

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

MAURICE ANTHONY, *et al.*,

Plaintiffs,

-against-

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION, *et al.*,

Defendants.

Index No. 512871/2024
(Capell, J.)

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION TO CHANGE VENUE**

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Plaintiffs Maurice Anthony, Corey Allen, Anna Adams, Andy Gneco, Andre Greene, Eric Lee, Stephanie Peña, Boubacare Tunkara, and Altreak Witherspoon (collectively, “Named Plaintiffs”), on behalf of themselves and all others similarly situated, by and through their undersigned attorneys (collectively, “Plaintiffs”), respectfully submit this Memorandum of Law in Opposition to Defendants’ Motion to Change Venue.

PRELIMINARY STATEMENT

A plaintiff’s choice of venue is entitled to substantial deference. A defendant seeking to change venue must show that venue is inappropriate or is so substantially inconvenient that justice warrants a transfer (*see* CPLR 509; CPLR 510; *see also, e.g.*, 92A CJS Venue § 64 [Lonnie E. Griffith Jr., J.D.]). Defendants have not met that high burden.

First, Defendants are incorrect that Kings County is an improper venue for this action. Plaintiffs brought this putative class action in Kings County because it is the only county in New York in which a majority of the Named Plaintiffs resided prior to their incarceration. It is well-established that incarcerated individuals retain their pre-incarceration residence for purposes of determining venue (*see, e.g., Farrell v. Lautob Realty Corp.*, 204 AD2d 597, 598 [2d Dept 1994] [holding that plaintiff’s “incarceration did not invalidate his Kings County residence”]). Of the nine Named Plaintiffs, five are Kings County residents under this well-settled rule: Corey Allen, Anna Adams, Maurice Anthony, Andre Greene, and Stephanie Peña (“Kings County Named Plaintiffs”). Defendants have not carried their burden to show otherwise. Plaintiffs show—in affirmations submitted in support of Plaintiffs’ Motion for Class Certification [NYSCEF Doc. No. 21 *et seq.*] [“Class Certification Motion”], in the Affirmation of Stefen R. Short in Opposition to Defendants’ Demand for Change of Venue [NYSCEF Doc. No. 96] [“Short Affirmation”], and in affirmations and evidence submitted herewith—that five Named Plaintiffs are Kings County

residents, and thus, that Kings County is an appropriate venue for this action.¹ Accordingly, the Court should reject Defendants' motion to change venue on the basis of CPLR 510 [1].

Second, Defendants' request that this Court exercise its discretion by transferring this action to Albany County on convenience grounds—even though venue is proper in Kings County—is also meritless. On a motion to change venue based on convenience grounds under CPLR 510 [3], a court's main consideration is the convenience of material *non-party* witnesses (*see, e.g., Lapidus v. 1050 Tenants Corp.*, 94 AD3d 950, 951 [2d Dept 2012]). Defendants have failed to identify a single non-party witness who would be inconvenienced by Plaintiffs' chosen venue. Certain non-party witnesses that Plaintiffs intend to call, however, would be inconvenienced if the case were transferred to Albany. Similarly, because Plaintiffs are represented by pro bono counsel based in New York City, justice does not warrant a transfer to Albany. For these reasons, this Court should deny Defendants' request for a discretionary change in venue.

BACKGROUND AND RELEVANT FACTS

I. Procedural History

On May 7, 2024, Plaintiffs initiated this Action in Kings County pursuant to CPLR 503 [a] [NYSCEF Doc. No. 1]. The Action seeks injunctive and declaratory relief on behalf of two putative classes of incarcerated people with disabilities subject to solitary confinement in violation

¹ Contrary to Defendants' assertions (*see* Defendants' Memorandum of Law in Support of Motion to Change Venue [NYSCEF Doc. No. 100] ["Def. Br."] at 6–7), a sworn affirmation of residence can constitute reliable evidence for purposes of a venue motion, especially where, as here, plaintiffs are incarcerated individuals with limited access to other forms of documentary evidence, making alternative means of providing residence difficult to obtain (*see, e.g., Collins v. Glenwood Mgmt. Corp.*, 25 AD3d 447, 448–50 [1st Dept 2006]). None of the cases Defendants cite regarding this issue involve questions of appropriate venue. In any event, additional evidence submitted herewith corroborates Named Plaintiffs' affirmations.

of New York’s Humane Alternatives to Long-Term Solitary Confinement Act (“HALT”). Five of the nine Named Plaintiffs are Kings County residents.

On August 6, 2024, Defendants filed their Demand for Change of Venue to Albany County [NYSCEF Doc. No. 94]. Plaintiffs responded on August 9, 2024, with the Short Affirmation, reiterating that five of the Named Plaintiffs are Kings County residents and thus venue is proper here. On August 12, 2024, Defendants filed their Motion to Change Venue [NYSCEF Doc. No. 98 *et seq.*] [“Motion”].

