UNITED STATES DISTRICT COURT
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.	Civil Action No. 20-cv-10738-GAO

RESPONDENTS' OPPOSITION TO PETITIONERS'
MOTION FOR RECONSIDERATION

On May 26, 2020, Petitioners filed a motion for reconsideration of this Court's order denying them preliminary injunctive relief. ECF No. 52. Petitioners claim that reconsideration is warranted because "previously unavailable evidence undermines factual predicates" of this Court's decision denying injunctive relief. *Id*. In particular, Petitioners claim that Respondent Warden Spaulding "admitted under oath that Respondents are deliberately disregarding health risks to prisoners" during his testimony in *United States v. Pena*, No. 16-cr-10236-MLW (D. Mass.). ECF No. 53, at 1. Petitioners further allege that, due to Bureau of Prisons ("BOP") policies, the infection is spreading. *Id*., at 2.

Petitioners' allegations are without merit and their motion for reconsideration must be denied. *First*, Warden Spaulding never testified that Respondents were acting with deliberate indifference to prisoners' medical needs. To the contrary, the Warden's testimony in the *Pena* case was consistent with all of the information previously before this Court at the time it denied

Petitioners' motion for injunctive relief. *Second*, although there have been additional cases of COVID-19 at the Federal Medical Center, Devens, Massachusetts ("FMC Devens"), this Court's decision finding that Petitioners failed to demonstrate a likelihood of success on their Eighth Amendment claims was not based solely on the number of positive COVID cases at FMC Devens. Because Petitioners cannot demonstrate that Respondents have acted with deliberate indifference, and because Petitioners offer no new legal or material factual information that undermines this Court's decision denying injunctive relief, Petitioners motion for reconsideration must be denied.

ARGUMENT

A. Legal Standard

"A motion for reconsideration is not intended to provide a party with a second bite of the proverbial apple." *Palmer v. Champion Mortg.*, 465 F.3d 24, 30 (1st Cir. 2006). "Courts should not permit motions for reconsideration to be used as vehicles for pressing arguments that could have been asserted earlier or for rearguing theories that have been previously advanced and rejected…Rather, the granting of motions for reconsideration is an extraordinary remedy which should be used sparingly." *Goldman v. United States*, 2019 WL 1129455, at *5 (D. Mass. Mar. 12, 2019) (citing *Palmer*, 465 F.3d at 30). "A trial court acts well within its discretion in declining to reconsider a legally correct order." *Hannon v. Beard*, 645 F.3d 45, 51 n. 5 (1st Cir. 2011).

Such is the case here. Petitioners' motion reasserts the allegations they made in their original petition for writ of habeas corpus ("Petition"), and they offer no new legal or *material* factual evidence for this Court's consideration. Petitioners do not identify any "manifest error of law or fact" made by this Court, nor can they. *National Metal Finishing Co., Inc. v. BarclaysAmerican/Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir. 1990). To the contrary, as set forth, *infra*, the measures Respondents have taken in response to the COVID-19 pandemic, and

precedential legal authority affirms this Court's decision denying injunctive relief to Petitioners. Accordingly, Petitioners' motion for reconsideration must be denied. *Estate of Rivera v. Doctor Susoni Hosp., Inc.*, 323 F.Supp.2d 262, 265 (D. Puerto Rico June 24, 2004) ("Motions for reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the Court overlooked and that might reasonably be expected to alter the conclusion reached by the Court.") (citing *Shrader v. CSC Transp., Inc.*, 70 F.3d 255, 257 (2nd Cir. 1995)).

B. Warden Spaulding Did Not Admit Deliberate Indifference To Prisoners' Medical Needs

Based upon the testimony of Warden Spaulding in the case of *United States v. Pena*, No. 16-cr-10236-MLW (D. Mass.), Petitioners claim that Respondents have acted with deliberate indifference in failing to properly consider COVID-19 in considering an inmate's reduction in sentence (compassionate release), or release on home confinement. In so arguing, Petitioners improperly conflate the varying considerations undertaken for each form of relief, and inappropriately conclude that the Warden's testimony equates to a finding of deliberate indifference by this Court. It does not.

In *Pena*, No. 16-CR-10236-MLW (D. Mass.), the sole issue before the district court (Wolf, J.) was defendant's motion for compassionate release (or reduction in sentence) pursuant to 18 U.S.C. § 3582. ECF No. 53-1, at 7; ECF No. 53-2, at 13. In considering defendant's motion, the court acknowledged that the BOP has the sole authority to decide whether to release an inmate to serve the remainder of his sentence in home confinement. ECF No. 53-1, at 12. In granting the defendant's motion for reduction in sentence, however, the district court found "that there [were] extraordinary and compelling reasons" that warranted the defendant's release. ECF No. 53-2, at 13. The court's finding was fact-specific. ECF No. 53-2.

