

**IN THE PHILADELPHIA COUNTY COURT OF COMMON PLEAS
CRIMINAL DIVISION**

Commonwealth of Pennsylvania,	:	
	:	
Respondent,	:	
	:	CP-51-CR-0532781-1992
v.	:	
	:	
Walter Ograd,	:	
	:	
Petitioner.	:	

**EMERGENCY UNOPPOSED MOTION BY WALTER J. OGRD
FOR EXPEDITED RULING ON CONCEDED CLAIMS**

Because of Mr. Ograd’s dire medical condition in the midst of a worldwide pandemic, the prison’s apparent inability to test him for the coronavirus (COVID-19) and treat him, and his incarceration on death row despite his likely innocence, Petitioner Walter J. Ograd, through counsel, and with no opposition from the Commonwealth, moves this Court for an expedited ruling on the two claims in his Consolidated Amended Petition for Habeas Corpus and Statutory Post-Conviction Relief to which the Commonwealth has conceded relief (the “Conceded Claims”). In support of this Motion, Mr. Ograd states as follows:

1. This Court has been thoroughly briefed and the record before it establishes that Mr. Ograd is likely factually innocent and is legally entitled to have his conviction and sentence vacated due to federal and state due process violations.¹

¹ After a two-year investigation, the Conviction Integrity Unit (“CIU”) of the Philadelphia District Attorney’s Office determined Mr. Ograd is likely innocent and then on February 28, 2020, the CIU informed the Court of its findings in written pleadings and stipulations of fact pursuant to which the Commonwealth conceded to relief on the Conceded Claims. See Answer to Petition for Post-Conviction Relief filed 2/28/20; Joint Stipulations of Fact of Petitioner

2. Mr. Ogrod is currently on death row at SCI Phoenix and has been wrongfully incarcerated since 1992.

3. Last Wednesday, March 11, 2020, Mr. Ogrod was taken to the prison infirmary with a fever, cough and difficulty breathing. He was immediately placed in isolation.

4. While in isolation, his fever spiked to 106 degrees and his breathing difficulties continued.²

5. On Monday March 16, 2020, with his fever seemingly under control, Mr. Ogrod was returned to his cell. However, Mr. Ogrod reports he is still coughing and having difficulty breathing (Mr. Ogrod has described his symptoms and condition like he is “breathing through a wet sponge”).

6. It was not until yesterday, March 17, 2020, nearly a week after first reporting symptoms, that a doctor gave Mr. Ogrod clearance to receive a decongestant for his respiratory issues.

7. As of the filing of this motion, it is counsel’s understanding that Mr. Ogrod remains confined to his cell, and despite his symptoms, Mr. Ogrod has not been tested for COVID-19.³

Walter Ogrod and Respondent Commonwealth of Pennsylvania (the “Joint Stipulation”) filed 2/28/20.

² The Center for Disease Control identifies these as symptoms to watch for. <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (accessed March 18, 2020).

³The Pennsylvania DOC has refused to release its pandemic response policy, citing security concerns. Given the lack of COVID-19 testing available in the United States in general, it is highly unlikely SCI Phoenix has the capacity to even test him and if so, it is unlikely they have tested him.

8. It is widely acknowledged that the COVID-19 pandemic is especially problematic for the prison population, putting prisoners who are housed in close quarters to one another and staff at grave risk.⁴

9. County jails and law enforcement agencies around the nation are taking unprecedented measures to decrease prison populations and thereby limit the spread of this pandemic.⁵ Most, if not all, of these measures have been adopted in Philadelphia.

⁴ See <https://theappeal.org/prosecutors-across-u-s-call-for-action-to-mitigate-spread-of-coronavirus-in-jails-and-prisons/>. “Jails and prisons are among the worst-positioned to manage an outbreak of a disease like COVID-19. Because people live in close quarters, it’s “impossible” for prisoners to comply with the recommended six feet of social distancing that health care and government officials are encouraging, Rikers Jail Complex former chief medical officer Homer Venters told The New Yorker. Many people who are incarcerated also lack sufficient access to soap, running water, hand sanitizer, and other cleaning products. Finally, people in jails tend to have underlying medical conditions that makes them particularly prone to diseases like COVID-19.” See also, <https://www.newyorker.com/news/q-and-a/how-prisons-and-jails-can-respond-to-the-coronavirus>.

