

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-21553-Civ-COOKE/GOODMAN

PATRICK GAYLE, *et al.*,

Petitioners,

vs.

MICHAEL W. MEADE, *et. al.*,

Respondents.

**ORDER DENYING RESPONDENTS' MOTION FOR
RECONSIDERATION OF THE COURT'S GRANT OF A PRELIMINARY INJUNCTION**

THIS MATTER is before the Court on Respondents' Motion for Reconsideration of the Court's Grant of a Preliminary Injunction (the "Motion") (ECF No. 195), filed July 6, 2020. Petitioners filed a response in opposition to the Motion on July 20, 2020. ECF No. 224. On July 27, 2020, Respondents filed their reply in support of the Motion. ECF No. 240. The Court has reviewed the Motion, the briefing, the record, and the relevant legal authorities. Upon doing so and being fully advised, the Court finds that the Motion should be denied.

Background

This case has an extensive and lengthy procedural background. Indeed, there have been over six hundred filings in this action to date. And this Court has held multiple hearings as this matter involves weighty and significant issues related to the health and safety of civil detainees. As such, a brief explanation of "how we got here" is warranted.

Thirty-four civil immigration detainees filed the instant action alleging that they are being held by the Miami Field Office of Immigration and Customs Enforcement (hereinafter "ICE") and housed at three detention centers—the Krome Detention Center in Miami ("Krome"), the Broward Transitional Center in Pompano Beach ("BTC"), and the Glades County Detention Center in Moore Haven ("Glades"). Petitioners all claim to be at imminent risk of contracting COVID-19 as a result of their inability to abide by the CDC's Guidelines and state and local directives during their continued detention. Each Petitioner further asserts that they are uniquely vulnerable to COVID-19 due to a range of serious chronic ailments including, but not limited to, cancer, human

immunodeficiency virus, and various respiratory issues. ECF Nos. 7, 8.

At the outset of this action, Petitioners filed a Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2241 (the “Writ”), and a combined Emergency Motion for Temporary Restraining Order and Motion for Preliminary Injunction for Proposed Class (“Motion for TRO/Preliminary Injunction”). ECF Nos. 1 and 4. Through these filings Petitioners allege that Respondents are not taking proper measures to prevent the transmission of COVID-19. As such, in the Writ, Petitioners assert three claims under the Due Process Clause of the Fifth Amendment: (1) a claim for violation of detention standards; (2) a claim for violation their right to reasonable safety; and (3) a claim for state-created danger. ECF No. 1. Petitioners’ supported their filings with declarations from Dr. Joseph Shin and DR. Pedro J. Greer, Jr.

On April 14, 2020, this Court referred Petitioners’ Motion for TRO/Preliminary Injunction to U.S. Magistrate Judge Jonathan Goodman. ECF No. 14. On that same day, Judge Goodman directed Respondents to submit declarations explaining what is being done at each of the three subject detention facilities to address the risk of the spread of COVID-19. ECF No. 18. In response to Judge Goodman’s directive, Respondents submitted: (1) the Declaration of Juan A. Lopez Vega, Assistant Field Office Director; and (2) the Declaration of Liana J. Castano, Acting Officer in Charge of the Krome Service Processing Center. On April 17, 2020, Judge Goodman held a hearing and subsequently issued a sixty-nine page report and recommendation (“R&R”) on the Motion for TRO/Preliminary Injunction. Notably, in his R&R, Judge Goodman concluded that the remedy of release is *not* available to Petitioners. ECF No. 63 at 51-55.

After reviewing the Parties’ objections to Judge Goodman’s R&R, on April 30, 2020, this Court issued an order approving and adopting Judge Goodman’s R&R on Petitioners’ Motion for TRO/Preliminary Injunction (the “April 30, 2020 Order”). ECF No. 76. In doing so, the Court granted in part and denied in part Petitioners’ Motion for TRO/Preliminary Injunction and ordered the following:

Within seven (7) days of this Order, ICE shall evaluate each of the 34 detainees named in the instant action consistent with ICE’s [Pandemic Response Requirements (“PRR”)] and inform the Court who among them can be released promptly in light of COVID-19. ICE must take into consideration the detainees’ current health status, eligibility for bond, immigration status, immigration court history and orders, and prior criminal history.