II. Facts Relevant to Named Plaintiffs’ Residence in Kings County

The Kings County Named Plaintiffs are each currently incarcerated by the Department of Corrections and Community Supervision. Their sworn affirmations as well as additional evidence submitted herewith—including documentary evidence provided by Defendants—show their Kings County residence for purposes of venue. Each Kings County Named Plaintiff has affirmed Kings County as his or her residence immediately prior to incarceration and his or her intent to return there upon release (*see* Affirmation of Eva W. Cole in Support of Plaintiffs’ Opposition to Defendants’ Motion to Change Venue [“Cole Aff.”], Ex. 1 ¶¶ 14–15; Affirmation of Corey Allen [NYSCEF Doc. No. 49] ¶ 2; Cole Aff., Ex. 2 ¶¶ 4–6; Affirmation of Anna Adams [NYSCEF Doc. No. 53] ¶ 1; Cole Aff., Ex. 3 ¶¶ 1, 8–9; Affirmation of Maurice Anthony [NYSCEF Doc. No. 64] ¶ 1; Cole Aff., Ex. 4 ¶¶ 7–10; Affirmation of Stephanie Peña [NYSCEF Doc. No. 52] ¶ 2; Cole Aff., Ex. 5 ¶¶ 1, 4–6, 10–11; Affirmation of Andre Greene [NYSCEF Doc. No. 51] ¶ 2).

A. Plaintiff Corey Allen

Plaintiff Allen (also known as Isaac Dozier; *see* Cole Aff., Ex. 1 ¶ 9) has had ties to Kings County throughout his life. In Kings County, he lived with his father as a child, attended high school, lived at a shelter, and received government benefits (*see id.* ¶¶ 1–3, 5–14). Indeed, Plaintiff

Allen consistently resided—in a homeless shelter, in friends’ homes, and on the street—in Kings County immediately before his incarceration, from 2014 to 2016 (*see id.* ¶¶ 8–14). Evidence corroborating Plaintiff Allen’s affirmation includes documentation produced by DOCCS listing a Brooklyn pre-incarceration address. (*see Cole Aff.*, Exs. 6 & 7).

B. Plaintiff Anna Adams

Plaintiff Adams was born and attended school in Kings County (*see Cole Aff.*, Ex. 2 ¶ 2). She has affirmed several of her prior Kings County addresses—including her address immediately prior to her current incarceration (*see id.* ¶¶ 4–5). Although Plaintiff Adams spent some time at her ex-partner’s home during the period prior to her incarceration, she maintained her Kings County apartment as her primary residence (*see id.* ¶ 5). Upon her release, Plaintiff Adams intends to return to Kings County, and reside in a temporary housing program to which she has been accepted (*see id.* ¶ 6). As additional evidence of her residence, Plaintiff Adams has provided hospital records from the period shortly before her present incarceration, listing her home address in Kings County (*see Cole Aff.*, Ex. 8).

C. Plaintiff Maurice Anthony

Plaintiff Anthony has maintained ties to Kings County throughout his life. Kings County is where Plaintiff Anthony was raised, attended school, and lived as an adult (*see Cole Aff.*, Ex. 3 ¶¶ 1–6, 8). Plaintiff Anthony has also affirmed several of his Kings County addresses, including his address immediately prior to his incarceration (*see id.* ¶¶ 5, 8). Although Plaintiff Anthony lived in Broome County years ago, he later relinquished that residence and returned to Kings County (*see id.* ¶ 7; *see also* Affirmation of Maurice Anthony [NYSCEF Doc. No. 64] ¶ 1). Over the years, Plaintiff Anthony has returned to Broome County to visit, but never to reside (*see Cole Aff.*, Ex. 3 ¶ 7). Although Plaintiff Anthony is currently serving a life sentence, he is seeking to overturn

his conviction and intends to return to Kings County if he is released (*see id.* ¶ 9). As additional evidence of his residence, Plaintiff Anthony has provided a document produced by DOCCS which lists his Brooklyn address (*see Cole Aff.*, Ex. 9).

D. Plaintiff Stephanie Peña

Plaintiff Peña has lived in Kings County her entire life and affirmed her Kings County addresses prior to her incarceration (*see Cole Aff.*, Ex. 4 ¶¶ 1–2, 7–8). Her Kings County residence is also reflected on her New York State driver license (*see Cole Aff.*, Ex. 10). Plaintiff Peña lived, went to school, worked, and volunteered in Kings County (*see Cole Aff.*, Ex. 4 ¶¶ 1–2, 5–8). The maximum expiration date of Plaintiff Peña’s sentence is February 27, 2025, and she has been approved for conditional release on October 25, 2024 (*see id.* ¶ 9; *see also* Affirmation on Venue of Steven N. Schulman [NYSCEF Doc. No. 101] [“Schulman Aff.”] ¶ 10). Plaintiff Peña has been accepted into a transitional housing program in Kings County for after her release—a release plan that DOCCS has approved—and she plans to stay in Kings County in the future (*see Cole Aff.*, Ex. 4 ¶¶ 9, 10).

E. Plaintiff Andre Greene

Plaintiff Greene was born in Kings County, lived there for much of his childhood and adulthood prior to his incarceration, and has affirmed his Kings County addresses immediately prior to his incarceration (*see Cole Aff.*, Ex. 5 ¶¶ 2–4, 6). After his release, Plaintiff Greene plans to move in with his son, who resides in Kings County, in the same building where Plaintiff Greene resided prior to his incarceration (*see id.* ¶¶ 4–8, 10–11).² Evidence corroborating Plaintiff

² In an affirmation submitted in May 2024 in support of Plaintiffs’ Motion for Class Certification, Plaintiff Greene declared that he intended to live in Queens after his release from custody (*see* Affirmation of Andre Greene [NYSCEF Doc. No. 51] ¶ 2). At that time, Plaintiff Greene planned

Greene's affirmation includes: Defendant DOCCS's records regarding family and residence information confirming Plaintiff Greene's Kings County address at the time of his arrest, records from the New York State Department of Probation confirming that same address, and sentencing documents from New York State Supreme Court listing his home address (*see* Cole Aff., Exs. 11–13).

