pandemic. (See, e.g., U.S. Centers for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (Mar. 27, 2020); Pohl, *California jails, prisons on alert for coronavirus*, Sac. Bee (Mar. 6, 2020); Techkmedyan & Hamilton, *Coronavirus; At L.A. jails, virus fears mount*, L.A. Times (Mar. 30, 2020) p. A1; Winton, *Prison outbreak*, L.A. Times (Apr. 26, 2020) p. B1; Fagine & Cassidy, *Sitting Ducks: Outbreaks hit prisons*, S.F. Chronicle (Apr. 15, 2020) p. A7.) During this winter, case counts have surged, and the state has repeatedly set single-day records for deaths. The petition before us underscores the dire predicament that the pandemic poses for incarcerated persons, correctional officials, and surrounding communities.

We have been here before. On May 4, 2020, we denied a petition brought on behalf of individuals confined in county jails and juvenile facilities “rais[ing] urgent questions concerning the responsibility of state authorities to ensure the health and safety of individuals confined in county jails and juvenile facilities in light of the ongoing COVID-19 pandemic.” (*National Association of Criminal Defense Lawyers v. Newsom*, S261827, Supreme Ct. Mins., May 4, 2020, pp. 591-593.) We said “[t]he issues raised in the petition call for prompt attention in a manner that considers the diversity of local conditions throughout the state.” (*Id.* p. 592.) We denied the petition for writ of mandate “without prejudice to the institution of actions raising similar claims against these respondents or other officials or entities in the superior courts of appropriate counties.” (*Ibid.*) We urged prompt resolution of any such petition and added that, “[g]iven the dynamic nature of the pandemic, the denial of the petition is without prejudice to the filing of a new petition in this court raising similar claims if circumstances warrant.” (*Id.* at p. 593.)

Less than two weeks later, we declined to intervene in a lawsuit seeking to stop transfers of California inmates to United States Immigration and Customs Enforcement (ICE) detention centers, despite more than 1,900 pages of exhibits and declarations detailing ICE’s “failures in providing basic protections against COVID-19 at its five detention facilities in California.” (*California Attorneys, supra*, S261829, Supreme Ct. Mins., May 13, 2020, p. 632 (dis. stmt. of Liu, J.) (*California Attorneys*)). I observed at the time that “[t]he warning signs could not be more clear” and urged the court to “act with an urgency that befits the current crisis” by appointing a special master to resolve the factual issues underlying the petition. (*Id.* at p. 637, 639 (dis. stmt. of Liu, J.)). Since the court’s decision, ICE detention facilities in California have experienced serious coronavirus outbreaks. (See, e.g., Castillo, *As coronavirus cases surge again, ICE leaders push to detain more immigrants*, L.A. Times (Nov. 23, 2020).)

On July 15, 2020, we again declined to intervene when Sacramento County jail inmates sought relief in this court after the superior court did not act for several weeks on a petition alleging that jail officials had taken inadequate steps to protect inmates from COVID-19. (*Marshall, supra*, S263043, Supreme Ct. Mins., July 15, 2020, pp. 907-914.) These petitioners submitted 54 declarations detailing unsafe conditions in Sacramento County jails and noting the spread of the virus in San Quentin State Prison and the Fresno, Monterey, and Los Angeles County jails. Again, I urged the court to appoint a special master to determine current conditions and provide prompt adjudication, observing that “petitioners have come to this court on the reasonable expectation that the buck stops with us.” (*Id.* at p. 914 (dis. stmt. of Liu, J.)).

In recent weeks, the court has twice ordered California’s Department of Corrections and Rehabilitation to show cause, returnable before the relevant superior court, why relief should not be granted to an inmate alleging inadequate precautions at a particular facility. (See *In re Belyew*, S265262, Supreme Ct. Mins., Jan. 12, 2021, p. 24; *In re Brown*, S265648, Supreme Ct. Mins., Jan. 15, 2021, p. 61.) In other recent cases, we have denied petitions for writ of habeas corpus without prejudice to the petitioners filing a new petition in the relevant superior court. (See *In re Walker*, S265521, Supreme Ct. Mins., Jan. 18, 2021, p. 63; *In re Patterson*, S265679, Supreme Ct. Mins., Jan. 21, 2021, p. 87.) In these latter cases, the number of infections at the relevant facility had substantially increased during the time the petition was pending in our court. (See, e.g., *Patterson*, at p. 87 [“This court recognizes that the reported number of active COVID-19 cases at the R.J. Donovan Correctional Facility has increased substantially since November 20, 2020, when the instant petition for writ of habeas corpus was filed with this court, including nearly 1,000 cases and 15 deaths in December and January.”].)