Within three (3) days of this Order, ICE shall submit a report informing the Court as to how it intends to accelerate its review of its “Alternatives to Detention” program (or other protocols resulting in detainee release) with the goal of reducing

the population to 75% of capacity at each of the three detention centers within two weeks of this Order.

ICE shall perform an internal review pursuant to ICE's PRR and file with the Court weekly reports (every Friday by 4:00 P.M.) on the following: a. The number of detainees who have been released; b. Which facility they were released from; and c. The nature of the detainee released (e.g., in a high-risk category because of age or a specific, documented medical condition, etc.).

Within ten (10) days of this Order, ICE shall submit twice weekly (every Monday and Thursday by 4:00 P.M.) reports on the following: a. How many detainees it is housing on the date of reporting; b. At which of the three centers the detainees are being housed; c. Which of the detainees are considered "mandatory detainees"; and d. Which of the detainees have no prior criminal convictions and no pending criminal charges.

ICE shall immediately comply with the CDC and ICE guidelines on providing adequate amounts of soap and water and cleaning materials to detainees at each of the three detention centers at issue. Further, within two (2) days of this Order, ICE shall provide masks to all detainees and shall replace those masks at least once per week.

ICE shall provide education and training about measures to reduce the health risks associated with COVID-19 to all staff members and detainees and to any new detainees or employees. ICE shall provide such education and training without any costs to the detainees.

This Temporary Order is valid for a limited period of 14 days or until further order of this Court, or until ICE demonstrates that it has substantially complied with this Order.

ECF No. 76 at pp. 10-11. Thus, as part of the April 30, 2020 Order, the Court issued a fourteen day temporary restraining order and, in addition to the Court's specific requirements and restrictions, instructed Respondents to adhere to their own guidelines as well as those from the Centers for Disease Control and Prevention ("CDC") in assessing and evaluating whether any of the Petitioners should be released. *Id.*

On May 2, 2020, in response to Petitioners' Motion for Clarification of the Court's April 30, 2020 Order, the Court issued an Order clarifying that ICE is permitted to transfer detainees from the three facilities at issue only *after* first evaluating and assessing each detainee's eligibility for release pursuant to ICE guidelines on the pandemic response. ECF No. 78.

On May 5, 2020, Petitioners filed a Motion for Class Certification. ECF No. 81. That same day, the Court referred that motion to Judge Goodman. ECF No. 82. On May 14, 2020, Judge Goodman held a hearing on the Motion for Class Certification. ECF No. 98.

On May 15, 2020, the Court extended the temporary restraining order by fourteen days

pending Judge Goodman's report and recommendation on Petitioners' Motion for Class Certification. ECF No. 101. Likewise, on May 15, 2020, the Court set a Hearing for May 27, 2020 on Petitioners' Motion for TRO/Preliminary Injunction. ECF No. 101. Then, on May 20, 2020, Petitioners filed an Emergency Motion to Compel Compliance ("Motion to Compel") with the Court's April 30, 2020 Order. In that motion, Petitioners argued that Respondents had not fully complied with the Court's April 30, 2020 Order. ECF No. 106. The Court set an expedited briefing schedule on the Motion to Compel, on May 21, 2020, and instructed the Parties to be prepared to discuss the Motion to Compel at the May 27, 2020 Hearing. ECF No. 107.

On May 22, 2020, Judge Goodman issued a report and recommendation in which he recommended that the Court deny Petitioners' Motion for Class Certification with respect to Petitioners' demand for release but grant Petitioners' Motion with respect to their conditions-of-confinement claims.¹ ECF No. 111 at 4-5.

