

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ALEXANDER GRINIS, MICHAEL
GORDON, and ANGEL SOLIZ, on behalf of
themselves and those similarly situated,

Petitioners,

v.

STEPHEN SPAULDING, Warden of Federal
Medical Center Devens, and MICHAEL
CARVAJAL, Director of the Federal Bureau
of Prisons, in their official capacities,

Respondents.

No. 20-cv-10738-GAO

SECOND NOTICE OF SUPPLEMENTAL AUTHORITIES AND INFORMATION

Petitioners submit this Notice to bring recent court decisions and other developments to this Court's attention.

First, a member of the proposed class at FMC Devens has died of COVID-19.

Undersigned counsel learned of this development from a press release that the BOP posted on its public website:

On April 7, 2020, inmate Darrel Underhill went to the outside hospital for a radical nephrectomy for renal cancer. On April 10, 2020, Mr. Underhill returned to the Federal Medical Center (FMC) Devens, in Ayer, Massachusetts, and was placed in quarantine status. On April 22, 2020, he developed a fever and was sent to the outside hospital where he tested positive for COVID-19; he returned to the institution the next day.

On Monday, May 4, 2020, Mr. Underhill, who was receiving hospice care in the Skilled Nursing Unit at FMC Devens, and had long-term, pre-existing medical conditions which the CDC lists as risk factors for developing more severe COVID-19 disease, was pronounced dead by FMC Devens hospital staff.

Mr. Underhill was a 76 year-old male who was sentenced in the District of New Jersey to a 121-month sentence for Distribution of

Child Pornography. He had been in custody at FMC Devens since April 26, 2018.¹

Respondents still have not revealed how many FMC Devens prisoners, if any, have been tested since the first confirmed case was identified on April 22. Thus, it is impossible to know how many other elderly and/or medically vulnerable prisoners, like Underhill, may be at imminent risk of serious illness and death from COVID-19.

Second, there are now 2,340 confirmed “open” COVID-19 cases among prisoners and staff across 51 BOP facilities, with 40 prisoner deaths.² Confirmed cases at FMC Fort Worth have grown to 458, with 4 deaths. Meanwhile, the total population of FMC Devens remains nearly static, despite Attorney General Barr’s admonition over a month ago that “time is of the essence” in reducing prisoner populations by arranging prompt transfers to home confinement.

Date	Camp	FMC
April 9	108	914
April 16	108	906
April 23	106	905
April 30	105	902

Third, today, the Sixth Circuit refused to stay the preliminary injunctive relief ordered in *Wilson v. Williams*, No. 4:20-cv-00794, 2020 U.S. Dist. LEXIS 70674, at *25 (N.D. Ohio Apr. 22, 2020) (ordering emergency transfers to reduce the population of FCI Elkton). *See Wilson v. Williams*, No. 20-3447 (6th Cir. May 4, 2020) (attached as Exhibit A). Of particular note, the

¹ Federal Bureau of Prisons Press Release (May 4, 2020), *available at* https://www.bop.gov/resources/news/pdfs/20200504_press_release_dev.pdf.

² See <https://www.bop.gov/coronavirus/> (last visited May 4, 2020). As explained in prior filings, this total apparently does not include the 692 inmates and staff whose cases are not counted as “open” because they have “recovered,” nor does it appear to include the prisoners who have died (BOP now lists “zero” open cases at FMC Devens in the wake of the death noted above).

Sixth Circuit found that the case was properly brought as a habeas petition, to which the PLRA does not apply:

Petitioners seek release for the subclass not because the conditions of their confinement fail to prevent irreparable constitutional injury at Elkton, but based on the fact of their confinement. Where a petitioner claims no set of conditions would be constitutionally sufficient, we construe the petitioner's claim as challenging the fact of the confinement Petitioners' proper invocation of § 2241 also forecloses any argument that the PLRA applies given its express exclusion of "habeas corpus proceedings challenging the fact or duration of confinement in prison" from its ambit. 18 U.S.C. § 3626(g)(2).

Wilson, supra, at 3 (internal citations omitted). With regard to the Eighth Amendment claim, the Sixth Circuit explained:

The district court found that Elkton's dorm-style structure rendered it unable to implement or enforce social distancing. The COVID-19 virus, now a pandemic, is highly contagious, and can be transmitted by asymptomatic but infected individuals. Older individuals or those who have certain underlying medical conditions are more likely to experience complications requiring significant medical intervention, and are more likely to die.

....

While the district court's findings are based on a limited evidentiary record, its "account of the evidence is plausible in light of the record viewed in its entirety."

Id. at 4 (internal citation omitted).

Fourth, today, in *Gomes v. Acting Secretary, U.S. Department of Homeland Security*, No. 20-cv-00453-LM (D.N.H. May 4, 2020), the District Court orally granted a motion to conduct emergency bail hearings for ICE detainees based on the threat of COVID-19 and provisionally certified a class, as the court has done in *Savino v. Hodgson*, No. 20-cv-10644-WGY, 2020 U.S. Dist. LEXIS 61775, at *28 (D. Mass. Apr. 8, 2020).

At this juncture, the court will provisionally certify the class for the purpose of holding expedited bail hearings—a form of preliminary and emergency relief in the context of this case.

...

Petitioners claim that respondents have subjected the putative class to the same injury: policies and practices (or the lack thereof) that put their health at substantial risk of harm by inhibiting their ability to practice social distancing during the COVID-19 pandemic. Petitioners' deliberate indifference claim thus presents at least two common questions: whether each respondent had actual knowledge of the impending harm or risk posed to the putative class by COVID-19; and whether each respondent failed to take steps that would have easily prevented the harm to detainees.

Gomes, supra, D.E. 50 at 3, 7.

Respectfully submitted,

ALEXANDER GRINIS, MICHAEL GORDON, ANGEL SOLIZ,
and others similarly situated,

By their attorneys,

/s/ William W. Fick

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on May 4, 2020.

/s/ William Fick