This is a challenging time for all Californians, yet it remains true “that the burdens of the pandemic do not fall equally upon all.” (*California Attorneys, supra*, S261829, Supreme Ct. Mins., May 13, 2020, p. 639 (dis. stmt. of Liu, J.)). What was true months ago remains true today: “Determining what must be done to protect inmates will also benefit correctional staff, sheriffs’ deputies, court staff, jurors, witnesses, and all other people who may come into the same space as inmates. Reducing the spread of COVID-19 will ameliorate the other challenges facing our courts. On the other hand, if COVID-19 spreads in the jails, the coming and going of

correctional staff as well as the treatment of inmates in local hospitals will create new opportunities for transmission. This will put the broader community at risk, which in turn will make all the other problems worse.” (Marshall, *supra*, S263043, Supreme Ct. Mins., July 15, 2020, p. 910 (dis. stmt. of Liu, J.)) In San Quentin, Folsom, and other facilities, we have seen the pandemic take its toll (see Cassidy & Fagone, *Virus Spreads at San Quentin*, S.F. Chronicle (June 26, 2020) p. A1; McGough, *Folsom Prison COVID-19 cases double, now California's largest active inmate outbreak*, Sac. Bee (Aug. 19, 2020)), and the current petition indicates that the California Medical Facility has experienced its own outbreak. We have the authority, capacity, and responsibility to act.

The judiciary is foremost among the institutions constitutionally entrusted to stand sentinel over the rights of our society’s most vulnerable and least valued members. We should not abdicate this role. I would issue an order to show cause and proceed expeditiously toward full and fair adjudication of this matter.

LIU, J.

Dissenting Statement by Justice Cuéllar

Petitioner Jay Shah is incarcerated at the California Medical Facility (CMF) in Vacaville, California. He alleges that California’s Department of Corrections and Rehabilitation (CDCR) has been deliberately indifferent to his medical needs, in violation of the Eighth Amendment to the United States Constitution. The crux of Mr. Shah’s claim is that, given his particular medical vulnerabilities, CDCR has failed to implement appropriate measures at CMF to protect his health from the spread of COVID-19.

In this dark pandemic winter, California’s prison officials face daunting challenges in meeting their constitutional obligation to safeguard the inmates in their custody from significant dangers. (See *Helling v. McKinney* (1993) 509 U.S. 25, 33 (*Helling*); *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1118-1119, 1123.) The burdens faced by prison authorities when they shoulder that responsibility - along with the changing pandemic conditions for inmates and the public and the difficulties inherent in adjudicating cases about complex institutions - make this case a particularly difficult one. What this petition nonetheless states is a *prima facie* case for relief. Because the court refused to issue an Order to Show Cause (OSC), I dissent with respect.

A prisoner alleging an Eighth Amendment violation must show two things: (1) an objective component, “the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm,” and (2) a subjective component, “a prison official must have a ‘sufficiently culpable state of mind,’ ” namely, in a case such as this, “ ‘deliberate indifference’ to inmate health or safety.” (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 (*Farmer*)). No one reasonably disputes that COVID-19 represents a substantial risk of serious harm to inmates. The crucial question here - or anywhere petitioners raise claims of unconstitutional conditions of confinement in light of COVID-19 - is whether prison officials have been deliberately indifferent. The familiar

inquiry is whether CDCR is “disregard[ing] that risk” as evidenced “by failing to take reasonable measures to abate it.” (*Id.* at p. 847.) Officials may not “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering.” (*Helling, supra*, 509 U.S. at p. 33.)