On May 27, 2020, the Court held a hearing on Petitioners' Motion for TRO/Preliminary Injunction and Motion to Compel. ECF No. 120. On May 28, 2020, Respondents consented to an extension of the temporary restraining order for an additional seven days. ECF No. 119. On June 2, 2020, the Court held a second hearing on Petitioners' Motion for TRO/Preliminary Injunction, during which Petitioners presented testimony from Dr. Joseph Shin. *See* ECF No. 158. On June 3, 2020, the Court held a third hearing on the Petitioners' Motion for TRO/Preliminary Injunction, during which Petitioners presented testimony from three detainees—Steve Cooper, a 39 year old Jamaican native detained at Glades, Alejandro Ferrera Borges, a 29 year old Cuban native detained at BTC, and Deivys Perez Valladares, a 35 year old Cuban native detained at Krome. *Id.*

On June 6, 2020, the Court issued a forty-page Omnibus Order on Petitioners' Emergency Motion for Temporary Restraining Order and Motion for Preliminary Injunction for Proposed Class (ECF No. 4), Petitioners' Expedited Motion for Class Certification (ECF No. 81), and Petitioners' Motion to Compel Compliance with the Court's April 30, 2020 Temporary Restraining Order (ECF No. 106). Accordingly, through its June 6, 2020 Omnibus Order, the Court granted a preliminary injunction as follows:

a. ICE shall immediately comply with the CDC and ICE guidelines by providing

¹ On May 29, 2020, Judge Goodman *sua sponte* issued an Amended R&R on the Motion for Class Certification expanding his discussion on the issue of how transfer of detainees affects jurisdiction and updating the procedural history. ECF No. 123. Other than these revisions, "the Amended Report is substantively identical to the first version." *Id.* at 1, n.1.

Petitioners and the class members with unrestricted access to hand soap, hand sanitizer, and disposable hand towels to facilitate handwashing.

b. Provide cleaning supplies for each housing area and CDC-recommended disinfectants in sufficient quantities to facilitate frequent cleaning, including in quantities sufficient for each inmate to clean and disinfect the floor and all surfaces of his own housing cubicle, and provide new gloves and masks for each inmate during each time they are cleaning or performing janitorial services.

c. Provide all inmates and staff members with masks and educate them on the importance and proper use of masks.

d. Increase regular cleaning and disinfecting of all common areas and surfaces, including common-use items such as television controls, books, and gym and sports equipment.

e. Limit transportation of detainees to only instances regarding immediately necessary medical appointments and release from custody.

f. For transportation necessary for prisoners to receive medical treatment or be released, CDC-recommended social distancing requirements should be strictly enforced in buses, vans, and planes.

g. Post signage and information in common areas that provides: (i) general updates and information about the COVID-19 pandemic; (ii) information on how inmates can protect themselves from contracting COVID-19; and (iii) instructions on how to properly wash hands. Among other locations, all signage must be posted in every housing area and above every sink.

h. Educate inmates on the COVID-19 pandemic by providing information about the COVID-19 pandemic, COVID-19 symptoms, COVID-19 transmission, and how to protect oneself from COVID-19. A staff person at each detention center must give an oral presentation or show an educational video with the above-listed information to all detainees and give all detainees an opportunity to ask questions.

i. ICE shall perform an internal review pursuant to ICE's PRR and file with the Court weekly reports (every Friday by 4:00 P.M.) on the following: i. The number of detainees who have been released; ii. Which facility they were released from; and iii. The nature of the detainee released (e.g., in a high-risk category because of age or a specific, documented medical condition, etc.).

j. Within ten (10) days of this Order, ICE shall submit weekly (every Monday by 4:00 P.M.) reports on the following: i. How many detainees it is housing on the date of reporting; ii. At which of the three centers the detainees are being housed; iii. Which of the detainees are considered "mandatory detainees"; and iv. Which of the detainees have no prior criminal convictions and no pending criminal charges.

The Preliminary Injunction is in effect until a full trial in the matter and/or further order of the Court.

Petitioners' Motion to Compel Compliance with the Court's April 30, 2020 Temporary Restraining Order, ECF 106, is GRANTED as follows: a. ICE is

permitted to transfer detainees but only after performing a verbal screening and a temperature check as outlined in the CDC Guidelines before the individual leaves the facility. b. Within ten (10) days of this Order, ICE shall submit weekly Court documentation of its evaluations for release before any transfer is executed. The documentation must include an evaluation of each prospective transfer candidate for COVID-19. c. ICE must provide a new mask to each transferee before the transfer process begins.

