

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 20-cv-00756-PAB

EDWARD NELLSON, individually, and
a CLASS of similarly-situated persons,

Plaintiffs,

v.

WARDEN J BARNHART, in his individual and official capacity, and
UNITED STATES FEDERAL BUREAU OF PRISONS,

Defendants.

**PLAINTIFF’S REPLY TO DEFENDANTS’ RESPONSE [ECF No. 31]
TO PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION**

Defendants’ actions, though seemingly vast and detailed, are ineffective as implemented against COVID-19, are overstated, and will continue to be deficient without change and testing. In their Response, Defendants explained the numerous precautionary measures they are allegedly taking to prevent the spread of COVID-19. ECF No. 31 at 2-9. Unfortunately, though, Defendants are not protecting the prisoners and are not providing these precautionary measures in an effective manner, as detailed below.

INTRODUCTION

COVID-19’s presence in USP Florence, or even the Federal Correctional Complex broadly, is not a question of if, but when. As of May 1, 2020, there are **1,852** federal prisoners and **343** BOP staff who have confirmed positive test results for COVID-19 nationwide across 49 BOP facilities. Federal Bureau of Prisons, “COVID-19 Virus,” May 1, 2020, available at: <https://www.bop.gov/coronavirus> (last accessed May 1, 2020). Thus far, COVID-19 has caused

36 federal prisoners' deaths. *Id.* There are now 22 confirmed cases of COVID-19 in Fremont County, where FCC Florence is located, and 146 confirmed cases in nearby Pueblo County. <https://covid19.colorado.gov/case-data> (last accessed May 1, 2020). Note that this is a significant increase from time at which the original Preliminary Injunction motion was drafted, at which point there were no cases in Fremont County and only one case in Pueblo County. The numbers are therefore multiplying, significantly. Defendants must act now to protect both their prisoners and staff.

REFUTATION OF DEFENDANTS' FACTUAL BACKGROUND

While USP Florence has placed its prisoners in lockdown, prisoners are otherwise unprotected and open to risk. Defendants claim that prisoners have “access to sinks, water, and soap at all times.” ECF No. 31 at 6. However, prisoners at USP-Florence have been placed on Restricted Commissary, meaning no prisoner may spend more than fifty dollars on commissary items per month. Ex. 1, Nellson Dec. ¶ 3; Ex. 2, Trevino Dec. ¶ 6.¹ Moreover, prisoners have also been limited to purchasing only hygiene items at this time and cannot purchase any other types of items from the commissary such as food. Ex. 2, Trevino Dec. ¶¶ 6-8. While Defendants claim “all inmates have access to sinks, water, and soap at all times,” and for prisoners who have insufficient funds to purchase soap from the commissary, “soap is provided at no extra cost,” ECF No. 31 at 6, these claims do not reflect the reality prisoners are facing. Prisoners are limited to purchasing hygiene items, but if they have insufficient funds, they are not being provided soap at no charge. Ex. 2, Trevino Dec. ¶ 9.

¹ Other declarations are forthcoming, but undersigned counsel has not yet received them in the mail. Mr. Nellson will ask the Court for leave to supplement this Reply when undersigned counsel receives the anticipated declarations.

A prisoner at USP Florence, Mr. Trevino, states in his attached declaration that when prisoners run out of money, they must wait to revalidate and get into the next month's period to buy items again, including soap. Ex. 2, Trevino Dec. at ¶ 9. Mr. Trevino states that he is personally aware of several people who went without soap for *several days* last week because they ran out of money. *Id.* When that happens, USP Florence does not distribute soap. Indeed, the last time Defendant BOP gave out soap was approximately six months ago when the facility was on lockdown for an extended time. Ex. 2, Trevino Dec. ¶ 10. Additionally, Mr. Nellson's financial ability to purchase soap from the commissary does not negate the circumstances of those he lives with in his unit and facility, who are unable to buy soap and are therefore unable to protect themselves and prevent the spread of COVID-19. Within the close confines of the prison and without the ability to wash their hands consistently, Mr. Nellson and other prisoners run an elevated risk of catching and spreading COVID-19.