Petitioners claim that Respondents' failure to consider COVID-19 as part of a decision for a reduction is sentence does not establish deliberate indifference. Furthermore, this allegation misconstrues the Warden's testimony. The Warden testified that he did not consider COVID-19 "as a *sole determination* of reduction in sentence or compassionate release." ECF No. 53-1 at 44 (emphasis added). This is consistent with the information that was before this Court at the time it denied Petitioners' motion for injunctive relief, and relates to Petitioners' claims regarding a reduction in sentence, and not to Respondents' actions regarding home confinement decisions. ECF No. 36-1. The Warden testified that he did not consider COVID-19 in response to the criteria to be considered for reduction in sentence motions, based upon Program Statement 5050.50, and the guidance he received from the BOP. ECF No. 53-1, at 44-45. As the Warden testified, the risk of contracting COVID-19, *as a sole determination*, is not considered an "extraordinary or compelling circumstance" for a reduction in sentence based upon Program Statement 5050.50 and BOP guidance that he followed. ECF No. 53-1, at 32, 44. Notably, this is the very information that was before the Court at the time this Court considered Petitioners' claims, and denied them. *See* ECF No. 36-1, at ¶ 31 (the sole basis for Petitioner Grinis' request for a reduction in sentence was the potential for COVID-19 infection, which does not meet the necessary criteria for a reduction in sentence under BOP policy); *id*., at ¶ 32 (Petitioner Gordon sought release based on potential effects of a COVID infection, which alone does not meet the necessary criteria for a reduction in sentence under BOP policy); *id*., at ¶ 33 (Petitioner Soliz was denied a reduction in sentence request as not having an end-of-life trajectory such that he met the necessary criteria for a reduction in sentence under BOP policy). Thus, the Warden's testimony neither presents new facts to this Court, nor does it evidence an admission of deliberate indifference, as Petitioners allege.

Furthermore, Petitioners' motion for reconsideration also ignores that the BOP lacks authority to provide inmates with a reduction in sentence through compassionate or "early release." ECF No. 36-1, at ¶ 22. A reduction of an inmate's federal sentence can only be accomplished by an Article III judge; specifically, the inmate's sentencing judge. *Id*. However, upon an inmate's request, the Director of BOP may make a motion to an inmate's sentencing court to reduce a term of imprisonment under 18 U.S.C. § 4205(g) and 18 U.S.C. § 3582(c)(1)(A). *Id*. This process is outlined in the U.S. Dep't of Justice Fed. Bureau of Prisons, C*ompassionate Release/Reduction In Sentence Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)*, Program Statement 5050.50 (Jan. 17, 2019)[1]. *Id*. The BOP uses these statutory authorities in "extraordinary or compelling circumstances," which could not have reasonably have been foreseen by the court at the time of sentencing. *Id*. For the reasons set forth, *supra*, based upon BOP policy and guidance, the risk of contracting COVID-19, alone, does not present "extraordinary or compelling circumstances" sufficient for Respondents to make a motion to the sentencing court.

With regard to home confinement, contrary to Petitioners' claims, the Warden's testimony in *Pena* does not change the information that was before this Court at the time it denied Petitioners' request for injunctive relief. At the time this Court considered Petitioners' request for a transfer to home confinement, pursuant to 18 U.S.C. § 3624(c)(2), the Court was aware that the BOP would consider the totality of the circumstances of each individual inmate, the statutory requirements for home confinement, and a list of discretionary factors that the BOP considered when evaluating Petitioners' claims. ECF No. 36-1, at ¶ 5. In highlighting but one aspect of the Warden's testimony in *Pena*, where the Warden testified that unless an inmate had served 50% or more of

[1] This BOP Program Statement and all other program statements and operations memoranda cited herein are available at www.bop.gov via the Resources link.

his sentence, or had served 25% or more of his sentence and had 18 months or less remaining, the inmate would not be considered for home confinement, Petitioners mischaracterize BOP policy, and mislead this Court.

The Warden's testimony in *Pena* took place on May 13, 2020, shortly after the BOP issued new guidance with regard to prioritization of inmates to be considered for home confinement. ECF No. 36, ECF No. 53-1. Indeed, in response to the newly-issued BOP guidance, on April 24, 2020, Respondents filed a supplemental notice and declaration with this Court. ECF No. 36. As Respondents informed this Court:

> The supplemental declaration of Amber Bourke, Case Manager, Federal Medical Center, Devens, Massachusetts ("Supp. Bourke Decl."), attached hereto, provides the most current information regarding BOP's priority home confinement program, and clarifies that the priority factors that BOP has generally considered for home confinement of inmates are subject to deviation in BOP's discretion in certain circumstances, and are subject to revision as the situation progresses. The BOP is, at this time, prioritizing for consideration those inmates who either, (1) have served 50% or more of their sentences; or, (2) have 18 months or less remaining in their sentences and have served 25% or more of their sentences. *See* Supp. Bourke Decl. ¶ 19. As BOP processes the inmates eligible for home confinement under these criteria and learns more about the COVID-19 pandemic and its effect on BOP facilities, it is assessing whether and how to otherwise prioritize consideration. *Id*.

