UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*,

Plaintiffs,

v.

QUINCY BOOTH, *et al.*,

Defendants.

Civil Action No. 20-0849 (CKK)

OPPOSITION BY THE UNITED STATES TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

This Court declined to order the release of inmates in response to Plaintiffs' motion for a temporary restraining order, and the reasons supporting that decision are only stronger today, with conditions at the D.C. Jail improving, the rate of COVID-19 infections substantially decreasing, and the reduction of the inmate population already accomplished and continuing further.

In any event, the Prison Litigation Reform Act precludes this Court from ordering the release of inmates absent specific and mandatory procedures that Plaintiffs have not followed. As several courts have held, Plaintiffs may not avoid these requirements simply by characterizing their claims as habeas petitions challenging the "fact or duration of confinement," as that characterization conflicts with the Supreme Court's definition of such claims and incorrectly conflates the relief requested with the nature of the petition. Nor may Plaintiffs avoid the Act's strictures by calling their requested relief an "enlargement," as such relief would nevertheless plainly fall within the Act's broad definition of a covered release order. In addition, the Bail Reform Act (and its D.C. equivalent) provides the appropriate means for pretrial inmates to seek release from custody.

Even were the Court able to consider Plaintiffs' request for a large-scale release of inmates, such extreme relief would be far from warranted. The rate of COVID-19 at the Jail has already been on a steady and continuous decline for over a month, and the number of positive inmates in isolation is at a nadir. Further, the Department of Corrections has made and continues to make improvements in medical care, environmental health, and staffing levels at the facility, as reported by the neutral, court-appointed amicus. Moreover, the relief Plaintiffs seek—a reduction in the population—has already been achieved. The number of inmates at the Jail is already down by a quarter from what it was on March 24, 2020, and it will decrease still further in the coming days

and weeks. In particular, the Bureau of Prisons and the U.S. Marshals Service will commence next week the removal of 130 to 160 inmates who have been sentenced and committed to the Bureau's custody. And the Bureau, Marshals Service, and United States Parole Commission are undertaking additional efforts that will reduce the population further still. For these reasons, the Court should deny Plaintiffs' motion for a preliminary injunction insofar as it seeks a release of inmates.

BACKGROUND

A. The COVID-19 Pandemic

Over the past several months, the world has faced a menacing global threat. In December 2019, reports of a respiratory disease caused by a novel coronavirus began to emerge out of Wuhan, Hubei Province, China. The rapid spread of the virus, named "severe acute respiratory syndrome coronavirus 2," and the disease it causes, called "coronavirus disease 2019" ("COVID-19"), pose a public health risk unparalleled in modern times. Although the complete clinical picture is not fully understood, the virus appears to be transmitted easily and quickly, and can have a high mortality rate for some of the most vulnerable members of society. The disease particularly affects older adults and those with underlying medical conditions. Data published by the CDC on April 17, 2020, shows that about 75% of people hospitalized with COVID-19 were aged 50 years or older, and, of those patients for whom information is available, nearly 90% had underlying medical conditions, such as obesity, chronic lung disease, diabetes, or cardiovascular disease.[1] There is currently no proven vaccine or therapeutic treatment.

On March 11, 2020, the World Health Organization classified the COVID-19 outbreak as a pandemic. The United States has seen over 1,571,000 confirmed cases and over 94,000 deaths

[1] https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm

as of May 22, 2020.[2] The District of Columbia has experienced about 7,900 confirmed cases of COVID-19 and has reported 418 deaths related to the disease as of May 21, 2020.[3] The mayor of the District of Columbia declared a state of emergency and a public health emergency on March 11, 2020. *See* Mayor's Orders 2020-045 & 2020-046 (Mar. 11, 2020). On March 30, the Mayor issued a stay-at-home order, requiring "all individuals anywhere in Washington, DC, to stay in their residences except to perform" certain specifically exempted activities. *See* Mayor's Order 2020-054 (Mar. 30, 2020). That order remains in effect.