Defendants also recognize the necessity of social distancing, claiming they have taken steps to promote distancing in addition to locking the complexes down. ECF No. 31 at 6. Despite this, Defendants still require prisoners to be housed in the same cell with at least one other prisoner, either of whom may or may not be able to purchase soap from the commissary. Given that the prisoners are locked down in their cells for 23 hours of the day, they have no options to choose which time they leave their cells. For example, they cannot go into the communal areas at less-busy times, thereby implementing social distancing measures. Social distancing is also impossible to respect given that prisoners are responsible for food service.

Notably, according to Mr. Trevino who works the kitchen at USP Florence, when they go to work the prisoners receive a temperature check. Ex. 2, Trevor Dec. at ¶ 4. When that happens,

15 to 20 individuals line up and a guard goes down the line checking temperature. *Id.* There is no indication the thermometer is cleaned between prisoners and there is no change of gloves in between prisoners. *Id.* Further, the staff still is not asking basic questions of prisoners, for example how they are feeling. *Id.*

ARGUMENT

After Defendants’ assurance that Mr. Nellson would receive expedited responses using the emergency grievance procedure, Mr. Nellson filed an administrative remedy. As he continues through the exhaustion process, he requests relief pending exhaustion. *Jones v. Bock*, 549 U.S. 199, 212-13 (2007) (holding that unless the PLRA explicitly says otherwise, the “usual practice” of litigation must be followed). As injunctive relief, especially preliminary injunctive relief, is a part of the usual practice of litigation under the Federal Rules of Civil Procedures, this court may grant that relief pending exhaustion. Fed. R. Civ. P. 65.

A. Defendants misconstrue the Eighth Amendment violation test

To begin with, Defendants misconstrue the objective and subjective factors of the Eighth Amendment test. According to Defendants, a plaintiff must establish “that prison officials (1) deprived him of the minimal measure of life’s necessities, such as inmate health or safety (the objective prong), and (2) did so with ‘deliberate indifference’ (the subjective prong).” ECF No. 31 at 12. Defendants’ contention does not square with Supreme Court and Tenth Circuit precedent. Defendants conflate the objective prong – which requires a plaintiff to prove he has a sufficiently serious medical need – with the subjective prong – which requires him to show Defendants are deliberately indifferent to that need. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Al-Turki v. Robinson*, 762 F.3d 1188, 1192 (10th Cir. 2014).

Certainly, a plaintiff claiming an Eighth Amendment violation must show a deprivation of life's necessities or a substantial risk of such a deprivation. *See Rhodes v. Chapman*, 452 U.S. 337, 345-46 (1981). But that showing is made by proving *both* the objective and subjective prongs. In other words, it is the deliberate indifference test itself, or the combination of the objective and subjective prongs *together*, that make that showing: *i.e.* serious medical need + deliberate indifference to that need = (risk of) deprivation/Eighth Amendment violation. Under the correct formulation of the Eighth Amendment analysis, Mr. Nellson easily satisfies this. The risk of COVID-19 is well-known, as demonstrated by Defendants' Response and attached declarations; COVID-19 is an extremely serious threat to both prisoners and staff. *See, e.g.*, ECF No. 31 at 2-7; ECF No. 17 at 2-7; ECF No. 17-1, Hemlie Declaration at ¶¶ 5-6.

B. Defendants continue to overstate the scope and effectiveness of their efforts, underscoring the need for injunctive relief

Defendants argue that Mr. Nellson has not shown that they have failed to respond to the COVID-19 crisis by detailing the measures they are supposedly taking over seven pages of their Response. ECF No. 31 at 2-9. However, these measures must be *implemented* to be effective. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (establishing that the government is obligated to provide medical care to its prisoners and failure to do so causes unnecessary and wanton infliction of pain). As of now, Defendants have not taken reasonable steps to abate the risk of COVID-19. As described above, Mr. Nellson and other prisoners have no guaranteed access to either soap or hand sanitizer at USP Florence, despite Defendants' claims that they are providing soap for handwashing. ECF No. 31 at 6. Indeed, with the entire facility on restricted commissary, prisoners run out of money in their \$50/month cap and cannot purchase more soap. Ex. 2, Trevino Dec. ¶¶

6-9; ECF No. 31 at 6. When that happens, Defendants do not provide these prisoners with any more soap, free of cost as they claim. Ex. 2, Trevino Dec. ¶¶ 6-9; ECF No. 31 at 6.

