

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.

*

**PLAINTIFFS’ SUPPLEMENTAL MEMORANDUM IN SUPPORT OF EMERGENCY
MOTION FOR RELIEF FROM RISK OF INJURY AND DEATH FROM COVID-19**

Plaintiffs file this Memorandum to update the Court on factual and legal developments since Plaintiffs filed their Emergency Motion for Relief From Risk of Injury and Death From COVID-19 (hereinafter the “Motion”) (Doc. 645) on April 9, 2020. Plaintiffs also rely upon that Motion and supporting documents (Doc. 645, 645-1 through 645-10, and 646), and incorporate them herein by reference.

Following the filing of Plaintiffs’ Motion, Magistrate Judge Sullivan held a conference with the parties on April 10. At the conclusion of that conference, the parties agreed that the deadline for Defendants to respond to Plaintiffs’ Motion would be held in abeyance while the parties discussed potential remedies for the risks posed by COVID-19 to persons confined at the Baltimore City Detention Center (hereinafter “BCDC” or “the Jail”). Doc. 647.

Unfortunately, Defendants’ failure to take effective steps to address the threat of COVID-19 at BCDC has since had alarming, but entirely predictable, results. The virus is now well-established at the Jail, with at least nine detainees, seven staff, and eight vendor employees testing positive. Meanwhile, contrary to the unanimous recommendation of public health experts that jail

populations must be reduced to slow the spread of COVID-19, the BCDC population has actually *increased* substantially. Finally, state court processes are not resulting in the release of medically vulnerable people from the Jail, as the parties had expected.

For all of these reasons, Plaintiffs ask that the Court grant the relief sought in their original Motion, including developing plans for the prompt transfer or release of medically vulnerable detainees.

FACTUAL BACKGROUND

COVID-19 spreads and the death toll mounts

As of May 14, 2020, the Centers for Disease Control and Prevention (CDC) has confirmed 1,384,930 cases of COVID-19 in the United States, and 83,947 people in the United States have died of the disease. Supplemental Declaration of Chris Beyrer, M.D., M.P.H. (“Beyrer Supp. Decl.”), ¶ 11. As of May 15, 2020, Maryland has confirmed and reported 36,986 cases of coronavirus statewide, with 1,496 current hospitalizations and 1,792 deaths resulting from the virus. These numbers have soared exponentially since the first 3 confirmed cases in Maryland on March 3, 2020, and the number of cases is doubling approximately every four days. *Id.*, ¶ 5. On May 12 alone, there were 58 COVID-19 related deaths in Maryland. *Id.*, ¶ 6.

Once COVID-19 enters a detention center, it spreads significantly faster inside the detention center than outside. In the United States, this is demonstrated by dramatic outbreaks in the Cook County jail, Rikers Island in New York City, and at a federal prison in Lompoc, California, where nearly 70% of prisoners have tested positive for COVID-19. *Id.*, ¶ 29. As of May 11, 2020, Maryland has confirmed and reported 290 cases of coronavirus in its prisons in 19 different facilities. This number includes 200 corrections officers, 13 non-uniformed staff, and 77 incarcerated people. Five Maryland prisoners have died from COVID-19. *Id.*, ¶ 7.

COVID-19 gains a foothold at BCDC

When Plaintiffs filed their Motion on April 9, 2020, no detainees had tested positive for COVID. This apparently reassuring datum was in fact meaningless, because as recently as May 5, *no* detainees had been tested for the virus. Fathi Decl., Exh. C. As of May 12, two detainees had tested positive; three days later, that number had quadrupled to eight. Fathi Decl. Exh. G, H; *see also* Exh. I. Defendants' counsel have since advised that as of May 18, nine detainees have tested positive. Eight vendor employees and seven staff members at the Jail have also tested positive. Fathi Decl., Exh. J. Given the exponential spread of the virus in jail settings, these numbers can be expected to skyrocket. According to Plaintiffs' expert epidemiologist Dr. Chris Beyrer, "[i]n light of these infections, and based upon our knowledge of the virus's propagation in prisons and jails, we can expect COVID-19 to spread rapidly among inmates and staff at BCDC, and from there into the community, unless immediate steps are taken to make social distancing possible." Beyrer Supp. Decl. ¶ 30.

The population at BCDC spirals upward

Public health experts have unanimously urged that populations in places of detention be reduced, both to protect persons who are particularly vulnerable to serious illness or death should they contract the virus, and to allow those who remain detained to practice social distancing. *See, e.g.*, Doc. 645-1 at 11 (letter from more than 200 Johns Hopkins public health and medical faculty to Governor Hogan, stating "It is ... an urgent priority in this time of national public health emergency to reduce the number of persons in detention as quickly as possible"). Dr. Puisis, the medical monitor in this case, agrees: "I strongly recommend depopulation of the jail to the extent it is safe to release inmates. **The jail can't be made safe with respect to current public health recommendations regarding social distancing and sanitation.**" *Id.* (emphasis added).