Thus, the Warden's testimony that inmates who had served 50% or more of their sentences; or, had 18 months or less remaining in their sentences and had served 25% or more of their sentences were being considered for priority consideration for home confinement, was information that was squarely before this Court at the time it denied Petitioners' request for injunctive relief. Nor did this Court take issue with such priority consideration of inmates, which was designed to prioritize BOP's limited resources. ECF No. 36-1, at ¶ 19. As this Court found, "[Petitioners] have not shown that it is likely that they would qualify for transfer from incarceration to home confinement under the current BOP eligibility requirement, and therefore they have not shown that

they personally have a likelihood of success in obtaining the relief prayed for in their petition." *Grinis v. Spaulding*, No. 20-cv-10738-GAO (D. Mass. May 8, 2020), ECF No. 45, at 5.

Finally, to the extent this Court considers Petitioners' claims that Respondents are wholesale disregarding COVID-19 risk factors when considering an inmate for home confinement and reduction in sentence, an examination of those facts will result in a decision in Respondents' favor. Since March, 2020, the BOP has increased home confinement by over 136%, and is continuing to aggressively screen inmates for home confinement. *See* Declaration of Amber Bourke ("Bourke Decl."), attached hereto, at ¶ 2. Since the March 26, 2020 Memorandum instructing the BOP to prioritize home confinement as an appropriate response to the COVID-19 pandemic, the BOP has placed an additional 3,883 inmates on home confinement. *Id*. Specifically at FMC Devens, with regard to priority consideration of home confinement placements, all inmates within the guidelines of the Attorney General's memos and the BOP guidelines have been reviewed, and referrals for home confinement have been made, when appropriate. Bourke Decl., at ¶ 3. Additionally, FMC Devens is reviewing the remaining inmates for COVID high-risk factors and determining which of those inmates may be reviewed and sent to BOP Central Office for a final review and determination. *Id*.

Under the initial reviews and these current ongoing reviews, FMC Devens has reviewed approximately 310 inmates for home confinement placement at this time. Bourke Decl., at ¶ 4. To date, FMC Devens has released 25 inmates to early Residential Re-entry Centers ("RRC") or home confinement. *Id.* Additionally, 6 inmates have approved placement dates and will be released between June 9, 2020, and June 18, 2020. *Id.* Approximately 12 additional inmates have now met the qualifications for home confinement, and are being reviewed by the Special Investigative Section ("SIS") and medical departments as part of the referral process. *Id.* Lastly,

since April 3, 2020, FMC Devens was required to release 35 inmates pursuant to judicial orders. *Id.* This is comprised of 26 Compassionate Release/Reduction in Sentence Orders, 1 related to Washington D.C. legislation, 1 Time Served Order, 5 First Step Act sentence reduction orders, 1 Bail Order and 1 Release Order pending an Appeal. *Id.*

With regard to reductions in sentence, since April 3, 2020, approximately 241 Reduction in Sentence ("RIS") requests have been submitted by FMC Devens inmates. Bourke Decl., at ¶ 5. To date, 5 RIS requests have been forwarded to BOP Central Office for further RIS consideration and approval, as FMC Devens has determined they meet RIS criteria. *Id*. Currently, none have been approved for a RIS by the BOP Central Office. *Id*.

Accordingly, it is clear that the Warden's testimony in *Pena* is consistent with the declarations and information before this Court, and upon which this Court considered and found that Petitioners were not likely to succeed in their claim that they have been subjected to cruel and unusual punishment by Respondents. From the additional facts set forth, *supra*, Petitioners cannot credibly claim that Respondents are acting with deliberate indifference. For these reasons, Petitioners' motion for reconsideration must be denied.

C. Additional Measures Taken At FMC Devens To Prevent The Spread Of COVID-19

Despite Petitioners' claims that new evidence demonstrates that Respondents' actions have failed to prevent a deadly outbreak of COVID-19 at FMC Devens, this Court did not base its decision solely on the number of positive cases at FMC Devens. Indeed, this Court found that "[b]oth the BOP and FMC Devens have made significant changes in operations in response to COVID-19." ECF No. 45, at 4. "These affirmative steps may or may not be the best possible response to the threat of COVID-19 within the institution, but they undermine an argument that the respondents have been actionably deliberately indifferent to the health risks of inmates." *Id*.,

at 5. Since the time of this Court's decision denying injunctive relief, Respondents have taken further measures in response to the threat of COVID-19 at FMC Devens, as set forth below. As such, Petitioners' cannot credibly claim that they have been subjected to cruel and unusual punishment in contravention of the Eighth Amendment.

Although there has been a rise in the number of positive COVID cases at FMC Devens, Petitioners ignore the reason behind that rise: increased testing of inmates. Petitioners also ignore that FMC Devens continues to operate under the BOP's Action Plan for COVID-19. On May 18, 2020, the Bureau of Prisons (BOP) ordered the implementation of Phase 7 of its COVID-19 Action Plan. *See* Declaration of Clinical Director Megan Shaw ("Shaw Decl."), attached hereto, at ¶ 2. This phase extends all measures from Phase 6, to include measures to contain movement and decrease the spread of the virus. *Id*. The Phase 7 action plan will remain in place through June 30, 2020, at which time the plan will be evaluated. *Id*. FMC Devens implemented Phase Seven as directed in conjunction with this order. Shaw Decl. ¶ 3.