Defendants also are not systematically testing the prisoners' temperatures and are only allegedly testing their employees' temperatures upon entering the facilities, even though Defendants know that a fever is a tell-tale sign of COVID-19. *See, e.g.*, ECF No. 31-1 at 28. Defendants also acknowledged themselves that prisoners are only allowed to wash their laundry "*at least once weekly.*" ECF No. 17 at 8 (emphasis added). This practice hardly maintains sanitary conditions in the face of a pandemic. Notably, this is not an isolated incident of misrepresentations; Defendants have also misrepresented their efforts in at least one other case involving the Metropolitan Detention Center in New York. Ex. 3 (demonstrating that infected prisoners have not been held in isolation nor have BOP staff been given sufficient protection gear, despite the BOP's representations about their practices).

Moreover, it is commonly known that people carrying COVID-19 can be asymptomatic. <https://www.cidrap.umn.edu/news-perspective/2020/04/study-many-asymptomatic-covid-19-cases-undetected> (last accessed May 1, 2020). Even though staff members are having their temperatures tested when they enter the prison, asymptomatic staff members may easily carry the virus into the prison and spread it prior to showing any symptoms at all. Ex. 2, Trevino Dec. ¶ 13. The first case of COVID-19 arrived in FCI Englewood, another BOP facility north of USP Florence. It is possible that this staff member exposed prisoners to COVID-19 who were then transferred to USP Florence. Ex. 1, Nellson Dec. ¶ 17. Without testing staff who enter and exit the prison daily, and without testing prisoners who are exposed to those staff members, Defendants place Mr. Nellson and every prisoner at USP-Florence at *imminent* risk of harm. Ex. 1, Nellson

Dec. ¶ 19. Once COVID-19 enters USP-Florence, it will likely spread quickly as it has done in other prisons across the country. *See, e.g., Mays v. Dart*, JC-IL-0054-0002, Doc. 1 (N.D. Ill. Apr. 3, 2020).

C. Mr. Nellson is likely to succeed on his Eighth Amendment claim

It naturally follows that a failure to take reasonable steps to mitigate a serious risk of harm from a pandemic virus necessitates a conclusion of deliberate indifference. *Mata v. Saiz*, 427 F.3d 745, 752 (10th Cir. 2005) (“[I]t is enough that the official acted or failed to act *despite his knowledge of a substantial risk* of serious harm.”) (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). As clearly outlined in both Defendants’ Response and the declarations attached thereto, Defendants are fully knowledgeable about COVID-19 and the risk it poses to both the prisoners and the BOP’s staff. *See generally*, ECF No. 31. Defendants are also undoubtedly aware of these concerns, as they have been raised in other lawsuits at different facilities. *See, e.g., Chunn v. Edge*, 1:20-cv-01590, Doc. No. 1 (E.D.N.Y. Mar. 27, 2020); *Livas v. Myers*, 2:20-cv-00422-TAD-KK, Doc. No. 1 (W.D. La., Apr. 6, 2020). Yet, despite this knowledge, Defendants still do not provide hand soap when needed, nor do they test any of their staff or prisoners for COVID-19; the only way to ensure there are no cases of COVID-19 in the facility and to ensure it remains that way. *See, e.g., Response* at 6, 9-10.

Finally, the relief Mr. Nellson is requesting is not unique. Several courts across the country recognize the urgency and necessity of this relief. *See, e.g., Wilson v. Williams*, No. 4:20-cv-00794 (N.D. Oh. Apr. 22, 2020) (recognizing the BOP’s efforts (or lack thereof) were insufficient to prevent the spread of COVID-19 within FCI Elkton); *Gayle v. Meade*, No. 20-21553-COOKE/GOODMAN (S.D. Fla. Apr. 30, 2020).