However, rather than declining, the population at BCDC has actually *increased* from 555 on May 1 to 689 on May 18 – an increase of nearly 25% in less than three weeks. *See* Fathi Decl. Exh. L and M. This increased population – with some housing units at 100% capacity or above (Fathi Decl., Exh. L) – makes social distancing impossible.

Medically vulnerable detainees are not being released or transferred

On April 13 Defendants, working with the independent medical monitor, Dr. Michael Puisis, developed a list of detainees organized by risk factors. In particular, this list identified approximately 107 detainees who, because of their age, chronic medical conditions, or both, were at particularly high risk of serious illness or death were they to become infected with COVID-19. Fathi Decl., Exh. B; Exh. A (“the table can be used from the top down to identify those with highest risk”). Dr. Puisis urged that “**There are about 100 people who should be targeted for release if possible.**” Fathi Decl., Exh. A (emphasis added).

Pursuant to a stipulated protective order (Doc. 650), these medically vulnerable detainees were identified to their criminal defense counsel, with the expectation that they could be released through state court processes. Unfortunately, despite an Administrative Order from the Chief Judge of the Maryland Courts issued on April 14, a few days after the filing of this Emergency Motion¹, that has not occurred, with the result that few of these detainees have been released, and numerous persons remain in the Jail who are at significant risk of serious injury or death if they contract the virus. *See* Declaration of Debra Gardner.

¹ <https://www.courts.state.md.us/sites/default/files/admin-orders/20200414guidingresponseoftrialcourts.pdf>

Defendants are not complying with Dr. Puisis' additional recommendations

On May 7, Dr. Puisis made the following additional recommendations:

I have recommended to [Jail Chief Physician] Dr. Tessema that incoming inmates be tested and consideration should be given to also testing mental health patients who lack executive function to describe symptoms. A low bar for symptoms should be used with respect to testing of any inmate. The same would hold for employees with the exception that they would see their private provider for testing.

Fathi Decl., Exh. D. It appears that Defendants are not complying with these recommendations. *See* Fathi Decl., Exh. E (email from Plaintiffs' counsel asking "if BCBIC intends to implement Dr. Puisis' recommendations on testing"); Exh. F (email from Defendants' counsel not responding directly to this inquiry).

ARGUMENT

When conditions in state and local detention facilities violate constitutional rights, federal courts are obligated to provide a remedy. "Courts ... must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners. Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown v. Plata*, 563 U.S. 493, 511 (2011). When the only effective remedy is release or transfer, that is the remedy the court must order. *Id.* (affirming prisoner release order when crowding was the primary cause of ongoing constitutional violations).

In the weeks since Plaintiffs filed their Motion, courts across the United States have concluded that, for persons who are at increased vulnerability due to age or pre-existing medical conditions, COVID-19 poses such a grave risk of severe illness or death that release or transfer is the only effective remedy. A judge of this Court has ordered detained immigrants released from the Worcester County Detention Center and Howard County Detention Center on this basis. *See Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 2292747, at *5 (D. Md. May 7, 2020)

(ordering release of detainee who “has a high-risk medical condition that makes him particularly vulnerable to COVID-19”); *Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 2201850, at *1 (D. Md. Apr. 30, 2020) (ordering release of detainee “with a high-risk health condition that places him at heightened risk of death or serious illness from COVID-19”).

In *Wilson v. Williams*, the court ordered prison officials to identify prisoners who were particularly vulnerable to serious illness or death from COVID-19; evaluate those prisoners for eligibility for transfer out of the prison “through any means, including but not limited to compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough;” and further ordered that vulnerable prisoners “who are ineligible for compassionate release, home release, or parole or community supervision must be transferred to another BOP facility where appropriate measures, such as testing and single-cell placement, or social distancing, may be accomplished.” *Wilson v. Williams*, No. 4:20-CV-00794, 2020 WL 1940882, at *10–11 (N.D. Ohio Apr. 22, 2020); *stay denied*, No. 20-3447, 2020 WL 2120814 (6th Cir. Apr. 30, 2020). Similarly, in *Martinez-Brooks v. Easter*, the court ordered prison officials to identify “medically vulnerable inmates,” defined as persons “who are aged 65 or over and/or who have any of the ... conditions specifically identified by the United States Centers for Disease Control as putting them at higher risk for severe illness from COVID-19,” and implement a process to review these vulnerable prisoners for home confinement. *Martinez-Brooks v. Easter*, No. 3:20-CV-00569 (MPS), 2020 WL 2405350, at *32-33 (D. Conn. May 12, 2020).