The Court shall retain jurisdiction over all class members who are transferred to other facilities regardless of where those facilities are located.

ICE shall not engage in the practice of cohorting unless ICE confirms through testing or other means that a prospective cohort candidate is a confirmed COVID-19 case.

ECF No. 158 at pp. 38-40.

Legal Standard

Three grounds justify reconsideration of an earlier order under Rule 59(e): “(1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice.” *Williams v. Cruise Ships Catering & Serv. Int’l, N.V.*, 320 F. Supp. 2d 1347, 1357–58 (S.D. Fla. 2004). A motion for reconsideration, however, is not a tool for relitigating what a court has already decided. *See Reyher v. Equitable Life Assurance Soc’y*, 900 F. Supp. 428, 430 (M.D. Fla. 1995). Rather, the motion “must demonstrate why the court should reconsider its prior decision and set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.” *Id.* (internal quotation marks omitted). Moreover, reconsideration of a previous order is “an extraordinary remedy, to be employed sparingly.” *Williams*, 320 F. Supp. 2d at 1358 (internal quotation marks omitted).

Analysis

In their Motion, Respondents contend that the Eleventh Circuit’s decision in *Swain v. Junior*, 961 F.3d 1276 (11th Cir. June 15, 2020), compels this Court to reconsider its issuance of a preliminary injunction in this action. More specifically, Respondents argue:

The intervening decision in *Swain* compels reconsideration of this Court’s grant of preliminary injunctive relief here because Defendants have taken reasonable steps to quell the spread of COVID-19 that do not amount to a showing of deliberate indifference. Under *Swain*, the Eleventh Circuit’s intervening change in the standard for deliberate indifference affects the basis on which this Court entered its preliminary injunction. This Court’s deliberate indifference analysis thus conflicts with the *Swain* Court’s intervening law. Reconsideration is therefore warranted on this basis.

ECF No. 195 at p. 11. Thus, Respondents argue that there has been a change in the legal standard applicable to deliberate indifference claims; however, Respondents' argument fails.

First, *Swain* did not create a new legal standard for deliberate indifference claims. Indeed, in analyzing the deliberate indifference standard, the *Swain* court relied upon an Eleventh Circuit decision from 2013 and a U.S. Supreme Court decision from 1994. To be clear, *Swain* states:

It bears repeating that deliberate indifference is not a constitutionalized version of common-law negligence. To the contrary, we (echoing the Supreme Court) have been at pains to emphasize that ‘the deliberate indifference standard . . . is far more onerous than normal tort-based standards of conduct sounding in negligence,’ *Goodman v. Kimbrough*, 718 F.3d 1325, 1332 (11th Cir. 2013), and is in fact akin to ‘subjective recklessness as used in the criminal law,’ [*Farmer v. Brennan*, 511 U.S. 825, 839-40 (1994)]; *see also id.* at 835 (‘[D]eliberate indifference describes a state of mind more blameworthy than negligence.’).

Swain v. Junior, 961 F.3d 1276, 1288 (11th Cir. 2020). To the extent Respondents' argument rests upon the contention that the Eleventh Circuit created a new deliberate indifference standard through its *Swain* decision, that argument is unpersuasive.

Second, the factual scenario presented in this case is distinguishable from that presented in *Swain*. There, the subjective deliberate indifference finding rested upon the district court's finding that there was an increase in COVID-19 cases and social distancing was impossible. *Swain*, 961 F.3d at 1287 (“Accordingly, even while the district court seemed to assume a state of affairs in which the defendants had taken numerous measures to combat the virus, it held that the defendants were nonetheless deliberately indifferent based on two considerations: (1) the increase in the rate of infections at Metro West and (2) the lack—and seeming impossibility—of meaningful social distancing at the facility. In so concluding, the district court erred. Neither the resultant harm of increasing infections nor the impossibility of achieving six-foot social distancing in a jail environment establishes that the defendants acted with ‘subjective recklessness as used in the criminal law.’”) (quoting *Farmer*, 511 U.S. at 839–40 (internal quotation omitted)). Here, however, the Court expressly rested its subjective deliberate indifference analysis on far more egregious conduct than just an increase in COVID-19 cases and the impossibility of social distancing within the detention centers. In fact, here, the Court's subjective analysis rested upon the fact that “the Court [was] presented with declarations and live testimony claiming that ICE continues to flout this Court's [temporary restraining order] by (1) failing to consistently evaluate detainees for COVID-19 before transferring them to other detention centers, (2) failing to provide protective masks during the transfer process; and (3) failing to provide meaningful access to hygiene products