III. Facts Relevant to Defendants and Material Non-Party Witnesses

A. DOCCS and Commissioner Daniel F. Martuscello III

Although DOCCS's central office is in Albany County, DOCCS maintains four field offices in Kings County (*see* Cole Aff. ¶ 5). DOCCS also maintains facilities near Kings County, including in Manhattan and Queens, and parole offices in all five New York City counties (*see id.*). DOCCS's Community Supervision Operations Center, which provides 24-hour support for DOCCS staff and operations, is also in Manhattan (*see id.*). DOCCS field offices, facilities, parole offices and operations centers help ensure that all DOCCS policies and procedures are implemented and enforced.

Commissioner Martuscello, as well as the expected DOCCS witnesses identified by Defendants—Associate Commissioner Jamie Donahue, Director of DOCCS Bureau of Mental Health El Hadji Gueye, Assistant Commissioner of Health Services Megan Yaiser, and Disciplinary Programs Director Anthony Rodriguez—are all employees of Defendant DOCCS. Defendants have stated that those four witnesses work at DOCCS's central office in Albany, and

to move in with his sister, who he understood was living in Queens (*see* Cole Aff., Ex. 5 ¶ 8). Since then, however, Plaintiff Greene learned that his sister moved out of New York state, and, therefore, Plaintiff Greene has reverted to his prior plan to move in with his son in Kings County (*see id.* ¶¶ 8, 10).

that Defendants may also call additional witnesses from facilities around the state (*see* Schulman Aff. ¶ 16).

B. OMH and Commissioner Ann Marie Sullivan

Although the Office of Mental Health (“OMH”) is headquartered in Albany, it maintains facilities in all five New York City counties (*see* Cole Aff. ¶ 6). OMH also has a field office in Manhattan that serves all five New York City counties (*see id.*). Commissioner Sullivan is an employee of Defendant OMH and also serves as a Clinical Professor at the Mount Sinai School of Medicine in New York City (*see id.* ¶ X). Moreover, all five of the OMH witnesses referenced in the Motion are OMH employees and only two work in Albany County. The other three do not work near Albany. OMH Deputy Director Vertoske’s office address is in Elmira, New York, Dr. Lee’s office address is in White Plains, New York, and Dr. Dill’s office address is in Marcy, New York (Schulman Aff. ¶ 18). OMH’s facilities throughout the State play an active role in the implementation and enforcement of HALT with regard to the mental health of incarcerated individuals (*see, e.g., Review of the First Two Years of HALT at the New York State Department of Corrections and Community Supervision*, State of New York Office of the Inspector General, at 8 [OMH works with everyone who is admitted to a Residential Rehabilitation Unit (RRU), the unit established by HALT]; Complaint Exhibit 5 [NYSCEF Doc. No. 6] [OMH Policy No. 6.0]; Correction Law § 137 [6] [d] [ii] [OMH is responsible for suicide prevention screening of individuals in segregated confinement and RRUs]; Correction Law § 137 [6] [k] [ii] [A] [OMH is

responsible for promulgating rules regarding which people may be placed in segregated confinement due to their posing a “threat”).³

C. Non-Party Witnesses

Defendants have not identified a single non-party witness that they plan to call at trial, let alone any non-party witnesses who would be inconvenienced by a Kings County trial (*see* Schulman Aff. ¶¶ 16–19 [identifying nine party witnesses and no non-party witnesses]).

On the other hand, Plaintiffs have identified non-party witnesses whom they plan to call at trial and who would be inconvenienced by a trial in Albany.⁴ Plaintiffs have retained Dr. Craig Katz, M.D., to serve as an expert witness on a pro bono basis in this matter. Dr. Katz is a Clinical Professor of Psychiatry, Medical Education, and System Design and Global Health at the Icahn School of Medicine at Mount Sinai in New York City and a licensed psychiatrist in New York State. He and his two residents have been retained to conduct psychiatric evaluations of the Named Plaintiffs (*see* Cole Aff. ¶ 8). Dr. Katz and his team have demanding schedules with limited availability for tasks outside of their clinical work and treating patients (*see id.* ¶¶ 10–11). Traveling to Albany County for a trial would not only burden the doctors personally, but also would reduce the amount of time they can devote to their work and patients (*see id.*).

Plaintiffs also plan to call witnesses from the Correctional Association of New York (CANY), which is based in Kings County, and which has conducted extensive monitoring of Defendants’ compliance with HALT and reported its findings (*see* Cole Aff. ¶ 12; Compl. ¶¶ 94,

³ Defendants are represented by Assistants Attorney General Steven N. Schulman, Wesley E. Bauman, and Carrie Windland, who are based in New York, New York.

⁴ Given the current stage of the case, Plaintiffs reserve the right to add and/or replace any witnesses for trial.