What we’ve concluded in cases like this one is that three circumstances together raise a strong enough possibility that prison officials have been deliberately indifferent such that we should at least order prison officials to respond to the allegations. The first is that the petitioner “alleges that she suffers from a particularly serious medical condition that would put her at heightened risk were she to contract COVID-19.” (*In re Belyew*, S265262, Supreme Ct. Mins., Jan. 12, 2021, p. 24.) The second is that the petitioner “alleges that respondent is taking insufficient precautions to protect inmates from COVID-19.” (*Ibid.*) And the third is that, taking judicial notice of the CDCR's own COVID-19 data, the facility at which the petitioner is incarcerated has experienced a “recent surge in active cases of COVID-19.” (*Ibid.*; see also *In re Brown*, S265648, Supreme Ct. Mins., Jan. 15, 2021, p. 61 (*Brown*).)

These three factors are interdependent. An individual prisoner’s more acute medical vulnerability to COVID-19, along with a higher recent number of active COVID-19 cases at the facility, would ordinarily tend to heighten CDCR’s responsibility under the Eighth Amendment to take “reasonable measures” protecting that prisoner. (*Farmer, supra*, 511 U.S. at p. 847.) No one should be blind to the challenges prison officials face administering facilities housing individuals with a vast range of different conditions, nor should the Eighth Amendment be interpreted to bar authorities from making certain rules or policies that apply broadly even to some individuals with different conditions. That said, what may be reasonable precautions to protect a facility as a whole may not be enough to satisfy the Eighth Amendment with respect to individual prisoners who have particular medical vulnerabilities, especially in times of high case numbers. (Cf. *Hinojosa v. Livingston* (5th Cir. 2015) 807 F.3d 657, 666-667; *Alvarado v. Litscher* (7th Cir. 2001) 267 F.3d 648, 652-653.) Allegations that CDCR is not taking effective measures protecting a particularly vulnerable prisoner from a particularly serious medical threat support an inference of deliberate indifference at this threshold stage. (See *Ball v. LeBlanc* (5th Cir. 2015) 792 F.3d 584, 593-594; *Board v. Farnham* (7th Cir. 2005) 394 F.3d 469, 485-487; see also *Darrah v. Krisher* (6th Cir. 2017) 865 F.3d 361, 369; *Benjamin v. Fraser* (2d Cir. 2003) 343 F.3d 35, 51-52; *McElligott v. Foley* (11th Cir. 1999) 182 F.3d 1248, 1255.)

Mr. Shah’s allegations could have been clearer and more detailed. But he’s presented sufficiently specific and relevant allegations to state a prima facie case for relief requiring an OSC under the three criteria relevant to our decisions in cases like *Belyew* and *Brown*. On the first factor, Mr. Shah alleges that he has a number of health issues, including type-2 diabetes, cerebral palsy, and hypertension, that place him at serious risk were he to contract COVID-19. The Centers for Disease Control and Prevention recognize that these conditions increase the risk of bad outcomes in COVID-19 patients. (Centers for Disease Control and Prevention, COVID-19: People at Increased Risk <<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>> [as of Feb. 1, 2021].) There is no question Mr. Shah satisfies this criterion.

The second factor turns on whether a petition, here Mr. Shah's, makes specific allegations that CDCR has failed to take appropriate precautionary measures to prevent the petitioner from becoming infected with COVID-19. It does. He alleges that CDCR has prevented adequate social distancing, because it has moved him from a single cell to a dormitory setting. He specifically notes that inmates are forced to touch and share common objects. Additionally, Mr. Shah alleges that CMF has inadequate ventilation because it was built more than 60 years ago. He also alleges that the bathrooms are in a state of disrepair and are unsanitary and covered in fungus and mold - allegations we can reasonably infer as implicating whether CDCR is adequately cleaning CMF to safeguard against COVID-19 transmission. Although I find these allegations plentiful, to the extent others may disagree, I would highlight that where the facts pertaining to the range of possible precautionary measures are peculiarly within the knowledge of the defendant, justice demands that we readily interpret a petitioner's adequate pleading of the remaining elements as stating a prima facie case. (See *People v. Duvall* (1995) 9 Cal.4th 464, 485 (*Duvall*) ["where access to critical information is limited or denied to one party, [or] where it is unreasonable to expect a party to obtain information at the pleading stage . . . the general rule requiring the pleading of facts *should not be enforced in such a draconian fashion so as to defeat the ends of justice*" (italics added)].)