Furthermore, nationally, there are more inmates and staff who have recovered from COVID-19 than are currently infected: there are 2,068 inmates and 185 BOP staff who have confirmed positive test results for COVID-19 nationwide; and 3,785 inmates and 452 BOP staff who have recovered, as of June 8, 2020. Shaw Decl. ¶ 4. FMC Devens has 42 open inmate cases of COVID-19, and 5 staff cases. Shaw Decl. ¶ 5. There have been 2 inmate deaths, and 0 staff deaths. *Id*. At FMC Devens, 10 inmates have recovered from COVID-19, and 1 staff member has recovered. *Id*. There are still *no* positive cases of COVID-19 at the Federal Prison Camp. Shaw Decl. ¶ 6. Furthermore, the entire asymptomatic inmate population at the Camp was tested for COVID-19 as part of the ongoing Infection Control procedures. *Id*.

The increased numbers at FMC Devens are not the result of deliberate difference, but, in part, demonstrate actions Respondents have taken to prevent the spread of COVID-19, to include increased testing. On May 7, 2020, the BOP announced that it would substantially expand testing at BOP detention and quarantine sites (of which FMC Devens is not one) using additional Abbot ID NOW instruments for Rapid RNA testing obtained from the U.S. Department of Health and Human Services ("HHS"). Shaw Decl. ¶ 7. Beginning in March 2020, the BOP worked with HHS and the Federal Emergency Management Agency ("FEMA") to increase its testing capabilities within the agency, and continued to provide testing for COVID-19 symptomatic inmates, as recommended by the Centers for Disease Control ("CDC"). *Id*.

In addition to the measures FMC Devens has already taken to prevent the introduction and spread of COVID-19 in the institution, as set forth in Respondents' opposition to Petitioners' motion for injunctive relief, FMC Devens received its first rapid Abbot test machine on April 29, 2020, and began to immediately rapid-test symptomatic inmates in order to isolate and quarantine them more quickly in an effort to decrease the chance of spread of COVID-19. Shaw Decl. ¶ 8. A short time later, FMC Devens received a second rapid Abbot test machine. Shaw Decl. ¶ 9. Both machines have been used, simultaneously, to quickly test both symptomatic inmates, and asymptomatic inmates who had close contact with an inmate who tested positive for COVID-19. *Id*. The BOP began testing of asymptomatic inmates to assist in slowing transmissions within a correction setting. Shaw Decl. ¶ 10. As a result, an increase in the number of COVID-19 positive tests has been reflected in the BOP's numbers. *Id*. In fact, FMC Devens began testing asymptomatic inmates beginning in March, 2020, when inmates had risk factors for close contact with known COVID-19 positive individuals. Shaw Decl. ¶ 11. Once the institution had positive cases, testing in asymptomatic housing units took place to make sure there were no additional

positive carriers who were potential vectors. *Id.* FMC Devens also tested every inmate at the institution during the last two weeks of May, 2020. *Id*. As a result of increased testing capabilities and the delivery of additional tests, FMC Devens was able to test *all* inmates in the institution. Shaw Decl. ¶ 12 (emphasis added). Additionally, continued inmate testing within units was conducted if there was a positive COVID-19 result in the unit, or if an inmate was within close contact of a COVID-positive inmate. *Id*.

Thus, while Petitioners seek to attribute the rise in positive COVID-19 cases to deliberate indifference by Respondents, the opposite is true. Respondents continue to take proactive measure to prevent the spread of COVID-19 at FMC Devens, and such measure have resulted in a reporting of increased positive COVID cases.

D. The Weight of Authority Supports Affirmance of this Court's Decision Denying Preliminary Injunctive Relief

In an attempt to raise new legal claims before this Court to support their request for reconsideration, Petitioners ask this Court to consider persuasive authority from other district courts which have granted injunctive relief on similar claims. Aside from the distinguishing circumstances in some of these cases, Petitioners ignore the weight of authority against their claims. Petitioners also ignore the substantial steps that Respondents continue to take to prevent the spread of COVID-19 within FMC Devens.

1. Supplemental Legal Authority

As this Court is aware, in *Swain v. Junior,* -- F.3d --, 2020 WL 2161317 (11th Cir. May 5, 2020), the plaintiffs sought declaratory and injunctive relief on behalf of the class claiming violations of the Eighth and Fourteenth Amendments, and seeking immediate release from custody pursuant to 28 U.S.C. § 2241. The plaintiffs challenged measures taken by the state prison to halt the spread of COVID-19. The district court granted a preliminary injunction, required defendants

to take certain safety measures, and imposed reporting requirements on the prison. The defendants moved for a stay pending appeal. The Eleventh Circuit court granted defendants' motion for a stay, finding that the district court likely committed error in granting a preliminary injunction. The court analyzed many of the same issues now before this Court, including: likelihood of success on the merits of plaintiffs' Eighth Amendment claim, and, specifically, what constitutes "deliberate indifference;" discussed the court's assumption of administrative decisions customarily left to the discretion of prison officials; and reviewed exhaustion under the Prison Litigation Reform Act ("PLRA").

