UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

MICHAEL AMOS, *ET AL*. **PLAINTIFFS**

V. **CASE NO. 4:20-CV-007-DMB-JMV**

TOMMY TAYLOR, *ET AL*. **DEFENDANTS**

PLAINTIFFS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND MANDATORY PRELIMINARY INJUNCTION AS TO COVID-19

At the time the instant Motion was filed, the World Health Organization ("WHO") had declared COVID-19, a global pandemic, with 168,019 confirmed cases worldwide, resulting in 6,610 deaths [Dkt. # 60, p. 1]; and, Defendants had announced only two measures they were taking to protect Named Plaintiffs, and all other people incarcerated or employed at Parchman:[1] (1) the suspension of certain visitation privileges and (2) a limitation on MDOC transfers. These measures were being implemented "until further notice," as MDOC confessed in its Response to Named Plaintiffs' motion, "in order to establish sanitation and prevention protocols to prevent the spread of COVID-19." [Dkt. # 62-1, p. 22 (emphasis added)]. Named Plaintiffs necessarily relied on MDOC's own statements as accurate descriptions of their efforts at that time.

Four days have passed. The World Health Organization now places the current count of confirmed cases worldwide at 234,073, an increase of nearly forty percent (40%). [Dkt. # 60, p. 1, fn. 2 (updated to March 20, 2020)]. In an effort to stream-line this issue for the Court and the parties, Plaintiffs' Counsel contacted Defense Counsel prior to the filing of their response and

[1] Defendants quibble with references in the Motion and Memorandum to both Named Plaintiffs and the remaining people incarcerated at Parchman - the unnamed putative class members. Defendants are fully aware that the parties and the Court have not yet addressed the issue of class certification in this matter. Yet, there is no question that the protective measures put in place for the entire inmate population necessarily impact Named Plaintiffs and vice versa, as a spread of COVID-19 through Parchman will not discriminate.

suggested the parties work together to present an order to the Court reflecting the protective measures both sides agree would be reasonable and appropriate. Unfortunately, Defense Counsel declined the offer, rebuffing any suggestion of a discussion. Nevertheless, Named Plaintiffs are pleased to read of the promised steps Centurion and MDOC will take in relation to this crisis, as well as the new measures they claim to have put in place since the filing of Plaintiffs' motion.

MDOC's Response reveals a commitment to implementing the procedures generally referenced in three primary documents: (1) the "Centurion Pandemic Preparedness and Emergency Response Plan" [Dkt. # 62-2, p. 16-24], (2) the MDOC Pandemic Influenza Plan SOP 25-09-B [Dkt # 62-2, p. 10-15], and (3) the Centurion general information pamphlets for Incarcerated Persons, Security Staff, and Correctional Healthcare Staff [Dkt # 62-2, p. 5-9]. While no response plan specific to the facilities at Parchman was produced by Defendants, we are relieved that the materials that were produced reflect a requirement to develop same and Centurion and Defendants stated commitment to implementing that plan.

Moreover, in their Response, Defendants claim they have already undertaken some of the new measures that would ultimately be included in any finalized plan to combat the introduction and spread of COVID-19 at the Parchman facilities. Specifically, Defendants now claim to have taken the following measures which correspond with the following requests for relief in Named Plaintiffs' motion:

(1) Plaintiffs requested that Defendants "screen each employee or other person entering the facility every day to detect fever over 100 degrees, cough, shortness of breath, recent travel to a high risk country, and/or exposure to someone who is symptomatic or under surveillance for COVID-19.

Defendants now claim they have implemented "procedures for screening staff and other visitors and restrictions on staff from entering the facility with symptoms of the virus" [Dkt. # 63, p. 3].

(2) Focusing on monitoring, Plaintiffs requested that Defendants "establish non-punitive quarantine for all individuals who test positive for COVID-19, who were directly exposed to individuals who test positive for COVID-19, or who exhibit symptoms of the virus," *which necessarily involves monitoring inmates for symptoms of the virus*.

