IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEROME DUVALL, *et al.* *

Plaintiffs, *

v. * Civil Action No. ELH 94-2541

LAWRENCE HOGAN, *et al.* *

Defendants. *

* * * * * * * * * * * *

DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR RELIEF FROM RISK OF INJURY AND DEATH FROM COVID-19

Lawrence J. Hogan, Governor ("Governor") of the State of Maryland, Robert L. Green, Secretary ("Secretary") of the Department of Public Safety and Correctional Services ("the Department"), and Michael Resnick, Commissioner ("Commissioner") of the Division of Pretrial Detention and Services ("DPDS"), through their attorneys, Brian E. Frosh, Attorney General of Maryland, and Laura Mullally, Assistant Attorney General, respond, pursuant to Fed. R. Civ. P. 7(b)(1), and Local Rule 105.1, to Plaintiffs' Supplemental Motion, ECF No. 652 – 652-5, and state:

I. INTRODUCTION

This emergency motion arises out of the world-wide COVID-19 pandemic, and the threat of harm that this novel virus poses to pretrial detainees at the Baltimore City Booking and Intake Center ("BCBIC"). Plaintiffs seek an order from this Court allowing for the release of pretrial detainees from BCBIC based upon the threat of the pandemic, without

regard to the nature of each detainee's pending charges, criminal history, failures to appear, home environment, ties to the community, threat to public safety or their amenability to pretrial supervision or home detention. The Supreme Court has not yet determined that a release of pretrial detainees is a remedy for a violation of rights under §1983. *See Cameron v. Bouchard*, case no. 2:20-cv-10949 (E.D. Mich. May 21, 2020) at p. 67.[1] In their motion, Plaintiffs do not specify whom they wish the Court to release, why they seek the release of any specific detainee, or what conditions of release they expect the Court to impose. There is no acknowledgement of the risk to public safety. Essentially, what this motion asks is for the Court to disregard the many prior case-appropriate decisions made by State court judicial officers concerning the release of pretrial detainees, even though those courts have had the opportunity to conduct hearings, accept the recommendations of counsel for state and defense, and receive investigations conducted by the Pretrial Release Services Program ("PRSP"). The motion fails to acknowledge that the Baltimore City District and Circuit Courts have considered over 500 requests for bail and other forms of release filed by criminal defendants since March 13, 2020. This Court should deny the relief sought because it is overbroad, non-specific, and in many cases, would override or countermand the sound judgment of State judicial officers, who have considered, and will continue to consider petitions for release filed by detainees through counsel.

II. THE STATUTORY AND RULE-BASED AUTHORITY OF THE DEFENDANTS, THE COURTS, AND COUNSEL FOR STATE AND DEFENSE IN EFFECTUATING THE RELEASE OF PRETRIAL DETAINEES

[1] Plaintiffs have included this opinion as Exhibit A in their Note, dated May 26, 2020, ECF No. 654-1.

Plaintiffs accuse the Defendants of failing to take "effective steps" to address the threat of COVID-19 at BCBIC. ECF No. 651-1 at 1. This claim fails to acknowledge the extensive and well-documented changes that the Defendants have implemented, consistent with the recommendations of the Centers for Disease Control and Prevention ("CDC"), the Maryland Department of Health ("DOH"), the *Duvall* medical monitor, Dr. Michael Puisis, and Sharon Baucom M.D., the Director of Clinical Services for the Department.[2]

A. THE ROLE OF THE *DUVALL* DEFENDANTS IN RESPONDING TO THE COVID-19 PANDEMIC

The population of pretrial detainees is driven by the number of arrests made in Baltimore City, and the number of detention orders issued, or bails set by judicial officers. A list of daily bookings since March 13, 2020, along a list of arrestees who were released by a court commissioner without bond, or released after posting bond is attached as Exhibit A. Bookings appear to be roughly commensurate with releases. The Commissioner has no authority to release a detainee from pretrial detention, or to review or countermand the decision of a judicial officer setting the terms of release or detention.