In *Valentine v. Collier,* -- F.3d --, 2020 WL 1934431 (5th Cir. Apr. 22, 2020) Plaintiffs brought a class action alleging Eighth Amendment violations and challenging the measures the state prison system put in place to prevent the spread of COVID-19. The district court granted the plaintiffs' motion for preliminary injunction and required the defendants to take specific measures. Defendants appealed. The Fifth Circuit entered a stay of the injunction pending appeal, found that defendants were likely to prevail on appeal, and analyzed the measures the prison took under the Eighth Amendment, and the standard for "deliberate indifference;" discussed the court's assumption of administrative decisions left to the discretion of prison officials; and reviewed the PLRA's exhaustion requirement, and the permissible scope of a remedial injunction under the PLRA.

In *Wragg, et al. v. Ortiz, et al.,* May 5, 2020), Civil No. 20-5496 (RMB), Opinion, ECF No. 40, (D. NJ May 27, 2020), the petitioners filed a "Complaint-Class Action for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus" claiming violation of the Eighth Amendment and seeking release of hundreds of inmates to allow for social distancing and protection against COVID-19. *Wragg*, D. 40 at 2-3. In denying petitioners' request for injunctive

relief, and granting respondents' motion to dismiss, the court analyzed the same issues now pending before this Court. Finding that it lacked jurisdiction to consider petitioners' conditions of confinement claims brought pursuant to 28 U.S.C. § 2241, the court noted that the Supreme Court has not recognized petitioners' claim as cognizable, *Wragg*, D. 40 at 54, and further opined, "[t]his Court does not find this case to be that 'extraordinary case' where it should expand habeas jurisdiction, more extraordinary than even *Abbasi*, where the Supreme Court did not see fit to extend habeas jurisdiction over a conditions of confinement claim involving outright alleged physical abuse of prisoners who were not serving a sentence upon conviction of a crime." *Id.*, at 54 (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1863 (2017)). Furthermore, even assuming jurisdiction to consider petitioners' claims existed, the court found that habeas relief was lacking where petitioners had other avenues available for immediate relief, such as a request for home confinement under the CARES Act and compassionate release under 18 U.S.C. § 3582(c)(1)(A), and exceptional circumstances to grant habeas relief were not present. *Id*. at 55.

The *Wragg* court further opined, as this Court has held, that petitioners failed to present a likelihood of success on the merits of their Eighth Amendment claim. Indeed, the court found that no deliberate indifference existed in light of the BOP's nationwide action plan to combat COVID-19, and the steps taken within the institution itself. *Wragg*, D. 40 at 61. In addressing the same claims as those made by Petitioners here – physical distancing is not possible in a prison environment – the court found "[t]hat physical distancing is not possible in a prison setting … does not an Eighth Amendment claim make…" *Id*. at 65.

Notably, while Petitioners rely upon *Wilson v. Williams*, No. 4:20-cv-00794, 2020 WL 1940882 (N.D. Ohio, Apr. 22, 2020) in support of their request for injunctive relief, the Supreme Court of the United States has issued a stay of the district court's orders pending disposition of the

government's appeal in the Sixth Circuit, and until further order of the Supreme Court. *Williams v. Wilson*, No. 19A1047, (June 4, 2002), attached hereto. And, a number of other courts have likewise determined that actions such as those taken by Respondents in this case do not violate the Eighth Amendment, and injunctive relief is not warranted. *Lucero-Gonzalez v. Kline,* No. CV-20-00901-PHX-DJH (DMF) (D. Ariz. June 2, 2020) (official capacity defendants not liable under the Eighth Amendment and no injunctive relief is warranted where policies at the prison were not objectively, deliberately indifferent to plaintiffs' health or safety, but rather reflected CDC recommendations and had been implemented without unreasonable delay); *Nellson v. Barnhart,* No. 20-cv-00756-PAB (D. Col. June 4, 2020) (finding no deliberate indifference or disregard of a substantial risk to inmate health where defendants are complying with CDC protocols, even if every inmate and staff member is not tested).

Thus, while Petitioners present some persuasive legal authority to support their request for reconsideration and the issuance of injunctive relief, the legal authority they offer is persuasive, and cumulative, and was considered by this Court when it denied Petitioners' motion for injunctive relief. Furthermore, as set forth above, additional persuasive legal authority supports this Court's denial of Petitioner's motion for injunctive relief, and supports this Court's finding that Petitioners are not likely to prevail on their Eighth Amendment claim.

E. New Evidence Further Weighs Against Petitioners' Claims for Injunctive Relief

It is clear that the BOP has not been deliberately indifferent to the COVID-19 outbreak, and is taking aggressive measures to combat its spread and to care for inmates who contract the disease. While Petitioners may ultimately disagree with the measures taken by the BOP to protect and treat inmate health and safety, while also carrying out its mission to effectuate criminal sentences imposed by federal courts, deliberate indifference is not shown simply by a difference

of medical judgment. *See Scott v. Benson*, 742 F.3d 335, 340 (8th Cir. 2014) (holding that a "mere difference of opinion over matters of expert medical judgment or a course of medical treatment fail[s] to rise to the level of a constitutional violation"). "[A] prisoner who merely disagrees with a diagnosis or a prescribed course of treatment does not state a constitutional violation." *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 811 (10th Cir. 1999). Indeed, a prisoner must prove more than "an inadvertent failure to provide adequate medical care," *Estelle*, 429 U.S. at 105, or a mere "disagreement[ ] between [himself] and [his] doctors about the proper course of [his] medical treatment," *Kosilek*, 774 F.3d at 83 (quoting *Watson*, 984 F.2d at 540). Regarding the latter, it is well established that the Eighth Amendment "does not impose upon prison administrators a duty to provide care ... of the prisoner's choosing." *Id*. at 82 (citing *Ferranti v. Moran*, 618 F.2d 888, 891 (1st Cir. 1980)).