Defendants now claim they have implemented procedures wherein "MDOC officers are currently actively monitoring inmates for symptoms of COVID-19, such as headaches, fevers, coughing, shortness of breath, and trouble breathing" [Dkt. # 63, p. 3]. Notably, however, Defendants provide no evidence to support this claim, nor do they describe how exactly MDOC officers "actively monitor" for headaches, fevers and other internal symptoms that do not announce themselves like a cough. This is especially concerning since evidence shows that most MDOC officers rarely enter housing zones, and, when they do, they are isolated from the inmates in common hallways outside the zones or in sealed observation towers from which active monitoring, as contemplated herein, is impossible.

(3) Focusing on quarantine, Plaintiffs requested the establishment of "non-punitive *quarantine* for all individuals who test positive for COVID-19, who were directly exposed to individuals who test positive for COVID-19, or who exhibit symptoms of the virus." (emphasis added).

Defendants now claim they have implemented procedures for quarantine of inmates upon contraction of COVID-19. [Dkt. 63, p. 3]. MDOC also claims it is isolating inmates who are transferred to Parchman regardless of symptoms - yet there are inconsistencies in their filing with respect to the length of time (and location) in which any such quarantine would take place. [Dkt. # 63, p. 4].

(4) Plaintiffs requested the implementation or increase of "non-contact visitation methods and opportunities such as video conferencing and/or telephone calls."

Defendants now claim they have implemented "measures to ameliorate the effects of denial of in-person visitation" such as two free telephone calls per week per inmate. [Dkt. # 63, p. 4]. Yet, no evidence was offered that that the phone systems in the various housing units at Parchman are now in working order.

(5) Plaintiffs request that Defendants be required to "increase the sanitation and cleaning protocol and schedule for all public spaces, highly traveled areas, and cells.

Defendants now claim they are "ensuring that additional chemicals and other cleaners are available to providing [sic] additional sanitation at Parchman" [Dkt. # 63, p. 4] Although, significantly, Defendants refused to even discuss the "assessment of necessary resources, including volume, storage requirements, availability, and utilization procedures" at Parchman as required by Centurion's own Pandemic Preparedness and Emergency Response Plan, [Dkt. #62-2, p. 23], asking Named Plaintiffs to simply trust *but not be able to verify* that "all areas of Parchman" are actually being "cleaned and sanitized" effectively.

(6) Plaintiffs request that they and the other inmates at Parchman be provided "hand sanitizer with alcohol, antibacterial soap, antibacterial wipes and other hygiene products" … "free of charge and ensure replacement products are available as needed."

Defendants now claim they are distributing "extra supplies of liquid and solid soap to inmates." [Dkt. # 63, p. 5]. Again, however, no meaningful details were provided beyond this representation.

Given the overwhelming evidence of deficiencies at Parchman in both its facilities and its practices, including deficiencies previously acknowledged by both the Governor and this Court, Plaintiffs are skeptical that Defendants are maintaining, or will be able to maintain in the future,

a steady supply of soap and clean, running water to each man entrusted to their care during the life of this pandemic.

PARCHMAN FALLS SHORT OF ALL OTHER CORRECTIONAL FACILITIES

Parchman's overriding problem in preparing to face a global pandemic is the horrible state from which it begins its preparations. Deputy Director of MDOC, Jaworski Mallett, states in his affidavit [Dkt. # 62-1] that "MDOC's measures [to prepare for COVID-19] are consistent with those employed by other correctional institutions across the nation." This statement is inaccurate. Prior to COVID-19, Parchman was fraught with so many sanitation and healthcare issues that it is impossible to compare it, at any point, to other correctional institutions across the Nation. *See* Affidavit of Marc Stern, MD, MPH [Dkt. # 59-6] ("Overall, the health-related and environmental conditions I observed at Parchman are the worst conditions I have observed in any US jail, prison, or immigration detention facility in my 20 years working in this field.").[2] In other words, Parchman's starting line in this race to protect incarcerated people from COVID-19 is miles behind "other correctional institutions across the nation." Without aggressive measures rigorously implemented, Parchman will not be able to catch up to other correctional institutions in time to protect lives.