soap, hand sanitizers, masks, gloves and cleaning supplies. (ECF Nos.106; 106-2.).” ECF No. 158 at p. 30. This Court went on to find:

At the June 3, 2020 Hearing[,] Mr. Borges provided testimony about his lived experience with ICE’s transfer process. Mr. Borges testified that he was not tested for COVID-19 before he was transferred from BTC to Stewart Detention Center (“Stewart”) in Georgia. He also testified that he was not processed at Stewart upon arrival. Rather, he was almost immediately transferred back to BTC. He was not tested before he was transferred from Stewart back to BTC. Mr. Borges also testified that he was not provided a mask during the transfer process, so he used the same mask, soiled from two days of wear, before his transfer from BTC to Stewart. Mr. Borges wore the same mask when he was transferred back to BTC. Disturbingly, guards did not wear masks during Mr. Borges’ transfer process. Indeed, the ICE guard that escorted Mr. Borges to the Hearing was not donning a mask, despite being seated a mere two feet away from Mr. Borges. Such behavior not only violates the spirit and the letter of TRO, it also amounts to deliberate indifference because it demonstrates a blameworthy disregard of the risks posed by COVID-19 by exponentially increasing the risk of spreading the virus to other detention centers—conduct that far exceeds mere negligence and evidences a reckless state of mind.

Id. at pp. 31. Additionally, the Court found:

[d]espite the fact that its own Guidelines call for detention facilities to avoid group cohorting, ICE flagrantly flouts its own rules on the subject and groups asymptomatic detainees together. ICE admits that it is currently cohorting 320 detainees at Glades—the entire detainee population— “as a precautionary measure, per the established protocol.” On June 3, 2020, Mr. Borges testified that upon transferring back to BTC, he was quarantined for 14 days. During his quarantine he was taken to recreation at the same time as individuals known to be sick with COVID-19. Such practices substantially increase a detainee’s exposure to COVID-19. And ICE’s failure to comply with its own Guidelines, which explicitly acknowledges the risks involved in cohorting in the manner described herein is further evidence of deliberate indifference.

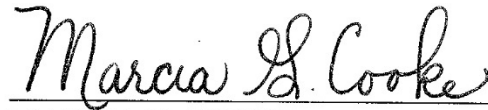
Id. at p. 32. Accordingly, the Court’s subjective deliberate indifference analysis rested on far more than just the increase in cases at the detention centers and the impossibility of social distancing. Respondents’ argument to the contrary is disingenuous and rests upon a blatant perversion of the record in this case. Unfortunately for Respondents, this Court cannot countenance revisionist history. As such, the Court finds that Respondents’ *Swain* arguments lack merit.

Conclusion

In short, the Court finds that there is no basis for it to conclude that there was an intervening change in controlling law or a need to correct clear error or prevent manifest injustice to warrant reconsideration of its preliminary injunction. Therefore, for the reasons discussed above, it is

ORDERED and ADJUDGED that Respondents' Motion for Reconsideration of the Court's Grant of a Preliminary Injunction (ECF No. 195) is **DENIED**.

DONE and ORDERED in Chambers at Miami, Florida this 24th day of March 2021.

A handwritten signature in cursive script, reading "Marcia G. Cooke", written in black ink.

MARCIA G. COOKE

United States District Judge

Copies furnished to:

*Jonathan Goodman, U.S. Magistrate Judge
Counsel of record*