⁵ These measures include not arresting people for low level crimes, seeking no bail detention, reducing bail for many already incarcerated inmates, ordering expedited hearings when release is a possible outcome, and outright releasing those convicted and sentenced for minor offenses. See <https://theappeal.org/prosecutors-across-u-s-call-for-action-to-mitigate-spread-of-coronavirus-in-jails-and-prisons/> (accessed March 18, 2020) Just yesterday, “31 top prosecutors across the country issued a joint statement, saying they are committing to take meaningful steps to reduce mass incarceration and prevent or slow the spread of COVID-19 in jails, prisons, and courtrooms. . . . The letter includes five key recommendations to reduce the number of incarcerated people in the U.S., including adopting cite-and-release policies to keep people out of jail; releasing people held pretrial because they cannot afford money bail; and releasing those with six months or less left to serve and people who are considered high-risk for contracting the virus, including the elderly and ill. . . . Additionally, prosecutors are calling on government actors to implement proper healthcare protocols in jails and prisons, eliminate medical co-pays for those confined, **avoid the use of solitary confinement to contain the virus**, and make phone calls free for those who are incarcerated. Across the country, criminal legal system actors are attempting to mitigate what seems likely to be a massive disaster should COVID-19 begin spreading through jails, prisons, immigration detention facilities, and courthouses. (Already, some correctional officers and prisoners have tested positive for the virus. A New York City Department of Corrections and Community Supervision employee died of the virus yesterday.) While some law enforcement responses have focused on blocking visitors to correctional facilities and creating plans for locking down facilities, some prosecutors are opting to accelerate criminal justice reforms in order to ensure both community health and respect for individual

10. On March 17, 2020, the Pennsylvania Supreme Court declared a statewide judicial emergency effective until April 14, 2020, authorizing Pennsylvania county courts to take actions deemed necessary to curb the spread of COVID-19.

11. The same day the Pennsylvania Supreme Court acted, the First Judicial District declared a judicial emergency and closed all First Judicial District of Pennsylvania Courts until April 1, 2020.

12. Most relevant in this case is that on that same date, the First Judicial District issued an order permitting emergency proceedings for medical reasons.⁶ The Order states: “Emergencies shall be limited to health and medical emergencies, public safety, and Orphan’s Court Emergency Guardianship Petitions, not including OPC’s.”⁷

13. It is expected that on April 1, 2020, the situation in Philadelphia will be reassessed and a new order will be issued.

14. Given the extent of the COVID-19 pandemic, which is only increasing in severity, it is likely Pennsylvania Courts will be closed or operating at limited capacity well after April 1, 2020.

15. Mr. Ogrod’s situation qualifies as a medical emergency, entitling him to an expedited ruling from this Court and, given the procedural posture of this case, this Court is well equipped to manage that emergency.

constitutional rights.” *Id.*; see also, <https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html> (accessed March 18, 2020).

⁶ <https://www.courts.phila.gov/pdf/regs/2020/10-of-2020-PJ-ORDER.pdf>. (accessed March 18, 2020).

⁷ Simultaneously with this motion, Mr. Ogrod is also filing an emergency request, pursuant to these protocols, for immediate medical treatment.

16. In January, 2020, this Court listed Mr. Ogrod's case for a status hearing on March 27, 2020, after the Commonwealth informed the Court that it anticipated it would concede Mr. Ogrod is entitled to a new trial.

17. Then, sometime around March 10, 2020, before COVID-19 was declared a pandemic and before Mr. Ogrod started experiencing symptoms consistent with coronavirus, this Court *sua sponte* cancelled that hearing.

18. On March 13, 2020, the parties participated in a telephone conference call with the Court's clerk to discuss the parties' surprise and disappointment with the unexpected cancellation and the logistics of how, when and where the Court would address the parties' joint request for relief on the Conceded Claims.⁸

19. The main impetus of the parties' request to the Court then was any unnecessary continued incarceration of Mr. Ogrod would further exacerbate the gross miscarriage of justice that has occurred.