Moreover, while Named Plaintiff's appreciate MDOC's promises to implement the general pandemic plans and strategies identified in their various response exhibits, MDOC must ensure these policies are further developed into a comprehensive Parchman-specific Covid-19 response plan as required by the terms and conditions of the very documents they produced.

[2] Defendants complain over Dr. Stern's qualifications, yet his qualifications in this field are sufficient that he routinely is employed to investigate, evaluate, and monitor the adequacy of health care systems in correctional institutions on behalf of the U.S. Justice Department, the U.S. Department of Homeland Security, federal courts, and various state departments of corrections and jails.

DEFENDANTS CLAIM THE REQUESTED RELIEF IS INAPPROPRIATE, BUT DEFENDANTS CLAIM TO HAVE BEGUN ENACTING THE SAME RELIEF

Defendants make a variety of legal arguments in an odd effort to dispute the requested relief; the same relief they claim they already working to provide. They are summarily addressed as follows:

- Defendants argue that the relief requested by Plaintiffs is "premature," yet Defendants also argue they have already performed most of the requested relief. [Dkt. # 63, p. 6].
- Defendants claim that the requested relief is "unsupported" by the evidence, yet they set forth meticulously the evidentiary bases for their preventative actions, which in most instances are identical to the relief requested by Plaintiffs. Support for Defendants' actions, and, by extension, Plaintiffs' requested relief, includes recommendations by the Mississippi Department of Health, the U.S. Department of Homeland Security, Local Law Enforcement, the Centers for Disease Control, [Dkt. # 63, pp. 2, 3, 8].
- Defendants argue that Plaintiffs have provided no evidence of risk of irreparable harm, yet Defendants "do not dispute that COVID-19 presents serious health risks" and unquestionably are aware that those health risks include death. [Dkt. # 63, p. 5]. Neither do Defendants dispute that Plaintiffs are part of the overall inmate population at Parchman, are not segregated based on their inclusion in this lawsuit, and therefore necessarily will be affected by any widespread outbreak of COVID-19.
- Defendants argue that the relief requested is not narrowly tailored. However, as stated previously, Defendants have instituted the very measures they claim exceed

the scope of a proper TRO. These measures, therefore, are *de facto* narrowly tailored to meet the needs outlined in Plaintiffs' Motion.

- Defendants argue that a TRO is to preserve the *status quo*, and implicitly that Plaintiffs' Motion is overreaching, yet they simultaneously acknowledge that mandatory injunctive relief – where a TRO requires action instead of merely preserving the *status quo* - is allowed in the Fifth Circuit. *Martinez v. Matthews*, 544 F.2d 1233 (5th Cir. 1976).
- Defendants argue that Plaintiffs have provided no evidence of reckless indifference by Defendants to the rights of Plaintiffs. However, Defendants do not dispute, and certainly provide no evidence, that at the time the instant Motion was filed, Defendants had in place no protective measures for Plaintiffs other than limitations on visitation and transfers.

PLAINTIFFS REQUESTED RELIEF IS APPROPRIATE UNDER THE PLRA

The PLRA provides that injunctive relief "in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1). However, it also is true that the Act merely codifies existing law and does not change the standards for determining whether to grant an injunction. *See, e.g., Williams v. Edwards*, 87 F.3d 126, 133 (5th Cir.1996). Moreover, courts have recognized in the context of similar litigation that "an injunction is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in a lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Smith v. Arkansas Dep't of Correction*, 103 F.3d 637, 646 (8th Cir. 1996) (internal quotations omitted). Finally, despite Defendants' contrary assertion,

"[t]o prove unconstitutional prison conditions, inmates need not show that death or serious injury has already occurred. They need only show that there is a "substantial risk of serious harm." *Ball v. LeBlanc*, 792 F.3d 584, 593 (5th Cir. 2015) (internal citations omitted).