The Commissioner is "in charge" of DPDS.[3] He reports to the Secretary, who reports to the Governor. *See* Md. Code Ann. Corr. Servs. ("CS") §§5-201(c)(1), 3-201(a),

[2] On a conference call on April 10, 2020, Plaintiffs had the opportunity to question BCBIC Warden Frederick Abello, along with Zakaria Shaikh, the Chief of Health Strategy and Operations, and Sharon Baucom M.D., Director of Clinical Services for the Department. Many of the factual assertions made in this paper and its attachments have been conveyed previously to counsel for the plaintiff class.

[3] DPDS has three component parts: the PRSP, the Baltimore City Detention Center, and a centralized booking facility, BCBIC. CS §5-201(b). BCBIC holds nearly all detainees that comprise the *Duvall* plaintiff class.

(b) (LexisNexis 2014). Unlike the Governor or the Secretary, who possess some authority to release sentenced inmates through pardons, paroles, administrative releases, commutations, compassionate releases, and mandatory supervisory releases,[4] the Commissioner has no ability to reduce the population of pretrial detainees. He must accept those committed to his custody by judicial order. Since March 13, 2020, the Governor and the Secretary have released 117 prison inmates from the Division of Correction ("DOC") on early mandatory supervision, 144 on regular mandatory supervision, and approved the early parole of 48 inmates.

In contrast, the power of the Commissioner "does not limit or supersede the authority of a court to determine the conditions of pretrial release." CS §5-201(d). The Commissioner supervises "a pretrial detention facility for inmates committed or transferred to the custody of the Commissioner." *Id.*, at §5-401(b). The Commissioner's power to make decisions concerning release is limited to the performance of his pretrial release duties, or the placement of eligible detainees on home detention. CS §5-301(a), (b).[5] The Commissioner, through the PRSP, and the Home Detention Unit ("HDU"), has actively

[4] The Maryland General Assembly granted certain powers to the Governor and the Secretary governing the release of sentenced inmates, or the reduction of a term of confinement through the application of diminution credits. *See* CS §§7-301 (parole); 7-301.1 (administrative release); 7-309 (medical parole); 7-501 (conditional release); 7-601 – 7-603 (pardons, commutations, and conditional pardons); 3-701 – 3-711 (diminution of confinement credits). The *Duvall* Defendants do not have corresponding powers applicable to pretrial detainees.

[5] Detainees and prison inmates are eligible for home detention according to terms established by the General Assembly. *See* CS §3-401 – 3-415; 5-201(c). On March 13, 2020, the number of BCBIC detainees on the PRSP caseload was 878. On May 27, 2020, the number of detainees on PRSP increased by 75% to 1538. *See* Declaration of Robert Weisengoff, attached hereto as Exhibit B.

participated in investigations, and State court hearings[6] in order to place eligible detainees on pretrial release or home detention. Exhibit B. Since March 13, 2020, the Department has placed 386 additional detainees and inmates its home detention program. While the district and circuit courts cannot order the Commissioner to place a detainee on home detention, those courts can permit home detention through a private monitoring service. Exhibit B. In spite of the statutory limitations on the Commissioner's power, he has engaged in daily telephone calls with supervisors in the State's Attorney's Office and the OPD that focus on facilitating release of pretrial detainees.

B. THE ROLE OF THE COURTS IN SETTING CONDITIONS FOR PRETRIAL RELEASE

For the most part, releasing additional detainees pending trial remains within the sound discretion of the State courts. The framework for decisions governing pretrial release is established by the Maryland Rules of Criminal Procedure. *See* Md. Rules 4-201(a) (a judicial officer[7] may release a defendant on personal recognizance, if the judicial officer finds that there is no probable cause for any of the charges); 4-216(c) (a defendant is entitled to consideration for release by a judicial officer); 4-216(d) (a defendant who is charged with certain felonies oron extradition may be released by judge solely); 4-216.1(b)(1)(B) (noting that the Rule is construed to permit the release of a defendant

[6] The Commissioner has supplied hardware and software to the courts, the detainees, and counsel for the State and the defense to enable bail reviews, bail re-reviews, and habeas corpus petitions to be heard via business skype, and to permit detainees to communicate privately with their attorneys throughout the process. Exhibit B.