106; Memorandum of Law In Support of Plaintiffs' Motion for Class Certification [NYSCEF Doc. No. 22] at 5, 7–8; *id.*, Ex. 7).⁵

LEGAL ARGUMENT

Under CPLR 503 and CPLR 509, Plaintiffs have the right to designate venue (*see, e.g., Andreadis v. Long Island R. Co.*, 166 AD2d 338, 338 [1st Dept 1990] [“The plaintiff had the right to choose a proper county in which to sue”]). The CPLR identifies only three grounds on which a court can order a change of venue: (1) if the county designated by plaintiffs is improper (change of venue as of right); (2) if an impartial trial cannot be had in the proper county; or (3) if a change in venue will promote the convenience of material witnesses and the ends of justice will be promoted (CPLR 510). Here, Defendants ask this Court to change venue based on the first and third grounds, arguing that Kings County is an improper venue and that, in any event, Albany would be a more convenient forum for relevant material witnesses. Because neither is true under the relevant legal standards, Defendants' request must be denied.

I. Venue Is Proper in Kings County Because Five Named Plaintiffs Resided There Prior to Incarceration

Pursuant to CPLR 503 [a], a plaintiff may commence an action in any county where one of the parties resides when the action is commenced (*see Hamilton v. Corona Ready Mix, Inc.*, 21 AD3d 448, 449 [2d Dept 2005]). In the class action context, the residence of the named representatives forms the basis for venue (*see, e.g., Kidd v. Delta Funding Corp.*, 270 AD2d 81, 82–83 [1st Dept 2000]). “For venue purposes, a residence is where a party stays for some time with a bona fide intent to retain the place as a residence for some length of time and with some

⁵ It bears noting that Plaintiffs' lawyers, most of whom are based in New York City, are representing Plaintiffs on a pro bono basis and would face significant inconvenience and expense if the trial were held in Albany County.

degree of permanency” (*Bikel v. Bakertown Realty Group, Inc.*, 157 AD3d 924, 925 [2d Dept 2018], citing *Ellis v. Wirshba*, 18 AD3d 805 [2d Dept 2005]).

Here, venue is straightforward. As Defendants concede, an incarcerated plaintiff’s residence for venue purposes is his or her residence *prior* to incarceration (*see* Def. Br. at 6). Indeed, a person does not lose his or her residence because of imprisonment, nor does the location where someone is incarcerated bear on their residence (*see, e.g., Farrell*, 204 AD2d at 598; *Moore v. Wagner*, 152 Misc 2d 478, 480 [Town of Colonie Just Ct 1991]; *Greenwald v. Board of Supervisors of Sullivan County*, 567 F Supp 200, 207 [SDNY 1983] [Section 4 of Article II of New York State Constitution makes clear that, “[f]or the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence ... while confined in any public prison.”], *aff’d*, 742 F2d 1434 [2nd Cir 1983]). A person in the custody of an institution “*retains the domicile he had when he entered the institution*” (*see Corr v. Westchester County Dept. of Social Servs.*, 33 NY2d 111, 115 [1973] [emphasis added]). Thus, if any one of the Named Plaintiffs was a resident of Kings County prior to incarceration, venue in Kings County is proper.

As set forth in detail above, each of the Kings County Named Plaintiffs established residence in Kings County prior to their incarceration, maintained that residence until the time they were arrested, and plans to return there upon their release from incarceration (*see supra* at 3–6), appropriately establishing venue here. None of Defendants’ arguments warrant a different conclusion.

A. Defendants Have Not Shown that All Five Named Plaintiffs Lack Residence in Kings County

The burden is on defendants to show that Plaintiffs' choice of venue was improper (*see, e.g., Gonzalez v. Sun Moon Enters. Corp.*, 53 AD3d 526, 526 [2d Dept 2008]). It is not enough for Defendants to show that their preferred venue may also be proper—or even better (*see, e.g., Joseph v. Kaufman*, 188 AD3d 847, 847–48 [2d Dept 2020]).

Because venue here is based on residence, to prevail on their motion, Defendants must demonstrate that *none* of the Named Plaintiffs were Kings County residents when this action was filed (*see Furth v. Elrac, Inc.*, 11 AD3d 509, 510 [2d Dept 2004]; *Joseph*, 188 AD3d at 848). Indeed, if Defendants fail to meet this burden, a court can and should deny the motion without even considering Plaintiffs' opposition (*see, e.g., Chehab v. Roitman*, 120 AD3d 736, 737–38 [2d Dept 2014]). Even though Plaintiffs have done so here, (*see supra* at 3-6), a plaintiff is not obligated to make an evidentiary showing in support of their choice of venue unless defendants have presented sufficient evidence showing plaintiffs' choice of venue was improper (*see, e.g., Aldridge v. Governing Body of Jehovah's Witnesses*, 204 AD3d 1469, 1470 [2d Dept 2022] ["Having failed to establish that plaintiff's original choice of venue was improper, the burden never shifted to plaintiff to establish, in opposition, that the venue selected was proper."] [internal citations omitted]; *Joseph v. Kaufman*, 188 AD3d at 847 ["Only if a defendant meets this burden [to show that plaintiff's choice of venue is improper and that defendant's choice is proper] is the plaintiff required to establish, in opposition, that the venue selected was proper."]).