Plaintiffs have readily identified an urgent violation of their Constitutional right which necessitates swift redress both to protect from and prevent irreparable harm. The constitutional right under consideration here is the right to be free from cruel and unusual punishment under the Eighth Amendment. Deliberate indifference to an inmate' serious medical needs is cruel and unusual punishment in violation of the Eighth Amendment. *McCaster v. Clausen*, 684 F.3d 740 (8th Cir. 2012); *see also, Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Vaughn v. Greene Cnty., Ark.*, 438 F.3d 845, 850 (8th Cir.2006). To establish a "serious medical need," Plaintiffs must demonstrate that the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Moreover, exposing inmates to infectious, communicable disease has been recognized as a violation of their constitutional rights in some circumstances. *See, e.g., Lareau v. Manson*, 651 F.2d 96, 109 (2nd Cir.1981); *Smith v. Sullivan*, 553 F.2d 373, 380 (5th Cir.1977). "[A] prisoner may state a cause of action under the Eighth Amendment when he alleges that prison officials have, with deliberate indifference, exposed him to a serious, communicable disease that poses an unreasonable risk of serious damage to the prisoner's future health." *Clark v. Williams*, 619 F.Supp.2d 95, 105–06 (D.Del.2009) (citing *Helling v. McKinney*, 509 U.S. 25, 33–35, (1993)). To establish deliberate indifference, "plaintiffs must prove an objectively serious medical need and that prison officials knew of the need but deliberately disregarded it." *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 531–32 (8th Cir.2009) (en banc) (citing *Estelle v. Gamble*, 429 U.S. 97, 106, (1976)).

Defendants urge that no violation or harm exists to be addressed here because no case of COVID-19 has been confirmed at Parchman. However, the Second Circuit has acknowledged that "it is unnecessary to require evidence that an infectious disease has actually spread in an overcrowded jail before issuing a remedy." Lareau v. Manson, 651 F.2d at 109 (2d. Cir. 1981). The question of the appropriateness of relief, rather, turns on whether Defendants had failed to timely implement reasonable, sufficient measures to ensure adequate protection against COVID-19.

MODIFIED RELIEF

In line with the relief originally requested by Named Plaintiffs, MDOC and Centurion have now committed to implementing the procedures generally referenced in three primary documents produced with Defendants' Response: (1) the "Centurion Pandemic Preparedness and Emergency Response Plan" [Dkt. # 62-2, p. 16-24], (2) the MDOC Pandemic Influenza Plan SOP 25-09-B [Dkt # 62-2, p. 10-15], and (3) the Centurion general information pamphlets for Incarcerated Persons, Security Staff, and Correctional Healthcare Staff [Dkt # 62-2, p. 5-9]. Named Plaintiffs seek only to ensure that these measures are effectively and actually implemented *at Parchman, and under a response plan specific to Parchman facilities, inmates, and staff*.

As such, Named Plaintiffs request that this Court enter an order: (1) formalizing the representations and promises contained in policies and procedures; (2) ensuring that these protective measures actually occur and continue to occur throughout the life of this pandemic; (3) and requiring verification of same to the Named Plaintiffs and the Court in whatever format and frequency the Court deems appropriate; and, (4) any such other relief as the Court may deem appropriate under these unique circumstances. Pursuant to L. U. Civ. R. 7(b)(2)(f), Plaintiffs will

submit to the Court and Defendants a proposed order setting forth the modified relief requested, as described herein.

Date: March 20, 2020

Respectfully submitted,

/s/ Marcy B. Croft

Marcy B. Croft (MS Bar #10864)
Carson H. Thurman (MS Bar #104871)
MARON MARVEL BRADLEY ANDERSON & TARDY LLC
200 South Lamar Street
Jackson, MS 39201
Telephone: (601) 960-8630
Telefax: (601) 206-0119

Thomas G. Bufkin (MS Bar #10810)
CARROLL BUFKIN, PLLC
1076 Highland Colony Parkway
600 Concourse, Suite 125
Ridgeland, MS 39157
Telephone: (601) 982-5011
Telefax: (601) 853-9540

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of March 2020, a copy of the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all counsel for record registered to receive electronic service by operation of the Court's electronic filing system.

/s/ Marcy B. Croft

Marcy B. Croft (MS Bar #10864)