[7] "Judicial officer" is defined by Md. Rule 4-102(f) as either a "judge or a District Court Commissioner."

pending trial except upon a finding by a judicial officer that the accused is reasonably likely to fail to appear, or poses a danger to the victim, another person, or the community); 4-201.1(b)(1), (2) (requiring a judicial officer to make decisions based upon individualized factual considerations, and requiring the judicial officer to impose the least onerous conditions of release that will reasonably insure the appearance of the defendant, and the safety of others); 4-216.1(d) (setting forth required and special conditions for release, including electronic monitoring or pretrial supervision, imposed by a judicial officer); 4-216.1(e)(1)(A), (B) (noting that imposition of special conditions of release on financial terms by a judicial officer may not be imposed solely because the defendant is financially incapable of meeting that condition, to punish the defendant, or placate public opinion, or to protect others, or prevent crime); 4-216.1(f) (in determining whether to release a defendant, a judicial officer may consider recommendations of the PRSP, the nature or circumstances of the offense charged, the defendant's juvenile and criminal history, the defendant's prior record of appearance at court, the safety of the victim, other individuals or the community, the defendant's family ties, employment history, financial resources, reputation, character, mental condition and length of residence in the community and the State, and any information or recommendation presented by the State's Attorney or the defendant or his attorney); 4-216.2 (a defendant denied pretrial release by a court commissioner is entitled to immediate presentation to the District Court for review of the commissioner's pretrial release order). Since the outbreak of the pandemic, the "judges of Maryland's trial courts" have been ordered by Chief Judge Barbera on April 14, 2023 to

take the risk of COVID-19 infection into account when considering issues of "detention, incarceration and release."

C. THE ROLES OF THE STATE'S ATTORNEY AND COUNSEL FOR THE DEFENDANT

The State's Attorney has the duty to prosecute all cases in which the State may be interested, and is vested with "broad official discretion to institute and prosecute criminal causes." *State v. Aquilla*, 18 Md. App. 487, 493 (1973); *see also* Md. Code Ann. Crim. Proc. ("CP") §15-102 (LexisNexis 2008) (the State's attorney shall "prosecute and defend on the part of the State all cases in which the State may be interested"); *see also* Constitution of Maryland, Art. V, §7 (creating the office of the State's Attorney). The State's Attorney may assign to her subordinate attorneys "the performance, subject to this discretion and control, of the duties required of [her] by law with respect to the institution and prosecution of criminal actions." *Aquilla*, 18 Md. App. at 494. The State's Attorney has the authority to file charges by way of information in the District Court, review statements of charges filed by arresting officers, dispose of a case by entering a *nolle prosequi*, or place any case on the inactive docket. *See* Md. Rules 4-211(b), (c); 4-247; 4-248.

The State's Attorney has declared that she will not pursue charges against misdemeanants for whom there is no mandatory arrest requirement, and who are taken into custody based upon the discretion of the arresting officer. The State's Attorney has declined to release similarly charged misdemeanants who were already in detention. As a result, the number of arrests in Baltimore have dropped, and is nearly equivalent with the numbers of releases. Exhibit A. The Defendants, working with the State's Attorney, have

released all BCBIC inmates who are serving a sentence of 90 days or less, or who are obligated to serve their sentences on weekends. The Commissioner also has daily phone calls with the State's Attorney and the OPD to facilitate any additional releases agreed upon by those parties.