The third factor makes it important for us to assess whether the detention facility in question - in this case, CMF - is in the midst of an outbreak. It is. On December 11, 2020, when the government filed its informal response, CMF had six active cases of COVID-19. (See CDCR, Population COVID-19 Tracking (Institution View) <<https://www.cdcr.ca.gov/covid19/population-status-tracking/>> [as of Feb. 1, 2021].) As of December 17, when petitioner filed his reply, CMF had 114 active cases. (*Ibid.*) And as of December 31, that number jumped to 352 active cases. (*Ibid.*) As of today, however, 31 inmates still have confirmed active case, 19 of those new in the last 14 days. (*Ibid.*) Eight inmates have died in the past four weeks. (See CDCR, COVID-19 Updates <<https://www.cdcr.ca.gov/covid19/updates/>> [as of Feb. 1, 2021].) The surging outbreak at CMF warranted our intervention when we issued the OSC in *Brown* (*Brown, supra*, S265648, Supreme Ct. Mins., Jan. 15, 2021, p. 61), and should not now be ignored based only on the happenstance that we are reviewing Mr. Shah's petition two weeks later. Falling case numbers may indicate greater protective measures, but they also may indicate lower testing rates - and particularly given the extent of the vulnerable population, they offer no guarantee that numbers will remain under control.

But neither is petitioner guaranteed a remedy. (Cal. Rules of Court, rules 4.551(c)(3), 8.385(d).) What we must decide is whether to issue an OSC: It does not entitle a prisoner to relief, or require CDCR to implement new procedures on the ground, or open the doors of the prison. (Cal. Rules of Court, rules 4.551(c)(3), 8.385(d).) An OSC gives a petitioner access to counsel if not already represented, and it requires CDCR to respond - to explain to a court with evidentiary support subject to adversarial testing how CDCR is in fact doing everything it reasonably can to honor the petitioner's constitutional rights. (Cal. Rules of Court, rules 4.551(c)(2) & (d), 8.385(e) & (f); *In re Serrano* (1995) 10 Cal.4th 447, 456; *Duvall, supra*, 9 Cal.4th at p. 482 ["The goal . . . of the procedures that govern habeas corpus is to provide a framework in which a court can discover the truth and do justice in timely fashion"].) A prima facie showing of these three factors

in this Eighth Amendment context simply determines whether further factfinding and argument are required to discover if, in truth, CDCR has failed to take all reasonable measures to keep this particular prisoner safe from the risk of serious illness and death. (See *In re Sassounian* (1995) 9 Cal.4th 535, 547.)

If any fundamental assumption underlies our system, it is that the protections of our constitutional charters extend to all persons in the country. We must endeavor to reconcile the challenging realities faced by public officials trying to carry out their mission in these daunting times with the constitutional requirement to protect the rights of those most vulnerable behind bars. I disagree with the majority's assessment that Mr. Shah doesn't meet the standards we have identified as meriting the limited, preliminary protection of an OSC. In light of his serious medical conditions, the alleged failings of CDCR, and the number of infections and deaths at CMF, I would grant him that opportunity to vindicate his rights. My colleagues do not - so with respect, I dissent.

CUÉLLAR, J.

S266911 B309747 Second Appellate District, Div. 8 **FRIEND OF CAMDEN, INC. v. S.C. (BRANDT)**

Time for ordering review extended on the court's own motion

The time for ordering review on the court's own motion is hereby extended to June 1, 2021. (Cal. Rules of Court, rule 8.512(c).)

S266750 **ERVING, JR., (ALBERT) v. S.C. (PEOPLE)**

Transferred to Court of Appeal, Sixth Appellate District

The above-entitled matter is transferred to the Court of Appeal, Sixth Appellate District.

S266818 **CLARK (MOSES) v. S.C. (PEOPLE)**

Transferred to Court of Appeal, Second Appellate District

The above-entitled matter is transferred to the Court of Appeal, Second Appellate District, for consideration in light of *Hagen V. Superior Court* (1962) 57 Cal.2d 767. In the event the Court of Appeal determines that this petition is substantially identical to a prior petition, the repetitious petition must be denied.

H048776

Second Appellate District

**HIRAMANNEK (ADIL) v. S.C.
(KAPADIA)**

The above-entitled matter, now pending in the Court of Appeal, Sixth Appellate District, is transferred to the Court of Appeal, Fifth Appellate District.