B. Plaintiffs' Counties of Conviction Do Not Change Their Residence

Defendants argue that because the Kings County Named Plaintiffs were convicted outside of Kings County, this undermines their claim of Kings County residence (*see* Def. Br. at 3–4, 7–

8). However, venue does not turn on the location of someone’s conviction. In fact, caselaw is to the contrary (*see, e.g., Chehab*, 120 AD3d at 738 [“a police accident report ... is not sufficient evidence to demonstrate that ... a plaintiff does not reside in the county where he or she elects to place the venue of trial”] [internal emphasis omitted]). This is eminently logical—place of conviction reflects where an offense was allegedly committed, which may not have anything to do with an individual’s county of residence.⁶ This is true here. As set forth above, the Kings County Named Plaintiffs are all Kings County residents, even though they were convicted elsewhere (*see supra* at 3–6).

C. Plaintiff Allen’s Homelessness Does Not Change His Residence

Defendants argue that “Plaintiff Allen’s claim that he was homeless without an address in one case, requires him to show that he established residence in Kings County between then and his imprisonment” (Def. Br. at 8). But this is contrary to caselaw (*see, e.g., Barbuto v. Blue Meadow Farm*, 2021 NY Misc LEXIS 4552, *2–3 [Sup Ct, Bronx County Jan. 27, 2021] [denying defendant’s motion to transfer venue on the theory that, at the time the action was commenced, plaintiff was an unhoused person; the court explained that defendant did not “rule[] out that the plaintiff [was] simply a homeless person who lives in Bronx County”]; *see also Johnson v. Finkelstein*, 145 AD3d 863, 863–64 [2d Dept 2016] [holding that plaintiff’s “lack of fixed address in Kings County” did not serve as prima facie evidence that plaintiff was not a Kings County resident when she commenced the action]). Here, too, Defendants have failed to rule out that Plaintiff Allen was an unhoused person who lived in Kings County. And as Plaintiff Allen has

⁶ Nor are Plaintiffs aware of any authority supporting Defendants’ argument that Plaintiffs’ incarceration outside Kings County constitutes prima facie evidence that they do not reside in Kings County. Unsurprisingly, Defendants cite none. *See* Def. Br. at 7.

explained, he was in fact an unboxed person who consistently slept in Kings County for two years prior to his incarceration (*see* Cole Aff., Ex. 1 ¶¶ 8–9, 11–12).

D. Temporary Stays and Dual Homes Do Not Change Residence for Plaintiffs Adams and Anthony

In an effort to refute Plaintiff Adams’s Kings County residence, Defendants mischaracterize a court order in another legal proceeding to suggest that it states she was “*living* with her two minor children in [her ex’s] home in Queens” (Def. Br. at 8, citing *Adams v. LaManna*, No. 21-cv-1271[KAM], slip op. [ECF Doc. No. 12] at 2 [EDNY Mar. 15, 2022] [emphasis added]). The order actually states only that Plaintiff Adams was “*staying*” in Queens (*Adams*, ECF Doc. No. 12 at 2 [emphasis added]). Nothing in that order establishes that Plaintiff Adams intended to “retain” Queens as “a place of residence for some length of time and with some degree of permanency” (*Bikel*, 157 AD3d at 925). In fact, the order describes a dispute between Plaintiff Adams and her ex because her ex “wanted [Plaintiff Adams] out of *his* house”—undermining Defendants’ assertions (*Adams*, ECF Doc. No. 12 at 2 [emphasis added]). Indeed, as Ms. Adams attested to in her affirmation, she maintained an apartment in Kings County prior to her incarceration in this case (*see* Cole Aff., Ex. 2 ¶ 5). Moreover, even if Plaintiff Adams resided in *both* Queens and Kings Counties, Kings County remains a proper venue, as an individual can have more than one residence for venue purposes (*see* CPLR 503 [a] [“[a] party resident in more than one county shall be deemed a resident of each such county”]; *Johnson*, 145 AD3d at 863).

As for Plaintiff Anthony, Defendants present no evidence to establish his residence as Broome County other than his prior convictions there. Plaintiff Anthony acknowledged that he lived in *both* Broome and Kings Counties prior to his present incarceration, but he explained that he gave up his Broome County residence years ago and was born, raised, and spent most of his life

before incarceration living in Kings County (*see* Cole Aff., Ex. 3 ¶ 7; Affirmation of Maurice Anthony [NYSCEF Doc. No. 64] ¶ 1).

E. Plaintiff Greene’s Indication of an Intention to Move Does Not Change His Residence, Especially Because the Evidence Shows that Such Intention Has Changed

Defendants do not dispute that Plaintiff Greene’s pre-incarceration residence was Kings County. Rather, they argue that because Plaintiff Greene stated that he plans to move to Queens, he “affirmatively... abandoned residence in Kings County” (Def. Br. at 7 n 3). As an initial matter, an incarcerated individual’s residence is determined according to where they resided *prior* to their conviction. Defendants have not identified any authority suggesting that if an incarcerated individual indicates his or her intent to move to a different county after release, residence for venue purposes should be based on the intended future residence rather than the pre-incarceration residence. Indeed, Defendants admit that to establish residence, it is not necessary to show an intent to make a place a permanent home (*see* Def. Br. at 6, citing *Mandelbaum v. Mandelbaum*, 151 AD2d 727, 728 [2d Dept 1989]).