There is, however, reason for some optimism. According to the most recent weekly report by the CDC, indicators of the prevalence of COVID-19 in the United States have "continued to decline."[4] In the District of Columbia, the number of COVID-19 patients at D.C. acute-care hospitals has generally declined from a peak of 477 on April 28, 2020, and currently, as of May 20, stands at around 342.[5]

B. This Litigation

Plaintiffs filed this action on March 30, 2020, against the Director and the Warden of the District of Columbia Department of Corrections ("DOC"). *See* Compl., ECF No. 1. Plaintiffs are inmates detained in DOC's Central Detention Facility ("CDF") or its Correctional Treatment Facility ("CTF") (collectively, the "D.C. Jail" or "Jail"), and they seek to represent a class of others similarly situated. They allege that conditions at the D.C. Jail violate their rights under either the Fifth Amendment or the Eighth Amendment of the United States Constitution because the DOC failed to take reasonable precautions to prevent the spread of COVID-19 within the Jail. Compl.

[2] https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html
[3] https://coronavirus.dc.gov/page/coronavirus-data
[4] https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html
[5] https://coronavirus.dc.gov/release/coronavirus-data-may-21-2020

¶ 4. With their complaint, Plaintiffs filed a motion for a temporary restraining order and a motion for a preliminary injunction. ECF Nos. 5, 6.

On April 9, 2020, the Court appointed Grace Lopes and Mark Jordan as amici curiae to provide the Court and the parties with information on the conditions at the D.C. Jail and to make findings regarding DOC's responses to COVID-19. ECF No. 34. The amici reviewed records and conducted unannounced and unescorted visits to the facility over three days and presented their findings in an oral report on April 15 and a final written report submitted April 18. ECF Nos. 45, 51-1.

On April 19, 2020, the Court granted in part and denied in part Plaintiffs' motion for a temporary restraining order. In doing so, the Court specifically declined to order the release of any inmates or to appoint an expert to oversee the downsizing of the Jail population. The Court noted that inmates at the Jail were already filing individual release petitions through which they could be considered for release. Further, the Court noted that the population of the Jail had already declined due to expanded authority on the part of law enforcement to release individuals with the approval of the relevant prosecuting authority and new authority for the DOC to award additional time credits to misdemeanants. Mem. Op. re TRO at 26–27. Given these efforts, the Court concluded that releasing inmates was inappropriate. *Id.* at 27. The Court did, however, grant significant injunctive relief in the form of requirements for DOC to rectify certain deficiencies in its health and safety practices in line with recommendations by the court-appointed amici. *Id.* at 27–31.

While the motion for a temporary restraining order was pending, the DOC defendants filed a motion to add the United States as a party, which the United States did not oppose. ECF Nos. 44, 46. This Court granted the motion over Plaintiffs opposition. In doing so, the Court observed

that the United States' "sole interest in this case is the potential that the Court could release a significant number of the inmates currently confined in the D.C. Jail." Mem. Op. at 2 (May 1, 2020), ECF No. 64. The Court therefore restricted the United States' joinder in the case to any issues involving the release of inmates. Mem. Op. at 10, ECF No. 64.

Following entry of the temporary restraining order and pursuant to a consent order submitted by Plaintiffs and DOC, the Court again appointed Ms. Lopes and Mr. Jordan as amici to conduct additional investigations of the Jail and to report answers to specific questions in an oral report on May 11 and a written report submitted May 20. ECF No. 62. On May 15, 2020, Plaintiffs filed an amended motion for preliminary injunction, again requesting that the Court appoint an expert to oversee the large-scale release of inmates from the Jail. ECF No. 70. The United States opposes that motion.

ARGUMENT

I. The Prison Litigation Reform Act applies and sets forth specific, mandatory procedures for release orders.

The PLRA prevents this Court from entering the release orders sought by Plaintiffs. The PLRA creates a carefully reticulated scheme for "the entry and termination of prospective relief in civil actions challenging prison conditions." *Miller v. French*, 530 U.S. 327, 331 (2000). And it broadly defines a "civil action with respect to prison conditions" as "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison," while excluding "habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2). Thus, the PLRA tracks the basic distinction between habeas suits challenging the "fact or duration of confinement itself," and civil actions "challenging the conditions of confinement." *Porter v. Nussle*, 534 U.S. 516, 527–28 (2002) (citation omitted).