A defendant has the right to an attorney, and is advised of his right to counsel at the earliest state of the proceedings. Md. Rule 4-213(a), 4-213.1, 4-214. It is the policy of the State to implement the "constitutional guarantees of counsel in the representation of indigent individuals" in the criminal courts of the State through the Office of the Public Defender ("OPD"). CP §16-201(1) - (3). The OPD represents an indigent defendant in a proceeding where the defendant is accused of a serious crime, or a criminal proceeding "in which an attorney is constitutionally required to be present prior to the presentment being made before a commissioner or a judge." CP §16-204(b)(1)(i), (ii). The State's Attorney and the OPD have been provided with the list of pretrial detainees who are at increased risk for COVID-19 complications, due to their age and co-morbidities. Using that list, and working with the courts and the PRSP, the OPD has filed approximately 859 petitions for release in both District and Circuit Court. *See* Exhibit A. At Circuit Court 41% of all hearings resulted in release on recognizance or placement on private home detention.

III. STEPS TAKEN BY THE DEFENDANTS TO REDUCE THE IMPACT OF COVID-19 INFECTION

Since the declaration of the pandemic, the Defendants in consultation with Drs. Puisis, and Baucom, and consistent with Centers for Disease Control ("CDC") and DOH

guidelines, and applicable law, have implemented policies and practices designed to prevent or limit the spread of the virus.

A. HOUSING OF BCBIC DETAINEES

BCBIC consists mostly of general population housing units, for males and females, located in three towers of the building at 300 East Madison Street. *See* Diagram of BCBIC, attached hereto as Exhibit C. Double bunks are placed 5'6" apart. *See* Declaration of Warden Frederick Abello, attached hereto as Exhibit D. BCBIC also has specialized housing units for quarantined detainees, consisting of a detoxification unit, a mental health unit, a unit for detainees in intake, and a housing unit for detainee workers, those over 65, and detainees with co-morbidities.[8] Consistent with the recommendation of Dr. Puisis, the Defendants have created an additional quarantine or isolation housing area in 4 North, A and B. Exhibit D.

The 4 North A unit is an isolation area comprised of cells, and used for symptomatic male detainees. A medical provider determines whether or not the detainee should be placed in the unit, and whether or not the detainee should have a cellmate. Exhibit D. Medical contractors are designated to work on the unit, and make rounds 24 hours per day. A detainee's temperature is taken and recorded twice per day. Exhibit D. Detainees are kept on the unit for 14 days, unless a medical provider determines that it is safe to release the detainee to the general population. Exhibit D. If outside or emergency hospitalization

[8] Most of hese specialized housing units are comprised of cells in a unit where medical and mental health care providers are available to treat the symptoms exhibited by detainees.

is necessary, the detainee is taken to a local hospital. *See* Declaration of Commissioner Michael Resnick, attached hereto as Exhibit E.

The 4 North B unit is comprised of cells, and designated for quarantined intakes. Since March, 2020, those male arrestees who are not released by a judicial officer within the first few days of detention are kept in the quarantine cells for 14 days.[9] Exhibit D. There are five states of quarantine. Exhibit D.

Male detainees with jobs within BCBIC, along with males over the age of 65, or males with co-morbidities are housed in Unit 3 South B. Exhibit D. The temperatures of these detainees are taken twice per day, and each detainee is asked a set of questions, approved by the CDC, concerning the detainee's health or symptoms. Exhibit D.

On May 27, 2020 BCBIC had a total of 17 detainees who are positive for COVID-19. Exhibit E. Most of these detainees are housed in 4 North A. Exhibit E. There are no positives amongst the females.

A Health Monitoring Facility ("HMF") at 531 East Madison Street is opening on Monday, June 1, 2020 to detain those that are positive for COVID-19. Exhibit E. This facility is a 30 bed convalescent unit for sick detainees who do not need hospitalization. Exhibit E. The HMF was created by DPDS based upon the recommendation of Dr. Puisis, that the COVID-positive detainees be moved to a separate building. The COVID-positive detainees will be moved there on June 1, 2020. The patients will be masked, and medical and correctional staff will wear masks, gowns, gloves and plastic face shields.