In any event, as Plaintiff Greene explains, his earlier plan to relocate to Queens after release was based on his sister’s residence there (*see* Cole Aff., Ex. 5 ¶ 8). However, because his sister has moved out of state, his current plan is to return to Kings County upon his release (*see id.* ¶¶ 8, 10). His plan to return to Kings County is not new; in early 2023, his attorneys told the New York State parole board that he planned to live with his son upon release (*see id.*).

F. Plaintiff Peña’s Upcoming Release Has No Bearing on Venue

Defendants argue that even if Plaintiff Peña is a Kings County resident, “venue there cannot be predicated on her claim because of the approaching end of her imprisonment” (Def. Br. at 9). Plaintiff Peña is scheduled to be conditionally released from DOCCS custody on October 25, 2024,

and must be released by February 27, 2025 (*see* Cole Aff., Ex. 4 ¶ 9; *see also* Schulman Aff ¶ 10). This is of no moment to this motion. “Venue is determined based upon the parties and allegations at the time the operative complaint is filed, not subsequent events” (*Keitt v. New York City*, 882 F Supp 2d 412, 459 n 44 [SDNY 2011]; *see also* *N-N v. Mayorkas*, 540 F Supp 3d 240, 253 [EDNY 2021]).

Moreover, defendants have not established that Plaintiff Peña’s claims challenging DOCCS and OMH policies as well as the conditions of her incarceration will be moot upon her release. This is a separate legal question that is unrelated to venue. Indeed, Plaintiff Peña’s claims would not be mooted by her release.⁷

Defendants’ meritless, premature, and half-baked mootness argument is not an acceptable basis for denying venue based on Plaintiff Peña’s pre-incarceration residence and none of the cases Defendants cite involve class actions with multiple named plaintiffs also establishing venue in the same county.

* * *

In short, venue is proper in Kings County because any one of the Kings County Named Plaintiffs resided in Kings County prior to their incarceration, the relevant question for venue purposes. None of Defendants’ arguments support a different conclusion.

⁷ Mootness is not an issue that needs to be considered at this juncture, especially since, among other things, Plaintiff Peña’s claims fit within the recognized exceptions to mootness (*see, e.g., City of N.Y. v. Maul*, 14 NY3d 499, 507 [2010]; *Hurrell-Harring v. State*, 81 AD3d 69, 73–74 [3d Dept 2011]; *Brad H. v. City of N.Y.*, 185 Misc 2d 420, 425 [Sup Ct, NY County 2000]).

II. Defendants Have Not Shown that Convenience Warrants Transfer to Albany County

Relying on CPLR 510 [3], Defendants alternatively argue that a change in venue will promote “the convenience of material witnesses and the ends of justice” (Def. Br. at 10; *see* CPLR 510 [3]). A moving party relying on this statutory provision bears the high burden of establishing that proposed *non-party material witnesses* would be “*greatly inconvenienced*” by the current venue and that the ends of justice will be promoted (*see, e.g., Lapidus*, 94 AD3d at 950; *Ambroise v. United Parcel Serv. of Am.*, 143 AD3d 927, 928 [2d Dept 2016] [denying motion because requiring witnesses to travel “a significant distance” did not meet the burden]; *see also Cardona v. Aggressive Heating Inc.*, 180 AD2d 572, 573 [1st Dept 1992] [“[A] plaintiff who has designated a county of appropriate venue is under no obligation to make any showing that the county designated is in any way preferable to the one to which the change is sought unless and until the party seeking the change has made an adequate showing as to the convenience of material witnesses and the furtherance of justice.”]; *Rowland v. Slayton*, 169 AD3d 1474, 1475 [4th Dept 2019]).

The movant must submit a factual affirmation setting out: (1) the names, addresses, and occupations of the material non-party witnesses; (2) the facts to which the witnesses will testify; (3) that the witnesses are willing to testify; and (4) how the witnesses will be inconvenienced if the venue of the action is not changed (*O’Brien v. Vassar Bros. Hosp.*, 207 AD2d 169, 172–73 [2d Dept 1995]). Courts often require a movant to demonstrate that the witnesses were contacted to determine their availability and willingness to testify (*see, e.g., Brevetti v. Roth*, 114 AD2d 877, 878 [2d Dept 1985]).

As discussed below, defendants have not established the requisite basis for a discretionary transfer under CPLR 510 [3].⁸

A. Convenience of Defendants or Their Employees is Not Relevant to the Inquiry

As an initial matter, CPLR 510 [3] applies to the convenience of *non-party* material witnesses. Convenience of party witnesses is not a factor in considering a motion to change venue pursuant to CPLR 510 [3] (*see, e.g., Palermo v. White*, 133 AD3d 834, 835 [2d Dept 2015] [“the convenience of [defendant] himself, a party to this action, is not a factor in considering a change of venue based on CPLR 510 (3)”]; *Lapidus*, 94 AD3d at 951 [the convenience of a defendant’s employees or agents “is not a factor in considering a motion for a change of venue pursuant to CPLR 510(3)”]; *O’Brien*, 207 AD2d at 170).⁹ Courts thus reject motions to transfer when the

⁸ Defendants also raise a forum argument under CPLR 902 [4], arguing that Kings County is not an appropriate forum because no Plaintiffs currently live there (Def. Br. at 15–16). Notwithstanding issues Plaintiffs take with that argument on the merits, which they reserve all rights to raise in response to Defendants’ forthcoming opposition to class certification, CPLR 902 [4] relates to the desirability or undesirability of litigating a class action in a particular forum and is not properly raised on a motion to change venue. Indeed, every case Defendants cite evaluates a motion for class certification (*see* Def. Br. at 15–16).