CONCLUSION

This is a matter of life and death. The Court must act.

Respectfully submitted this 1st day of May 2020.

/s/ Maria-Vittoria G. Carminati
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CERTIFICATE OF SERVICE

I certify that the foregoing was served on all Defendants of record via e-filing on May 1, 2020.

/s/ Alexandra Parrott
Alexandra Parrott

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a CLASS of similarly-situated persons,

Plaintiffs,

v.

WARDEN J BARNHART, in his individual and official capacity, and
UNITED STATES FEDERAL BUREAU OF PRISONS,

Defendants.

DECLARATION OF EDWARD NELLSON

I, Edward Nellson, declare under penalty of perjury under the law of Colorado that the following is true and correct to the best of my knowledge and information:

1. My name is Edward Nellson, and I am the plaintiff in this case. I am over the age of twenty-one and am otherwise competent to testify. I make the following statements based upon my personal knowledge.

2. I live in the United States Penitentiary – Florence in Florence, Colorado.

3. We have to buy our own soap from the commissary when we need it. I was able to recently buy soap from the commissary but up until recently, half of my unit was on commissary restriction, meaning they could only spend \$10, \$15, or \$25 on commissary each month.

4. Now, everyone in the prison is on restricted commissary because of supply chain issues.

5. The BOP is only providing hand soap to inmates who have no money in their account, but this does not take into consideration inmates on commissary restriction. Because they

spend their limited money on other items, they can't also buy hand soap when they run out. The prison has soap, but they aren't giving it to people who need it.

6. I live in a single cell, but the overwhelming majority of my unit has cellmates. They are never going to be six feet away from each other.

7. There are numerous inmates with preexisting health conditions here, like diabetes and high blood pressure, who are at a higher risk of getting COVID-19. There's one guy next door to me with borderline kidney failure, diabetes, asthma, and obesity, and he's sixty years old; if he catches it, he's going to die.

8. We also don't have a doctor here at USP Florence. They moved our last doctor, Dr. Bailey, to FCC Florence three weeks ago, so all we have here are nurses. One nurse told me that the first time they get a case in here, they're going to have to wrap me up in a bubble because people are so susceptible in here.

9. The prison gave us one mask each, but they are very flimsy and paper thin. There isn't a good way to wash the masks, so all I can do is spray disinfectant on my mask, but I don't know what is in it. The masks would dissolve if we tried to wash them.

10. Up until April 8, the guards weren't wearing masks either. Then on Wednesday, all of the guards started wearing masks. They also told us we couldn't leave our cells without wearing our masks.

11. The guards only wear the masks; they don't wear gloves or any other protective gear when they work. They wear masks when they hand out our food every day, but they don't wear any gloves when they pass out our food.

12. Common areas also are not guaranteed to be clean. I work as an orderly and I and other orderlies clean the common areas once every few hours. The problem is that with commonly used areas, like the phones, the inmates don't always clean the phones before and after they use them.

13. The guards also don't screen the prisoners daily. No inmate gets their temperature taken, period. We never have our temperature taken, including the guys who leave the unit for work-duty to work in the kitchen or laundry or commissary.

14. A big issue is that the inmates who work in the kitchen, laundry, commissary, or trash duty aren't screened before they leave the unit and don't have their temperature taken. If they get sick, they touch all of the food or clothes or commissary items that go to every unit in the facility. If one of them gets sick, we all get sick. Everything that goes through their hands goes to every housing unit.

15. At least two staff members have had COVID-19. One just came back yesterday, April 23, 2020, after being out for a month because of it. Another one stopped coming in a couple weeks ago because she also has COVID-19. We didn't have masks before she stopped coming in to work either.

16. The prison also has a quarantine unit in FCI Florence for the entire compound. They keep the inmates there for fourteen days, but while they're there, they can only shower for five minutes every other day and they use the same shower stalls.