Numerous other courts have ordered transfer or release of medically vulnerable prisoners in light of the risk posed by COVID-19.² Courts granting release have weighed public safety and

² See, e.g., *Rivas v. Jennings*, —F. Supp. 3d —, No. 20-cv-2731 (VC), 2020 WL 2059848 (N.D. Cal. Apr. 29, 2020); *United States v. Smith*, No. 12-cr-133, 2020 WL 1849748 (S.D.N.Y. Apr. 13,

flight risk, but have released detainees with significant criminal histories when the risk to their health was sufficiently grave.³

Defendants have expressed concern that detainees – even those who have tested negative for COVID-19 – cannot safely be released from the Jail because they may infect others in the community. This concern is unfounded. *See* Beyrer Supp. Decl., ¶ 36. Indeed, in light of the public health risk posed by rapid spread within detention facilities, courts have granted release to detainees who have tested positive for COVID-19. *See Prieto Refunjol v. Adducci*, No. 2:20-CV-2099, 2020 WL 2487119, at *28 (S.D. Ohio May 14, 2020) (“Petitioners have also put forward persuasive evidence that the current large cluster of positive [COVID-19] cases at Morrow creates a larger threat to public health than does releasing some or all of these detainees from custody.”); *cf. Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *6 (D. Md. Apr. 3,

2020); *United States v. Sawicz*, No. 08-cr-287, 2020 WL1815851 (E.D.N.Y. Apr. 10, 2020); *United States v. Stahl*, No. 18-cr-694, 2020 WL 1819986 (S.D.N.Y. Apr. 10, 2020).

³ *See, e.g., Medeiros v. Martin*, No. 20-178 WES, 2020 WL 2104897, at *5 (D.R.I. May 1, 2020) (ordering the release of medically vulnerable detainees who were arrested for simple assault, domestic violence, assault with a dangerous weapon, domestic assault and battery, and assault on rape when the facility’s COVID-19 precautions were insufficient to protect them from COVID-19 infection); *Pimentel-Estrada v. Barr*, No. C20-495 RSM-BAT, 2020 WL 2092430, at *17 (W.D. Wash. Apr. 28, 2020) (ordering the release of a medically vulnerable detainee convicted of serious controlled substances violations involving methamphetamine when his continued detention during the COVID-19 pandemic would “create a substantial risk of serious and potentially permanent, irreparable harm due to his age and underlying health conditions”); *Bent v. Barr*, No. 19-CV-06123-DMR, 2020 WL 1812850, at *6 (N.D. Cal. Apr. 9, 2020) (ordering the release of a medically vulnerable detainee convicted of voluntary manslaughter and attempted murder when the facility’s identified preventative measures were “inadequate to ensure the safety and general wellbeing” of detainees during the COVID-19 pandemic); *Castillo v. Barr*, No. CV 20-00605 TJH (AFMx), 2020 WL 1502864, at *5 (C.D. Cal. Mar. 27, 2020) (ordering the release of medically vulnerable detainees convicted of criminal offenses related to driving under the influence when their continued detention during the COVID-19 pandemic presented a sufficiently likely risk of “potential exposure to a serious, communicable disease”).

2020) (finding it implausible that “someone will be safer from a contagious disease while confined in close quarters with dozens of other detainees and staff than while at liberty”).⁴

CONCLUSION

There is a narrow and rapidly closing window of time to protect the health, safety, and lives of the hundreds of persons detained at BCDC. Every day counts. Five Maryland prisoners have already died of COVID-19, and many more will sicken and die unless Defendants take immediate steps to comply with the unanimous recommendations of public health experts. Because Defendants have failed to take effective action, this Court must intervene. The Court should grant Plaintiffs’ Motion and order the relief sought in that Motion, including the request that Defendants “[i]n consultation with Dr. Puisis, formulate a plan for the release or transfer of detainees from the Jail in order to meaningfully mitigate the risk of transmission, giving priority to those whose age and/or underlying medical conditions put them at especially severe risk from COVID-19.” Doc. 645-1 at 17.⁵

⁴ Defendants may argue that an order releasing or transferring medically vulnerable detainees is subject to the “prisoner release order” provisions of the Prison Litigation Reform Act (“PLRA”), including the requirement that such an order may be entered only by a three-judge court. *See* 18 U.S.C. § 3626(a)(3). Any such argument would be meritless. Under the PLRA, a three-judge court may enter a prisoner release order only if it finds, by clear and convincing evidence, that “crowding is the primary cause of the violation of a Federal right.” 18 U.S.C. § 3626(a)(3)(E). In order to provide a remedy for constitutional violations, the PLRA must be read to permit courts to order transfers where some condition *other than* crowding causes the violation. Accordingly, courts have held that transfers of prisoners to protect them from disease or otherwise protect their health are not “prisoner release orders” under the PLRA. *See, e.g., Plata v. Brown*, 427 F. Supp. 3d 1211, 1222-24 (N.D. Cal. 2013) (order transferring medically vulnerable prisoners out of two prisons due to risk of coccidioidomycosis (Valley Fever) was not a prisoner release order); *Reaves v. Dep’t of Correction*, 404 F. Supp. 3d 520, 522-25 (D. Mass. 2019) (order transferring prisoner with quadriplegia to outside treatment facility was not a prisoner release order).

⁵ Any transfer must necessarily be to a facility where medically vulnerable people are safe from COVID-19 infection. In light of the significant and increasing level of infection in Maryland prisons, the parties agree that transferring vulnerable people from BCDC to other MDPSCS facilities is not appropriate, and indeed may be counterproductive.

Respectfully submitted this 20th day of May 2020.

/s/David C. Fathi
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