⁹ Defendants suggest that where a change of venue presents no inconvenience to the non-moving party, the convenience of the moving party’s employee witnesses may be considered (*see* Def. Br. at 10–11). But the cases Defendants cite to support this position are inapposite (*see Jansen v. Bernhang*, 149 AD2d 468 [2d Dept 1989] [non-party witnesses at issue, and non-movants had an office in the county to which transfer was sought]; *Quick Const. Corp. v. Loribeth Theatres, Inc.*, 186 AD2d 546, 547 [2d Dept 1992] [non-party witnesses at issue]; *Creed v. United Hosp.*, 158 AD2d 654 [2d Dept 1990] [most parties based in same county] [also, holding limited by *O’Brien v. Vassar Hosp.*, 207 AD2d 169, 174 [2d Dept 1995]]; *Seeley v. New York Tel. Co.*, 278 AD 613 [3d Dept 1951] [no plaintiff witnesses would be inconvenienced by transfer, and transfer was to neighboring county]; *Chindamo v. Long Is. R.R. Co.*, 176 AD2d 558 [1st Dept 1991] [original choice of venue was based on *defendant’s* principal place of business, plaintiff was a resident of the county defendants sought transfer to, and no plaintiff witnesses would be inconvenienced by transfer]). In any event, a change of venue here from Kings County to Albany County would present an inconvenience to Plaintiffs and their counsel.

movant neglects to identify material non-party witnesses and the subjects of their testimony, and, critically, how they would be inconvenienced by maintaining the current venue (*see, e.g., O'Brien*, 207 AD2d at 170–73). To succeed, the movant must provide sufficient detail regarding the proposed witnesses and testimony to allow the Court to evaluate its materiality and the inconvenience to the witnesses (*see, e.g., Ambroise*, 143 AD3d at 928; *Rochester Drug Co-op., Inc. v. Marcott Pharm. N. Corp.*, 15 AD3d 899, 899 [4th Dept 2005]). Here, Defendants have not identified **any** non-party witnesses whom they claim would be inconvenienced by a Kings County venue, let alone provided any information about those witnesses and their testimony (*see Schulman Aff.* ¶¶ 16–19 [identifying nine party witnesses and no non-party witnesses]).

Defendants argue that the exclusion under CPLR 510 [3] of the convenience of party employees does not apply to them because they are government agencies and employees whose work may be disrupted by testifying in this case (Def. Br. at 11–12). As Defendants themselves acknowledge, the cases they cite involve **non-party witnesses** and provide no indication that any government-related exception should apply to party witnesses.¹⁰ Moreover, those cases involve police officers and county employees, whose day-to-day work is naturally tied to a particular county, unlike the purported inconvenience for DOCCS and OMH executives here, who could make use of their agencies' multiple offices in or near Kings County to fulfill their duties during trial (*see, e.g., Jansen v. Bernhang*, 149 AD2d 468, 470 [2d Dept 1989]; *Mayer v. Fleischer*, 92

¹⁰ Defendants erroneously rely on *Award Incentives, Inc. v. State*, 4 AD2d 985 [3d Dept 1957], to assert that a court can consider the convenience of a party's witnesses when they are government employees (Def. Br. at 12–13). But that case considered the convenience of a *non-moving party's* employees, not those of the moving party (*Award Incentives, Inc.*, 4 AD2d at 986).

AD2d 463, 463 [1st Dept 1983] [“[S]ince all defendants maintain professional offices in Bronx County, they can hardly claim any prejudice in having the matter tried there.”)].¹¹

In short, DOCCS and OMH witnesses’ purported inconvenience is irrelevant under CPLR 510 [3].

B. Even If Defendants’ Convenience Were the Relevant Inquiry, Defendants Would Not Be So Inconvenienced that Transfer to Albany County Is Warranted

To succeed on a CPLR 510 [3] motion, the movant must show that the identified material witnesses would be “greatly inconvenienced” by the current venue (*see, e.g., Lapidus*, 94 AD3d at 950–51). Thus, even if the Defendants’ convenience were the relevant inquiry, Defendants would have to show that the inconvenience is substantial. Defendants assert only that traveling to testify at a trial in Kings County would inconvenience their proposed party witnesses.¹² However, “(t)he mere fact that the witnesses would be required to travel a significant distance does not establish, without more, that requiring their testimony would impose an undue burden on them” (*Ambroise*, 143 AD3d at 928). Moreover, Defendants’ argument fails to account for the potential for alternative, less burdensome options for taking those individuals’ testimony—including remote depositions, on-site depositions in Albany, and even remote testimony at trial (*see, e.g., Rowland v. Slayton*, 169 AD3d 1474, 1475 [4th Dept 2019]).¹³

¹¹ Plaintiffs further note that this case concerns DOCCS’s and OMH’s *failures* to undertake their governmental responsibilities by violating a state law that protects people in their custody.

¹² As for Defendants’ reference to potential witnesses from other DOCCS facilities not near Kings County, this fails for the same reasons set forth above: these hypothetical witnesses and their purported materiality has not been identified, and, importantly, they would all be party witnesses.