[9] Prior to the arrival of COVID-19, detainees in intake were kept in quarantine until their tuberculosis test results were returned after 3 days.

Additionally, the Metropolitan Transition Center ("MTC") Hospital, a licensed hospital facility, has been designated to hold detainees who are positive for COVID-19 and are seriously mentally ill, require a greater level of security, have disabilities, or are on a medication treatment program. Exhibit E. The MTC Hospital has 4 single negative pressure cells available to detainees who should be placed there.

B. PERSONAL PROTECTIVE EQUIPMENT ("PPE")

BCBIC has issued PPE to all detainees and staff. In March, 2020, the Maryland Correctional Enterprises ("MCE") began manufacturing masks, gowns, face shields and non-alcoholic sanitizer. As of May 27, 2020, MCE had manufactured 3,388 gowns, 27,620 blue face masks, 44,682 gray face masks, 36,200 face shields, and 24,330 bottles of hand sanitizer masks, gowns, face shields and sanitizer. By the end of March, 2020, every arrestee and detainee had a mask, and by mid-April, 2020, hand sanitizer was available in the common areas of every dormitory. By May 29, 2020, every detainee and inmate in the Department will have two masks. Additionally, arresting police officers who enter BCBIC are issued a mask if they do not arrive wearing one. Arresting officers must have their temperature checked and respond to questions regarding their health prior to entry into BCBIC.

C. SIGNAGE AND EDUCATION, SANITATION, AND RESTRICTIONS ON MOVEMENTS FOR DETAINEES AND STAFF

Signage, which has been approved by the Department's medical director, has been placed in housing units and common areas since mid-March. Examples of signage are attached as Exhibits 1 – 8 to the Declaration of Frederick Abello, Exhibit D. Education of

detainees and staff concerning the risk of transmission of COVID-19 has been implemented by the medical contractor's infectious disease coordinators. *See* Declaration of Zakaria Shaikh, attached hereto as Exhibit F.

Although staff roll calls were suspended in March, 2020 to reduce the risk of COVID-19 infection, they were replaced by roving roll calls, so that staff on all three shifts could be educated on new developments arising from the spread of COVID-19 infection. Exhibit D. Recently, staff roll calls have begun again, with enforced social distancing during the roll call. Exhibit D.

Sanitation in the housing units is performed by detainee workers, and occurs twice per shift. Exhibit D. All hard surfaces in the common areas, showers, and bathrooms are cleaned with a germicide solution. Exhibit D. Cell sanitation is performed by its occupants, or by detainee workers between occupancies. Exhibit D. As noted above, the detainee workers are housed with one another in Unit 3 South B. The Department has engaged an outside contractor to perform deep cleanings of BCBIC, which have occurred twice since the declaration of the state of emergency, on March 29, and April 23, 2020. Exhibit D. Detainee workers and contractors wear masks and gloves during the performance of their duties.

Every detainee is issued a towel and three bars of soap. Exhibit D. Additional soap and shampoo is available every Tuesday and Friday at BCBIC. The Secretary has declared that every detainee have access to soap, shampoo and cleaner. Towels are washed by detainee workers in washing machines on the housing units. Exhibit D. Laundry detergent and bleach is available. Exhibit D.

The Secretary has ordered that detainees move from their assigned locations only when necessary to reduce any potential spread of COVID-19. *See* Declaration of Assistant Secretary Gary McLhinney, attached hereto as Exhibit G. Hospital transports, non-elective medical treatments, such as chemotherapy, movement of detainees from intake into the general population, or from the general population into a specialized quarantine or isolation housing unit have continued. Transportation to the courts has ceased. Most outside medical appointments, and visits to in-house dentists have been suspended, unless there is an emergency. Transports to the DOH for evaluations as to competency and criminal responsibility have ceased. Exhibits D, G.