Here, there can be no dispute that Plaintiffs' lawsuit is one "with respect to prison conditions" and is therefore governed by the PLRA. Plaintiffs allege that the "[d]efendants' ongoing failure to take reasonable precautions to prevent the spread and severity of a COVID-19 outbreak gravely jeopardizes the safety of Plaintiffs and all of the approximately 1,600 individuals confined in the [D.C. Jail,]" Compl. ¶ 4, and they assert that "proper hygiene and other procedures must be implemented to ensure the safety of Plaintiffs and proposed class members," *id.* at 28. These are challenges to the conditions of the facility, and therefore implicate the PLRA's requirements for release orders.

A. Plaintiffs' invocation of habeas does not allow them to avoid the PLRA.

Although Plaintiffs invoke habeas and 28 U.S.C. § 2241, Compl. ¶ 11, and label their claims as challenging the "fact of confinement in a facility" whose conditions they allege to be unconstitutional, Pls.' Am. PI Mot. at 37, this is not, in fact, a "habeas corpus proceeding[ ] challenging the fact or duration of confinement in prison." The Supreme Court has repeatedly drawn a line between "two broad categories of prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement." *McCarthy v. Bronson*, 500 U.S. 136, 140 (1991). Challenges to the fact or duration of confinement are those in which the prisoners' success would "necessarily imply the invalidity of their convictions or sentences." *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (brackets and citation omitted). By contrast, challenges to the conditions of confinement are those in which petitioners "allege[] unconstitutional treatment of them while in confinement," as Plaintiffs do here. *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973); *see also id.* at 507 (Brennan, J., dissenting) (noting that "an attack on the validity of conviction or sentence is plainly directed at the fact or duration of confinement," and that a challenge to the deprivation of good-time credits also "falls

within" that definition); *Moran v. Sondalle*, 218 F.3d 647, 650-51 (7th Cir. 2000) (per curiam) ("State prisoners who want to challenge their convictions, their sentences, or administrative orders revoking good-time credits or equivalent sentence-shortening devices . . . contest the fact or duration of custody."). Challenges to the fact or duration of confinement constitute the "core" of federal habeas. *Nelson v. Campbell*, 541 U.S. 637, 643 (2004) ("[W]here an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence," that claim "fall[s] within the 'core' of federal habeas. By contrast, constitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core.") (citation omitted).

Plaintiffs clearly challenge the conditions of their confinement and not the fact of it. They make no claims regarding the propriety of their detention, but instead challenge the defendants' alleged failure "to implement other basic policies and procedures that would mitigate the risk to Plaintiffs' health and safety," Compl. ¶ 10. And if Plaintiffs succeed on the merits, it would not remotely "imply" that their "convictions or sentences" are invalid. *Wilkinson*, 544 U.S. at 82 (brackets and citation omitted). Nor would success entitle them to outright release from custody, but only to the improvement of or removal from the challenged conditions. *See Aamer v. Obama*, 742 F.3d 1023, 1035 (D.C. Cir. 2014) (noting that in a conditions of confinement claim, the court may "order the prisoner released unless the unlawful conditions are rectified, leaving it up to the government whether to respond by transferring the petitioner to a place where the unlawful conditions are absent or by eliminating the unlawful conditions in the petitioner's current place of confinement").

The mere fact that Plaintiffs seek release cannot automatically convert this suit to a habeas "fact or duration" challenge because the PLRA clearly contemplates that actions challenging

"prison conditions" may lead to release in rare circumstances where the conditions cannot be redressed, because the statute sets out detailed requirements governing how and when such a "prisoner release order" may be issued. 18 U.S.C. § 3626(a). In *Brown v. Plata*, the Supreme Court considered the proper application of those PLRA provisions to two cases in which California prisoners alleged that overcrowding and deficiencies in medical care constituted an Eighth Amendment violation that entitled them to orders granting the release or transfer of a portion of the state prison population. 563 U.S. 493, 507–08, 511 (2011). The Court never once questioned that the suit was a challenge "to prison conditions" that was squarely governed by the PLRA. *Id.* at 530; *see also Nussle*, 534 U.S. at 532 (recognizing that the PLRA covers "all inmate suits about prison life").