¹³ Unsurprisingly, OMH and DOCCS have faced trial in counties outside of Albany (*see, e.g., T.D. v. New York State Off. of Mental Health*, 228 AD2d 95 [1st Dept 1996]; *Pan v. New York State*

Finally, two prospective party witnesses identified in the Schulman Affidavit apparently would be just as inconvenienced if the trial were held in Albany County. OMH Deputy Director Vertoske's office address is in Elmira, New York—which is nearly as far from Albany County as it is from Kings County (*see, e.g., Markowitz v. Makura, Inc.*, 29 AD3d 650, 651 [2d Dept 2006] [“defendant did not demonstrate that it would be more inconvenient for [witness from Buffalo] to travel to New York City than to Albany”]). In addition, Dr. Lee's office address is in White Plains, New York—significantly closer to Kings County than to Albany County (*see, e.g., Heinemann v. Grunfeld*, 224 AD2d 204, 204 [1st Dept 1996] [witnesses not inconvenienced by “short distance” between Westchester and Bronx]).¹⁴ Moreover, as stated above, both DOCCS and OMH maintain offices and facilities in Kings County, to which any DOCCS and OMH witnesses would presumably have access during trial.

C. **Kings County Is the More Convenient Venue for Non-Party Witnesses and Promotes Justice**

While Defendants have failed to identify a single non-party witness who would be inconvenienced by a trial in Kings County, several non-party witnesses who may appear for Plaintiffs would be substantially inconvenienced by a transfer to Albany County.

Dept. of Corr. Servs., 16 Misc 3d 1101[A], 2007 NY Slip Op 51209[U] [Sup Ct, Kings County 2007]).

¹⁴ Another one of the party witnesses identified in the Schulman Affidavit is located far from Albany: Dr. Dill, whose office address is in Marcy, New York, approximately 100 miles from Albany (*see Schulman Aff.* ¶ 19). Though Dr. Dill lives even further away from Kings County, Defendants have not shown that she would be greatly inconvenienced by having to make the longer of two already long trips (*see, e.g., Markowitz*, 29 AD3d at 561 [“defendant did not demonstrate that it would be more inconvenient for [witness from Buffalo] to travel to New York City than to Albany”]).

First, Plaintiffs plan to call as expert witnesses at trial Dr. Katz and his team, who work out of the Icahn School of Medicine at Mount Sinai in New York City (*see* Cole Aff. ¶¶ 8–9). Dr. Katz and his team, who have time-constrained schedules, have undertaken their clinical evaluations of the Named Plaintiffs on a pro bono basis and thus the Court may consider the inconvenience and cost associated with their travel to Albany County (*see, e.g., Hilgers v. Hyde*, 6 AD2d 963, 963 [3d Dept 1958] [“convenience of busy [medical practitioners] has real significance”).

In addition, plaintiffs intend to call fact witnesses from the Correctional Association of New York (CANY), which is based in Kings County (*see* Cole Aff. ¶ 12). Notably, Defendants argue that the Court should deem any written report from CANY to be inadmissible hearsay (*see* Def. Br. at 14), and so, if the Court agrees, their trial testimony will be necessary. Defendants’ arguments regarding admissibility aside, Plaintiffs do intend to rely on CANY’s reports and call CANY witnesses for their testimony. Thus, the Court may consider the inconvenience that travel to Albany for trial would present for CANY.¹⁵

Finally, in addition to showing that a transfer to Albany County will promote convenience, Defendants bear the burden of establishing that such a transfer would promote the ends of justice (*see, e.g., Harris v. Havanera Tropical Mkt. Corp.*, 160 AD2d 344, 345 [1st Dept 1990]; CPLR

¹⁵ Defendants mistakenly assert that Plaintiffs would not face any inconvenience if the case were transferred to Albany County. The mere fact that Plaintiffs must be transported to court regardless of venue does not negate the burden of being transported to Albany County, which, like Kings County, has no state prisons. Defendants offer no support for their argument that if inconvenience is inevitable in either venue, then it is simply a wash. In any event, for Plaintiff Adams, who is currently incarcerated at Bedford Hills, a transfer to Albany would likely result in significant additional hardship, as it would extend her transport time by at least an hour compared to a trial in Kings County. In addition, Plaintiff Peña, who will be living in Kings County upon release, will be greatly inconvenienced by having to travel to Albany.

510 [3])). Here, a transfer would not promote justice because Plaintiffs are represented by pro bono counsel based in New York City. Litigating the case in Albany County would impose undue logistical and financial burdens on both counsel and Plaintiffs, impacting their ability to most efficiently and effectively litigate the case. Plaintiffs are entitled to their chosen venue.

CONCLUSION

For the reasons discussed above, the Court should deny Defendants' Motion to Change Venue.

Dated: September 19, 2024
New York, NY

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CERTIFICATION OF COMPLIANCE

1. The following statement is made in accordance with 22 NYCRR § 202.8-b.
2. I hereby certify that this Memorandum of Law in Opposition to Defendants' Motion to Change Venue was prepared in the Microsoft Word processing system, with Times New Roman typeface, 12-point font.
3. The total number of words in this document, exclusive of any caption, table of contents, table of authorities, and signature block is 6,901.

Dated: September 19, 2024
New York, New York

Respectfully submitted,
/s/ Eva W. Cole
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