D. TESTING

Obtaining test kits for COVID-19 has been difficult both nationwide and locally. In *Seth v. McDonough*, case number 8:20-cv-01028-PX, ECF No. 84, at 27 (D. Md. May 21, 2020), this Court acknowledged the difficulties in obtaining and performing COVID-19 tests. Although Dr. Puisis has made recommendations for universal testing, CDC recommendations do not include universal testing of all inmates at any facility. *See* Declaration of Sharon Baucom, M.D., attached hereto as Exhibit H. Following CDC guidelines, priorities for testing have been assigned by Dr. Baucom to subpopulations at greater risk for infection and complications. Exhibit H.

Prior to the onset of universal testing at BCBIC, testing decisions have been made by medical providers, based upon factors such as presenting symptoms, or the detainee's ability to advocate for himself. Exhibit E. Only 1,000 test kits have been distributed to the Department by the DOH. Exhibit H. More test kits have been provided by a private

laboratory. Exhibit F. Prior to the obtaining of test kits, BCBIC sent symptomatic detainees to an outside hospital, which would decide whether or not to test the detainee. The Department is looking into procuring rapid COVID-19 tests, which can be used prior to the transport of any detainee. Exhibit F. The Secretary has instituted universal testing of employees, contractors and detainees in the Jessup region, where the outbreak has been more significant than in BCBIC. Exhibit F. When that testing is completed, the testing teams will move to the Baltimore region, with a priority of universal testing at BCBIC. Exhibit F.

IV. ARGUMENT

A. THE PRISONER LITIGATION REFORM ACT

The Prison Litigation Reform Act (PLRA) 42 U.S.C. § 1997e(a) provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Exhaustion is mandatory. *Ross v. Blake*, 136 S. Ct. 1850, 1856-58 (2016); *Jones v. Bock*, 549 U.S. 199, 219 (2007). The purpose of exhaustion is to: 1) allow a prison to address complaints about the program it administers before being subjected to suit; 2) reduce litigation to the extent complaints are satisfactorily resolved; and 3) prepare a useful record in the event of litigation. *Jones*, 549 U.S. at 219. *Ross* held that "the PLRA's text suggests no limits on an inmate's obligation to exhaust irrespective of any 'special circumstances.'" *Id*. at 1856. In so holding, the Supreme Court reaffirmed that "all inmates must now exhaust all available

remedies: 'Exhaustion is no longer left to the discretion of the district court.'" *Id*. at 1858 (quoting *Woodford v. Ngo*, 126 S. Ct. 2378, 2382 (2006)).

As *Valentine v. Collier*, 956 F. 3d 797, 804 (5th Cir.), cert. denied ___ S. Ct. ___, 2020 WL 2497541 (2020) notes:

> This exhaustion obligation is mandatory—there are no "futility or other [judicially created] exceptions [to the] statutory exhaustion requirements ...." *Booth v. Churner*, 532 U.S. 731, 741 n.6, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). So long as the State's administrative procedure grants "authority to take *some* action in response to a complaint," that procedure is considered "available," even if it cannot provide "the remedial action an inmate demands." *Id.* at 736, 121 S.Ct. 1819 (emphasis added); *see also id.* at 739, 121 S.Ct. 1819 ("Congress meant to require procedural exhaustion regardless of the fit between a prisoner's prayer for relief and the administrative remedies possible.").

Further, in *Ross v. Blake*, the Supreme Court identified three circumstances in which an administrative remedy is unavailable. First, an administrative procedure is unavailable when, despite what regulations or guidance materials may promise, it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates. 136 S. Ct. at 1859. Second, "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use. In this situation, some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it." *Id.* The third circumstance arises when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 1860. This case does not implicate any of the scenario envisioned by the Supreme Court in *Ross*.