Because Plaintiffs claims challenge the conditions (and not the fact) of their confinement, the PLRA applies and strictly limits the relief this Court may grant. Under the PLRA, "[t]he authority to release prisoners as a remedy to cure a systemic violation of the Eighth Amendment is a power reserved to a three-judge district court, not a single-judge district court." *Brown v. Plata*, 563 U.S. at 500 (citing 18 U.S.C. § 3626(a)); *see* 18 U.S.C. § 3626(a)(3)(B) ("In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court[.]"). Moreover, such an order may not be entered unless "(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders." *Id.* § 3626(a)(3)(A). And even a three-judge court may order prisoners released to remedy unconstitutional prison conditions "only if the court finds by clear and convincing evidence" that

"crowding is the primary cause of the violation" and "no other relief will remedy [it.]" *Id.* § 3626(a)(3)(E)(i)-(ii).

Plaintiffs cite a handful of cases in which other federal courts have used the writ of habeas corpus to grant release as relief from conditions related to COVID-19. Those decisions are not, however, controlling here, and there is good reason for this Court not to follow their reasoning; namely, those courts conflated the plaintiffs' request for release as a remedy with the nature of the habeas challenge. *See Martinez-Brooks v. Easter*, No. 20-0569, 2020 WL 2405350, at *16 (D. Conn. May 12, 2020); *Wilson v. Williams*, No. 20-0794, 2020 WL 1940882, at *10 (N.D. Ohio Apr. 22, 2020), *stay pending appeal denied*, Order, *Wilson v. Williams*, No. 20-3447 (6th Cir. May 4, 2020).[6] But this ignores the distinction between cases challenging the fact of confinement and those challenging conditions of confinement, which turns not on the relief requested but on whether success on the merits would "necessarily imply the invalidity of [the petitioners'] convictions or sentences," *Wilkinson*, 544 U.S. at 82, or whether they "allege[] unconstitutional treatment . . . while in confinement," *Preiser*, 411 U.S. at 499.

Other cases that Plaintiffs cite were brought by persons held in civil detention by Immigration and Customs Enforcement and therefore did not address the applicability of the PLRA. *See Savino v. Souza*, No. 20-10617, 2020 WL 2404923 (D. Mass. May 12, 2020); *Rivas v. Jennings*, No. 20-2731, 2020 WL 2059848 (N.D. Cal. Apr. 29, 2020); *Thakker v. Doll*, No. 20-0480, 2020 WL 2025384 (M.D. Pa. Apr. 27, 2020). Individuals who are being detained pending deportation are not "prisoners" as defined by the PLRA. *See, e.g.*, *Agyeman v. INS*, 296 F.3d 871, 886 (9th Cir. 2002) ("[T]he term 'prisoner' does not encompass a civil detainee for purposes of

[6] The government's application for a stay of the injunction in *Wilson* is currently pending in the Supreme Court of the United States. *See* Application for a Stay, *Williams v. Wilson*, No. 19A1041 (U.S. filed May 20, 2020).

the PLRA."); *see also* 18 U.S.C. § 3626(g)(3) ("[T]he term 'prisoner' means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program[.]"). Accordingly, *Sevino*, *Rivas*, and *Thakker* are not instructive on the applicability of the PLRA to this case.