17. Even though transferred inmates are quarantined for 14 days when they get here, some of them have to come through FCI Englewood because there's a holdover unit there and we get people from there.

18. They've also now shut down the law library. They aren't letting anyone go to the library and they only tell us that its unavailable and they aren't doing it.

19. The BOP says they're doing a lot here, but it won't actually be effective if the virus gets in here, because the people who have access to all units of the prison aren't being screened or protected properly. A lot of guys in here are very susceptible to catching it, because they're at Care Levels 3 and 4, in addition to the Care Level 2 inmates here.

s/ Edward Nellson
Edward Nellson

I, Alexandra L. Parrott, certify that I reviewed this Declaration with Edward Nellson by phone on April 17, 2020, and April 24, 2020, and that he certified that the declaration was true and correct to the best of his knowledge. I am unable to meet in-person with Mr. Nellson as he is currently incarcerated in the USP-Florence, which is currently not allowing legal visitation; I am also subject to Governor Polis's Executive Order restricting public travel and requiring physical distancing.

s/ Alexandra Parrott
Alexandra Parrott, Associate Attorney

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WARDEN J BARNHART, in his individual and official capacity, and
UNITED STATES FEDERAL BUREAU OF PRISONS,

Defendants.

DECLARATION OF FIDEL TREVINO

I, Fidel Trevino, declare under penalty of perjury under the law of Colorado that the following is true and correct to the best of my knowledge and information:

1. My name is Fidel Trevino and I am over the age of twenty-one and am otherwise competent to testify. I make the following statements based upon my personal knowledge.

2. I live in the United States Penitentiary – Florence in Florence, Colorado. I am thirty-four years old and I have asthma.

3. We're all stuck here because the BOP told us nobody in maximum security qualifies for home confinement or compassionate release just because of our security level. Even my cellie, who has done everything to qualify, including serving more than 50% of his sentence and has medical issues like breathing problems and diabetes that place him at greater risk of getting COVID-19, was told he can't be released to home confinement or compassionate release because he's in this facility.

4. I currently work in the kitchen at USP-Florence. When we go to work, all they do is give us a temperature check. About 15-20 guys line up to go to work and one person goes down the line to check our temperature. The staff that checks our temperature wears a mask and gloves but doesn't change gloves between prisoners. They don't ask us how we're feeling or if we're feeling sick at all.

5. We told the guards several times that the COs can bring the virus in, they can carry it without showing symptoms for two weeks, and during those two weeks, they can still pass it on without having a high temperature. They just tell us to get to work.

6. The entire facility is now on restricted commissary. Before, we were able to order anything on the commissary up to \$50. Now you can only order hygiene items, not food anymore. It went into effect two weeks ago.

7. Having restricted commissary is very difficult. There's a lot of people here who depend on that food and need that food, like people with diabetes who need to be eating all day throughout the day.

8. Now we can only order hygiene things like soap, shampoos, conditioners, toothpaste, toothbrushes, and deodorant. Last week, I heard people saying they weren't able to get hygiene stuff because that commissary didn't have enough to provide.

9. If you run out of money, you have to wait to revalidate and get into the next month's period to be able to buy stuff again, the BOP isn't giving any to us. I know a couple people who went a couple days without soap last week. They ran out of money and the BOP didn't give them any soap.

10. The BOP hasn't given us soap in a very long time. The last time they gave us soap was a lockdown about six months ago. We had to threaten to riot just to get them to bring us razors and soap. But they don't give us soap if we run out and can't buy any now.

11. A couple weeks ago the guards gave us all masks that we have to wear any time we leave the cell. Our masks are just cloth with strings on them. I have asthma and its hard to breathe with the mask on. I don't think the masks are super effective though, because its just like having a t-shirt on your face. The guards have good masks though, they get to wear the doctor-masks.

12. As of right now, we don't have a doctor here, we only have nurses. I would hope they would send a doctor soon if we need one, but we've been told there's no doctors here.