In addition to the measures set forth in opposition to Petitioners' request for injunctive relief, FMC Devens continues to take measures to prevent inmates from contracting COVID-19. In late May, 2020, several inmates housed in the sex offender unit (G Unit) tested positive for COVID-19 in the same day. Shaw Decl. ¶ 13. The G Unit has a first and second floor. *Id*. Four inmates on the first floor sex offender unit reported to sick call that they had fatigue, cough and or fever. *Id*. They were assessed and tested for COVID-19 and all 4 were positive. *Id*. In response to the positive test results, all inmates in the G Unit were tested, although there were no other symptomatic inmates on either floor at that time. *Id*. As a result, approximately 20 inmates tested positive for COVID. *Id*. All of the inmates who tested positive came out of the first floor sex offender unit. *Id*. FMC Devens immediately went into full facility lockdown and began testing all inmates in every housing unit to ensure there were no asymptomatic vectors with COVID-19. *Id*. The lockdown effectively prevented any inmates from coming into contact with inmates from other

housing units. *Id*. FMC Devens also established the first floor of G Unit ("Unit G-A"), as an isolation unit and all inmates who tested negative for COVID-19 were moved into a quarantine unit where they would not be exposed to the positive G-A Unit inmates. *Id*. The quarantine inmates began a 14-day quarantine in this separate housing unit to mitigate the outbreak from further spread in case some of these inmates developed COVID-19 during the known 14-day incubation period of COVID-19. *Id*. Unit G-A inmates were then isolated in the unit to prevent exposure and reduce the spread of the virus with an emphasis on PPE and isolation infection control precautions. *Id*. Donning and doffing stations for PPE were established on the unit and education of custody officers began on every shift prior to its start. *Id*. The inmates from the G-B Unit (second floor) who all tested negative were not moved from their unit as they are physically separated from the first floor of G Unit. *Id*. A 14-day continuation of the institution lockdown was enforced to ensure there was adequate time for any potentially exposed asymptomatic inmates to convert to a positive COVID-19 test or to begin showing symptoms that would trigger an automatic COVID-19 test and move to isolation. Shaw Decl. ¶ 14. In addition to placing the institution on lockdown, all of the asymptomatic housing units were then re-tested for COVID-19 during the 14-day lockdown to ensure that all inmates were negative prior to discontinuing the lockdown. *Id*.

As inmates who were positive for COVID-19 near the end of their required 14-day isolation period, they began to convert to being COVID-19 negative. Shaw Decl. ¶ 15. These inmates are in a "recovered" status, and they will be able to leave restrictive housing and return to their normal housing units. *Id*. Some COVID-19 positive inmates do not convert to negative for several weeks, and these inmates will remain in isolation on infection control precautions until they meet the CDC Testing Based Strategy for discontinuation of isolation precautions. *Id*. FMC Devens will be

using the CDC's strictest guidelines for Discontinuation of Isolation Precautions (the "Test-Based Strategy"). Shaw Decl. ¶ 16. Before discontinuation of isolation precautions, inmates will be required to have gone 3 consecutive days without a fever, have a resolution of respiratory symptoms, and have two negative COVID-19 tests taken more than 24 hours apart from each other. Shaw Decl. ¶ 17. The requirement for two tests will decrease the likelihood that one negative test is a false negative, and will help reassure that the inmate is COVID-19 negative before the isolation precautions are discontinued. *Id*. FMC Devens will continue its diligent testing and isolation/quarantine strategy to prevent the spread of COVID-19 within the institution, including separating from general population all inmates who develop symptoms or who have close contact with a suspected COVID-19 positive individual. Shaw Decl. ¶ 18. In addition, the institution will immediately return to a lockdown status if there are any signs that a new outbreak of cases is occurring in any housing unit. *Id*.

As such, it is clear that Respondents continue to take aggressive measures to prevent the spread of COVID-19 within the institution, injunctive relief is not warranted, and Petitioners' motion for reconsideration must be denied.

CONCLUSION

The BOP is taking significant and ongoing steps to prevent the spread of COVID-19 in FMC Devens and to provide medical care and treatment for inmates who do become infected. Petitioners cannot demonstrate that the BOP, or FMC Devens, has acted with deliberate indifference, and their constitutional claims under the Eighth Amendment fail. Respondents respectfully request that this Court deny Petitioner's motion for reconsideration of this Court's order denying injunctive relief to the Petitioners.

Respectfully submitted,

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Dated: June 9, 2020

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

Petitioners

v.

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Respondents.