On the other hand, Plaintiffs fail to acknowledge the substantial persuasive authority against their position. Numerous courts have concluded that the PLRA does indeed apply to lawsuits challenging prison conditions in connection with the presence of COVID-19 within a facility, even where those cases are styled as habeas claims. *Alvarez v. Larose*, — F. Supp. 3d — , No. 20-0782, 2020 WL 2315807, at *3 (S.D. Cal. May 9, 2020) (concluding that the PLRA applies despite the fact that plaintiffs sought release and noting that plaintiffs' argument to the contrary "conflates the nature of relief with the substance of the claim to avoid limitations of the PLRA"); *Money v. Pritzker*, —— F. Supp. 3d ——, No. 20-2093, 2020 WL 1820660, at *14 (N.D. Ill. Apr. 10, 2020) (stating that the PLRA "prevents" court from granting release of inmates based on prison conditions and COVID-19); *Plata v. Newsom*, —— F. Supp. 3d ——, No. 01-1351, 2020 WL 1908776, at * 1 (N.D. Cal. Apr. 17, 2020) ("To the extent Plaintiffs seek an order requiring inmate releases or an order requiring transfer of inmates to [other] facilities, this Court lacks authority to grant that relief [under the PLRA]."). *cf. Grinis v. Spaulding*, No. 20-10738, 2020 WL 2300313, at *2 (D. Mass. May 8, 2020) (noting that there was a "substantial question" as to whether habeas claims seeking a reduction in a prison population due to COVID-19 could properly be characterized as challenging the fact of confinement but denying temporary restraining order on alternate grounds).

As the Northern District of Illinois recognized in *Money*, although "the issue of inmate health and safety is deserving of the highest degree of attention," an "order imposing a court-ordered and court-managed 'process' for determining who should be released" from a state prison in response to the COVID-19 pandemic falls "squarely within Section 3626(a)(3)—which forbids this Court from granting it." 2020 WL 1820660, at *1, 13. "[T]he release of inmates requires a process that gives close attention to detail, for the safety of each inmate, his or her family, and the community at large demands a sensible and individualized release plan—especially during a pandemic." *Id.* at *1. As discussed in more detail below, individual motions for release under the federal and D.C. Bail Reform Acts allow judges to undertake that "inherently inmate-specific inquiry," *id.*, and are the proper legal vehicle for inmates at D.C. Jail to attempt to obtain release due to health risks posed by the COVID-19 pandemic.

B. Plaintiffs' invocation of "enlargement" does not allow them to avoid the PLRA.

Plaintiffs alternatively contend that the Court may grant them their requested relief without issuing a writ of habeas corpus by "enlarging" their sentences to include maintaining their custody in another location, such as a hospital, halfway house, or home. Pls.' Am. PI Mot. at 35–37. Plaintiffs contend that this would allow them to sidestep the PLRA because they would remain in some form of custody. *Id.* at 38. But Plaintiffs ignore the PLRA's broad definition of a "prisoner release order," which covers more than simply orders that end all custody whatsoever. "The term 'prisoner release order' includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population." 18 U.S.C. § 3626(g)(4). And *Brown* recognized that an order that permitted state officials to "comply by . . . transferring prisoners to [other] facilities," was still a "prisoner release order" because it had the "'effect of reducing or limiting the prison population.'" 563 U.S. at 511 (quoting 18 U.S.C.

§ 3626(g)(4)). The order sought by Plaintiffs would require the appointment of an expert to "reduce the population" of the D.C. Jail by releasing inmates on a categorical basis. *See* Pls.' Am. PI Mot. at 39 (quoting Schiraldi Decl. ¶ 14). Thus, the requested relief, whether called enlargement or a habeas writ, would have the "purpose or effect" of limiting the population at the D.C. Jail, and would therefore constitute a release order under the PLRA. *See Brown*, 563 U.S. at 511.

In support of their argument to the contrary, Plaintiffs rely on *Reaves v. Department of Correction*. *See* Pls.' Am. PI Mot. at 38 (citing 404 F. Supp. 3d 520, 522 (D. Mass. 2019)). But the decision in *Reaves* did not turn on the fact that the petitioner there would remain in custody following the order, but on the fact that the requested relief (transfer to a facility where the prisoner could be treated for his medical needs as a quadriplegic person) applied only to a single prisoner and was premised on the need to remedy alleged individualized constitutional violations and not overcrowding. 404 F. Supp. 3d at 523. That situation clearly does not analogize to Plaintiffs' claims seeking a broad-based releases of several inmates for the express purpose of reducing the population of the Jail.

II. Inmates can—and are—seeking individualized release determinations through the Bail Reform Act, which is the appropriate vehicle for pretrial release.