13. I understand the BOP is doing stuff, but they have to understand too that we're human beings and we shouldn't be going through all of this just to be safe. We aren't the one going in and out of the facility, the guards are. This is our home and the guards are the ones bringing the sickness in here, but they don't care because we're just criminals.

s/ Fidel Trevino
Fidel Trevino

I, Alexandra L. Parrott, certify that I reviewed this Declaration with Fidel Trevino by phone on April 30, 2020, and that he certified that the declaration was true and correct to the best of his knowledge. I am unable to meet in-person with Mr. Nellson as he is currently incarcerated in the USP-Florence, which is currently not allowing legal visitation; I am also subject to Governor Polis's Executive Order restricting public travel and requiring physical distancing.

s/ Alexandra Parrott
Alexandra Parrott, Associate Attorney

**Federal Defenders
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April 9, 2020

BY ECF AND EMAIL

Honorable Kenneth M. Karas
United States District Judge
Southern District of New York
40 Foley Square
New York, NY 10007

**Re: United States v. Rabadi
13 Cr. 353 (KMK)**

Dear Judge Karas:

We write to briefly supplement our reply, filed this morning, based on factual information we just received from correctional staff at the MDC that directly contradicts information provided by the BOP to the government, and relied on by the government in opposing Mr. Rabadi's compassionate release, with respect to the measures being taken by the BOP to control the spread of COVID-19 within the facility. Specifically, we learned that the Vice-President of the Union that represents correctional staff at the MDC sent the below email to the Warden of the MDC this morning:

Good morning,

The Preamble states that we recognize that the employees are the most valuable resource of the agency.

It has come to the Union's attention that management has shown that inmates are the most valuable asset to the Bureau. Can we please address the following concerns:

Why are staff not quarantined who have been in direct contact with inmates who have tested positive or were symptomatic? Meanwhile, you are quarantining an entire unit, and not saying a word to those staff members left behind.

When will we show staff that we care about them? You only gave us 2 surgical masks to enter the building for protection, one more mask than you gave the inmates to reuse weekly.

Why do we have 2 inmates who tested positive on regular housing units? J-73 and G-43. These inmates were released to general population even before 7days of quarantine. Why aren't those

Honorable Kenneth M. Karas
United States District Judge

April 8, 2020
Page 2

housing units on quarantine with appropriate PPE for staff? if a staff member gets sick or even dies from the COVID19 virus in one of these units it's now noted that you were well aware. We are asking for N-95's on those units and for all staff entering these housing units.

Once staff test positive why haven't we informed all staff who have been in direct contact with those individuals? Why are they not quarantined? Why are we not appropriately informing the staff?

Rhonda Barnwell,
A.F.G.E Local 2005 - Deputy Chief
U.S. Department of Justice
Federal Bureau of Prisons
Metropolitan Detention Center
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[REDACTED]

The BOP has repeatedly asserted in litigation in the Southern and Eastern Districts of New York that it is containing the spread of coronavirus by keeping positive and symptomatic inmates on isolation (*Gov't Opp.* at 17-18; April 9 Letter to Chief Judge Mauskopf, pursuant to Administrative Order No. 2020-14, from Warden Edge and Warden Licon-Vitale, attached as Ex. A), but the Union, whose members are required to work inside the facility every day, states that two inmates who have tested positive were returned to regular housing units after less than 7 days, that those units are not now quarantined, and staff on those units have not been given appropriate personal protective gear. The Union also raises the clear problem of exposed staff not being quarantined, but rather, continuing to work on the units, and of staff members not being informed when other staff members whom they were in contact with have tested positive.

These assertions by the Union call the credibility of the BOP's representations about the practices at MDC Brooklyn into serious question and further speak to the risk to all the inmates from such practices that are contrary to the CDC's advice, and in particular the risk to vulnerable inmates such as Mr. Rabadi.

Respectfully Submitted,

/s/
Sylvie J. Levine
Deirdre D. von Dornum
Federal Defenders of New York

Honorable Kenneth M. Karas
United States District Judge

April 8, 2020
Page 3

CC: AUSA Daniel Richenthal
AUSA Margery Feinzig
Chief U.S. Probation Officer Michael Fitzpatrick
Albert Dayan, Esq.