20. The Court's clerk agreed to communicate the parties' concerns to the Judge, but she believed that the earliest possible date the Court could hear the case was June 5, 2020.⁹

21. After the conference call, Mr. Ogrod filed a letter with the Court, asking to formally reinstate the March 27, 2020 court date and for an expedited ruling on the case.

⁸ At the time of the conference call, undersigned counsel was not aware of the severity of Mr. Ogrod's symptoms nor the full extent of the gravity of the pandemic and what extraordinary measures would be implemented by local, state, and federal governments.

⁹ Specifically, the Court's clerk explained that the Court has two matters scheduled for the morning of March 27, 2020, and is not available that afternoon; therefore, the hearing could not go forward as previously scheduled. As for any other date prior to June 5, 2020, the Court's clerk indicated that an earlier date was not possible because (a) the Court would not be in session for most of May due to a pre-planned trip abroad; (b) the Court only hears criminal matters on Fridays; and (c) the Court has no available time any other Friday before the trip abroad in May.

22. On Monday May 16, 2020, the Court's clerk informed the parties that June 5, 2020 is when the Court would hear this matter.

23. Every day a decision and/or hearing is delayed is another day that Mr. Ogrod remains on death row for a crime he did not commit.

24. Every day a decision and/or hearing is delayed is another day that Mr. Ogrod's health is at grave risk.

25. This Court can and should rule on the Conceded Claims on the written submissions, without a hearing and Mr. Ogrod requests that the Court do so as soon as possible.¹⁰

WHEREFORE, Mr. Ogrod requests that the Court:

- 1) Rule on the Conceded Claims on the written submissions and without a hearing as soon as possible; or
- 2) If the Court requires a hearing, schedule a telephonic hearing on the earliest possible date available to the Court – during which Mr. Ogrod will waive his presence, the parties will read the Joint Stipulations of Fact into the record, and each side will have five minutes for argument – followed by a ruling that day.

¹⁰ Before anyone fully grasped the pandemic facing us all, this Court communicated to the parties that transparency and accountability to the public in this matter was of paramount concern. Thus, should this Court still require a hearing be held, both the Commonwealth and Mr. Ogrod have agreed that, consistent with its filings and the law, the parties are willing to proceed telephonically and waive Mr. Ogrod's presence. During a telephonic hearing, the parties have agreed to read or enter their previously filed Joint Stipulations of Fact into the record and limit their arguments to five minutes per side. With this streamlined presentation, a hearing could be completed in less than one hour.

RESPECTFULLY SUBMITTED:

/s/ Andrew J. Gallo

Andrew J. Gallo , *pro hac vice*
Robert E. McDonnell, *pro hac vice*
MORGAN, LEWIS & BOCKIUS, LLP
One Federal Street
Boston, MA 02110
617) 951-8000

/s/ James Rollins

James S. Rollins, *pro hac vice*
NELSON MULLINS RILEY &
SCARBOROUGH LLP
One Post Office Square
Boston, MA 02109
(617) 217-4722

/s/ Tracy Ulstad

Tracy Ulstad (Pa. Bar 87377)
Samuel J.B. Angell (Pa. Bar 61239)
Loren Stewart (Pa. Bar 311928)
Federal Community Defender Office
for Eastern District of Pennsylvania
Capital Habeas Corpus Unit
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Petitioner, Walter J. Ograd

Dated: March 18, 2020

CERTIFICATE OF SERVICE

I, Tracy Ulstad, hereby certify that on this 18th of March, 2020, I caused the foregoing to be filed through the Court's electronic filing system and thereby served the following individuals:

Patricia Cummings, Esq.
Supervisor, Conviction Integrity and Special Investigations Unit
Philadelphia District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107
patricia.cummings@phila.gov

Carrie Wood, Esq.
Assistant District Attorney
Conviction Integrity Unit
Philadelphia District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107
carrie.wood@phila.gov

/s/ Tracy Ulstad
Tracy Ulstad, Esq.