Nor has Congress carved out an exception under the PLRA to exempt from the exhaustion requirement an inmate's claim that he is housed under an emergency conditions.

In this case, no member of the plaintiff class at BCBIC has exhausted available administrative remedies, which is mandated prior to filing suit pursuant to the Prison Litigation Reform Act, even during the emergency COVID-19 crisis. *Nellson v. Barnhardt,* 2020 WL 1890670 at *5 (D. Colo. 2020); *see also* Declaration of Kelvin L. Harris, attached hereto as Exhibit I.

This Court has acknowledged that exhaustion applies to cases in which plaintiffs seek relief under §1983. *See Seth*, ECF No. 84 at 15. Moreover, this Court has acknowledged that its power to issue a prison release order is circumscribed by the PLRA, which permits such an order only when issued by a three-judge panel, convened at the request of the court, and only after less intrusive relief has been demonstrated to be insufficient in remedying the constitutional violation. *Seth,* ECF No. 84, at 15-16; *see also* the PLRA, 18 U.S.C. §3626(a)(3), (g)(4).

Pursuant to *Blake v. Ross,* the DPDS maintains a 4-step grievance process to address alleged wrongs arising out of the COVID-19 pandemic. Exhibit I. The plaintiff class at BCBIC has not exhausted administrative remedies. Exhibit I. Plaintiffs do not address the issue of exhaustion. ECF Nos. 645 - 652. Nor have they connected these claims, which arise directly from the novel COVID-19 virus, to any prior exhausted claims in *Duvall.* This case must be dismissed because exhaustion has not even been attempted, much less completed.

B. DELIBERATE INDIFFERENCE UNDER SECTION 1983

Even if Plaintiffs had exhausted their administrative remedies, the emergency motion must fail because the Defendants have not been subjectively, criminally reckless in

their response to the COVID-19 outbreak. The Due Process Clause of the Fourteenth Amendment protects the constitutional rights of pretrial detainees. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *see also Hill v. Nicodemus*, 979 F. 2d 987, 991 (4th Cir. 1992). This Court has consistently held that when a pretrial detainee brings a failure to protect claim under the Fourteenth Amendment, the same standards apply as for an Eighth Amendment claim brought by a convicted inmate. *See Perry v. Barnes*, case no. PWG-16-705, 2019 WL 1040454 D. Md. March 3, 2019) (collecting cases). In order to state failure to protect claims, Plaintiffs must allege that the Defendants acted with "deliberate indifference to a substantial risk of serious harm to [them]." *Danser v. Stansberry*, 772 F. 340, 346-47 (4th Cir. 2014). In a claim for denial of medical care a prisoner must allege facts from which a trier of fact could find that the defendants' acts or failures to act amounted to deliberate indifference to a serious medical need. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

The objective component of this test requires that the Plaintiffs demonstrate the existence of a serious medical condition. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992); *Estelle*, 429 U.S. at 105; *Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995). The right to medical treatment is "limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable." *Bowring v. Godwin*, 551 F.2d 44, 47-48 (4th Cir. 1977). "'[S]ociety does not expect that prisoners will have unqualified access to health care'" *Shakka*, 71 F.3d at 166 (quoting *Hudson*, 503 U.S. at 9). It is the necessity of medical treatment, not its desirability, which is determinative. *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981) (describing balancing test for need for psychiatric care).

The subjective component of related to a denial of medical care requires a showing that the Defendants acted with deliberate indifference. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). Deliberate indifference occurs when a defendant "knows of and disregards an excessive risk to inmate health or safety; the [defendant] must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). No deliberate indifference occurs when prison administrators take multiple, informed steps to protect inmates and staff. *Valentine*, 956 F. 3d at 802. In addition, the Fourth Circuit has acknowledged:

> Deliberate indifference is a very high standard—a showing of mere negligence will not meet it. . . . [T]he Constitution is designed to deal with deprivations of rights, not errors in judgments, even though such errors may have unfortunate consequences. . . . To lower this threshold would thrust federal courts into the daily practices of local police departments.