Civil Action No. 20-cv-10738-GAO

DECLARATION OF AMBER BOURKE, CASE MANAGEMENT COORDINATOR

I, Amber Bourke, declare the following under 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

1. I have previously signed two declarations for this litigation, dated April 22, 2020 and April 24, 2020. The statements contained in this declaration are based upon my personal knowledge or information provided to me in my official capacity, and are intended to supplement the information previously submitted in this litigation.

BOP Releases To Home Confinement and Reduction in Sentences

2. The BOP has increased home confinement by over 136% since March 2020, and is continuing to aggressively screen inmates for home confinement. Since the March 26, 2020 Memorandum instructing the BOP to prioritize home confinement as an appropriate response to the COVID-19 pandemic, the BOP has placed an additional 3,883 inmates on home confinement. *See* www.bop.gov (last visited June 8, 2020).

3. Specifically at FMC Devens, with regard to priority consideration of Home Confinement placements, all inmates within the guidelines of the Attorney General's memos and the BOP guidelines have been reviewed, and referrals for home confinement were made, when appropriate. Additionally, FMC Devens is reviewing the remaining inmates for COVID

high-risk factors and determining which of those inmates may be reviewed and sent to BOP Central Office for a final review and determination.

4. Under the initial reviews and these current ongoing reviews, FMC Devens has reviewed approximately 310 inmates for Home Confinement placement at this time. As of this date, FMC Devens has released 25 inmates to early Residential Re-entry Centers (RRC) or Home Confinement. Additionally, 6 inmates have approved placement dates and will be released between the dates of June 9, 2020 and June 18, 2020. Approximately 12 more inmates have now met the qualifications for home confinement, and are being reviewed by the Special Investigative Section (SIS) and medical departments as part of the referral process. These inmates are not approved yet, but are being processed. Lastly, since April 3, 2020, FMC Devens was required to release 35 inmates pursuant to judicial orders. This is comprised of 26 Compassionate Release/Reduction in Sentence Orders, 1 related to Washington D.C. legislation, 1 Time Served Order, 5 First Step Act sentence reduction orders, 1 Bail Order and 1 Release Order pending an Appeal.

5. Upon information and belief, as has been submitted to me from the FMC Devens Reduction in Sentence Coordinator, since April 3, 2020, approximately 241 Reduction in Sentence (RIS) requests have been submitted by FMC Devens inmates. As of this date, 5 have been forwarded to BOP Central Office for further RIS consideration and approval as they have been determined by FMC Devens to meet RIS criteria. At this time, 0 have been approved for a RIS by the BOP Central Office.

Executed on this 9 day of June, 2020.

AMBER BOURKE
Case Management Coordinator
Federal Bureau of Prisons, FMC Devens

UNITED STATES DISTRICT COURT
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.

Civil Action No. 20-cv-10738-GAO

DECLARATION OF MEGAN SHAW, M.D., CLINCAL DIRECTOR

I, MEGAN SHAW, M.D., Clinical Director, Federal Medical Center, Devens, Massachusetts, declare the following under 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

1. I have previously signed a declaration for this litigation, dated April 22, 2020. The statements contained in this declaration are based upon my personal knowledge or information provided to me in my official capacity, and are intended to supplement the information previously submitted in this litigation.

Action Plan for COVID-19 – Phase Seven

2. On May 18, 2020, the Bureau of Prisons (BOP) ordered the implementation of Phase 7 of its COVID-19 Action Plan. This phase extends all measures from Phase 6, to include measures to contain movement and decrease the spread of the virus. The Phase 7 action plan will remain in place through June 30, 2020, at which time the plan will be evaluated. *See* https://www.bop.gov/resources/news/20200520_covid-19_phase_seven.jsp.

3. FMC Devens implemented Phase Seven as directed in conjunction with this order.

The Bureau of Prisons' COVID-19 Statistics

4. The BOP has 134,522 federal inmates in BOP-managed institutions and 12,788 inmates in community based facilities. Nationally, there are more inmates and staff who have recovered from COVID-19 than are currently infected: there are 2,068 inmates and 185 BOP staff who have confirmed positive test results for COVID-19 nationwide; and 3,785 inmates and 452 BOP staff who have recovered. *See* https://www.bop.gov/coronavirus/ (last visited June 8, 2020).

5. At this time, FMC Devens has 42 open inmate cases of COVID-19, and 5 staff cases. There have been 2 inmate deaths, and 0 staff deaths. At the institution, 10 inmates have recovered from COVID-19, and 1 staff member has recovered. *See* https://www.bop.gov/coronavirus/ (last visited June 8, 2020).

6. To date, there are no positive cases of COVID-19 at the Federal Prison Camp. The entire asymptomatic inmate population at the camp was tested for COVID-19 as part of the ongoing Infection Control procedures.

Expanded Testing Capabilities

7. On May 7, 2020, the BOP announced that it would substantially expand testing at BOP detention and quarantine sites[1] using additional Abbot ID NOW instruments for Rapid RNA testing obtained from the U.S. Department of Health and Human Services (HHS). Beginning in March 2020, the BOP worked with HHS and the Federal Emergency Management Agency (FEMA) to increase its testing capabilities within the agency, and continued to provide testing for COVID-19 symptomatic inmates, as recommended by the Centers for Disease Control (CDC).[2]

8. In addition to the measures FMC Devens has taken to prevent the introduction and spread of COVID-19 in the institution, as set forth in my previous declaration, FMC Devens received its first rapid Abbot test machine on April 29, 2020, and began to immediately rapid-test

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[1] FMC Devens was not one of these sites.