Grayson v. Peed, 195 F.3d 692, 695-96 (4th Cir. 1999).

In the rapidly evolving and unfamiliar landscape of the COVID-19 pandemic, the concept of deliberate indifference may be equally fluid. *White by White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997) ("A claim of deliberate indifference . . . implies at a minimum that defendants were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice."). Hindsight is not enough. "The law cannot demand that officers be mind readers." *Grayson*, 195 F.3d at 695. The facts illustrate that the Defendants have responded quickly and reasonably to the myriad of challenges presented by the pandemic to the plaintiff class.

Equally important, a plaintiff's disagreement with a prescribed course of treatment does not establish deliberate indifference and therefore does not state a claim. *Peterson v. Davis*, 551 F. Supp. 137, 146 (D. Md. 1982,) *aff'd*, 729 F.2d 1453 (4th Cir. 1984). Working with available resources, the Defendants have created and implemented policies and procedures designed to combat the risk of COVID-19. The difficulties in obtaining testing kits is a nationwide issue, one that cannot be resolved solely through the efforts of the Defendants, although they have taken timely steps to resolve the crisis on multiple fronts. On this issue, *Valentine*, 956 F. 3d at 801, states:

> The "incidence of diseases or infections, standing alone," do not "imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks." *Shepherd v. Dallas Cty.*, 591 F.3d 445, 454 (5th Cir. 2009). Instead, the plaintiff must show a denial of "basic human needs." *Ibid.* "Deliberate indifference is an extremely high standard to meet." *Cadena v. El Paso Cty.*, 946 F.3d 717, 728 (5th Cir. 2020).

The Eighth Amendment proscribes conditions that result in an "unnecessary and wanton" infliction of pain, including practices that are "totally without penological justification." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (*quoting Gregg v. Georgia*, 428 U.S. 153, 173 & 183 (1976)). Furthermore, actual injury must have occurred because of the Eighth Amendment deprivation in order to merit constitutional consideration as a civil rights cause of action. *Strickler v. Waters*, 989 F.2d 1375, 1381 (4th Cir. 1993).

Plaintiff has not produced evidence of a serious or significant physical or emotional injury resulting from the alleged conditions. *See, Strickler v. Waters,* 989 F.2d 1375, 1381(4th Cir. 1993) ("to withstand summary judgment on an Eighth Amendment challenge to prison conditions a plaintiff must produce evidence of a serious or significant physical

or emotional injury resulting from the challenged conditions."). There is no evidence to support that any member of the plaintiff class suffered injury as a result of the alleged conditions during the relevant time frame. The efforts by corrections officials are reasonable and do not rise to a deliberate indifference to the safety of the Plaintiffs.

Finally, this Court recently acknowledged that to combat the onslaught of COVID-19, Governor Hogan has used "the emergency powers granted to him by the state legislature, has issued a series of executive orders designed to slow the spread of the disease and to protect the health of Maryland residents. In so doing he has consulted and relied on the advice of acknowledged public health professionals." *Antietam Battlefield KOA, et al, v Lawrence J. Hogan, et al.,* Civil No. CCB-20-1130, at p.1. Indeed, a highly qualified team of public health officials informed Governor Hogan's responses in a variety of areas. See *Antietam Battlefield KOA, et al*., Defendants' Exhibit 26-2, Declaration of Clifford S. Mitchell, MS, MD, MPH, at para. 26. Dr. Mitchell was actively involved in planning and implementing strategies for state agencies, including the concerns of the Department of Public Safety and Correctional Services, as to "to testing strategies, safe practices, containment and mitigation strategies in congregate housing settings, and safe re-opening strategies and plans." *Id.,* at para. 4.

V. CONCLUSION

The Defendants respectfully request that this Court deny relief to the plaintiff class.

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/s/

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