[2] https://www.bop.gov/resources/news/pdfs/20200507_press_release_expanding_rapid_testing.pdf.

symptomatic inmates in order to isolate and quarantine them more quickly in an effort to decrease the chance of spread of COVID-19.

9. A short time later, FMC Devens received a second rapid Abbot test machine. Both machines have been used, simultaneously, to quickly test both symptomatic inmates, and asymptomatic inmates who had close contact with an inmate who tested positive for COVID-19.

10. The BOP began testing of asymptomatic inmates to assist in slowing transmissions within a correction setting. As a result, an increase in the number of COVID-19 positive tests has been reflected in the BOP's numbers.

11. FMC Devens began testing asymptomatic inmates beginning in March, 2020, when inmates had risk factors for close contact with known COVID-19 positive individuals. Once the institution had positive cases, testing in asymptomatic housing units took place to make sure there were no additional positive carriers who were potential vectors. FMC Devens also tested every inmate at the institution during the last two weeks of May, 2020.

12. As a result of increased testing capabilities and the delivery of additional tests, FMC Devens was able to test all inmates in the institution. Additionally, continued asymptomatic inmate testing within units was conducted if there was a positive COVID-19 result in the unit, or if an inmate was within close contact of a COVID-positive inmate.

Additional Isolation Unit Created after Several Positive COVID-19 Results

13. In late May, 2020, several inmates housed in the sex offender unit (G Unit) tested positive for COVID-19 in the same day. The G Unit has a first and second floor. Four inmates on the first floor sex offender unit reported to sick call that they had fatigue, cough and or fever. They were assessed and tested for COVID-19 and all 4 were positive. In response to the positive test results, all inmates on both floors of G Unit were tested, although there were no other symptomatic inmates on either floor at that time. As a result, approximately 20 inmates tested positive for COVID. All of the inmates who tested positive came out of the first floor sex offender unit. FMC Devens immediately went into full facility lockdown and began testing all inmates in

every housing unit to ensure there were no asymptomatic vectors with COVID-19. The lockdown effectively prevents any inmates from coming into contact with inmates from other housing units. In addition, FMC Devens established the first floor of G unit as an Isolation unit and all inmates who tested negative for COVID-19 were moved into a quarantine unit where they would not be exposed to the positive G-A Unit inmates. The quarantine inmates began a 14-day quarantine in this separate housing unit to mitigate the outbreak from further spread in case some of these inmates developed COVID -19 during the known 14-day incubation period of COVID-19. Unit G-A (the first floor of G Unit) inmates were then isolated in the unit to prevent exposure and reduce the spread of the virus with an emphasis on PPE and Isolation infection control precautions. Donning and doffing stations for PPE were established on the unit and education of custody officers began on every shift prior to its start. The inmates from G-B who all tested negative were not moved from their unit as they are physically separated from the first floor of G Unit.

14. A 14-day continuation of the institution lockdown was enforced to ensure there was adequate time for any potentially exposed asymptomatic inmates to convert to a positive COVID-19 test or to begin showing symptoms that would trigger an automatic COVID-19 test and move to isolation. All of the asymptomatic housing units were then re-tested for COVID-19 during the 14-day lockdown to ensure that all inmates were negative prior to discontinuing the lockdown.

Test-Based Strategy Before Discontinuation of Isolation Precautions

15. As inmates who were positive for COVID-19 neared the end of their required 14-day isolation period, they began to convert to being COVID-19 negative. These are in a "recovered" status, and they will be able to leave restrictive housing and return to their normal housing units. Some COVID-19 positive inmates do not convert to negative for several weeks and these inmates will remain in isolation on infection control precautions until they meet the CDC Testing Based Strategy for discontinuation of isolation precautions.

16. FMC Devens will be using the CDC's strictest guidelines for Discontinuation of Isolation Precautions. The strategy is called the "Test-Based Strategy," and can be found at https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-hospitalized-patients.html.

17. Before discontinuation of isolation precautions, inmates will be required to have gone 3 consecutive days without a fever, have a resolution of respiratory symptoms, and have two negative COVID-19 tests taken more than 24 hours apart from each other. The requirement for two tests will decrease the likelihood that one negative test is a false negative, and will help reassure that the inmate is COVID-19 negative before the isolation precautions are discontinued.

18. FMC Devens will continue its diligent testing and isolation/quarantine strategy to prevent the spread of COVID-19 within the institution, including separating from general population all inmates who develop symptoms or who have close contact with a suspected COVID-19 positive individual. In addition, the institution will immediately return to a lockdown status if there are any signs that a new outbreak of cases is occurring in any housing unit.

I declare the foregoing is true and correct to the best of my knowledge and belief, and is given under the penalty of perjury pursuant to 28 U.S.C. § 1746, this 9th day of June, 2020.

Respectfully submitted,

MEGAN SHAW, M.D.
Clinical Director
FMC Devens