Inmates at the Jail, many of whom are detained pending trial, already have an expeditious method for seeking release that permits judges assigned to and familiar with their cases to make considered and individualized determinations about whether conditions at the Jail, among other factors, warrant their release. Both the federal Bail Reform Act and its D.C. counterpart expressly allow judges to consider an individual defendant's health when deciding whether to detain him or her pending trial. Under the federal BRA, a person charged with an offense may be released, released on conditions, or detained pending trial. 18 U.S.C. § 3142(a). In determining "whether there are conditions of release that will reasonably assure the appearance of the person as required

and the safety of any other person and the community," the court "shall . . . take into account the available information concerning," *inter alia*, "the history and characteristics of the person, including . . . the person's . . . physical and mental condition[.]" *Id.* § 3142(g)(3). District judges have statutory authority to review a magistrate judge's detention order, *id.* § 3145(b), and "inherent authority to reconsider detention decisions . . . where 'changed circumstances' support release." *United States v. Smith*, 200 F. Supp. 3d 192, 194 (D.D.C. 2016).

The D.C. BRA operates in a similar fashion. *See* D.C. Code § 23-1322(e) ("The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account information available concerning . . . The history and characteristics of the person, including: [t]he person's . . . physical and mental condition[.]"); § 23-1324(a) ("A person who is detained . . . may move the court having original jurisdiction over the offense with which he is charged to amend the order."). To facilitate the D.C. Superior Court's evaluation of motions for release "due to the health threat posed by the COVID-19 Pandemic," the court has issued a standing order requiring such motions to identify, among other things, whether the defendant has "a documented health condition that puts [him or her] especially at risk with respect to COVID-19," and whether the defendant is "charged only with non-assaultive misdemeanors" or "only with felonies that are not crimes of violence[.]" Criminal Standing Order of March 22, 2020—Amended, *available at* https://www.dccourts.gov/sites/default/files/Order-Attachment-PDFs/Standing-order-amended.pdf.

The Attorney General has issued guidance to federal prosecutors concerning "Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic." AG Memo at 1.[7] That guidance

[7] https://www.justice.gov/file/1266901/download

makes clear that "the current COVID-19 pandemic requires that [prosecutors] ensure [they] are giving appropriate weight to the potential risks facing certain individual from being remanded to . . . custody." *Id.* Thus, although the Department's "paramount obligation" is to "[p]rotect[ ] the public," prosecutors must also "consider the medical risks associated with individuals being remanded into . . . custody during the COVID-19 pandemic." *Id.* at 1–2. Prosecutors "should consider not seeking detention to the same degree [they] would under normal circumstances," and must weigh "the risk of flight and seriousness of the offense . . . against the defendant's vulnerability to COVID-19." *Id.* at 2. Likewise, "these same considerations should govern [prosecutors'] litigation of motions filed by detained defendants seeking release in light of the pandemic." *Id.* Such a defendant's "risk from COVID-19 should be a significant factor in [each prosecutor's] analysis[.]" *Id.*

The United States is currently in the midst of litigating hundreds of motions for release filed by individual defendants incarcerated at the D.C. jail pending trial. These motions are the correct vehicle for a defendant seeking release based on the health risks posed by COVID-19. *See Gon v. Gonzales*, 534 F. Supp. 2d 118, 119 (D.D.C. 2008) ("For pretrial detainees . . . , habeas corpus relief is not necessarily available when the pretrial detention order can be challenged under § 3145."); *see also, e.g.*, *Reese v. Warden Philadelphia FDC*, 904 F.3d 244, 246–48 (3d Cir. 2018) (holding that "federal defendants who seek pretrial release should do so through the means authorized by the Bail Reform Act, not through a separate § 2241 action"); *Medina v. Choate*, 875 F.3d 1025, 1029 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 1573 (2018) ("[W]e now adopt the general rule that § 2241 is not a proper avenue of relief for federal prisoners awaiting federal trial."); *Falcon v. U.S. Bureau of Prisons*, 52 F.3d 137, 139 (7th Cir. 1995) (same); *Fassler v. United States*, 858 F.2d 1016, 1017–19 (5th Cir. 1988) (same); Brian R. Means, Federal Habeas

Manual § 1:29 (May 2019 Update) ("Section 2241 generally is not a proper avenue of relief for federal prisoners awaiting federal trial.").

Further, both the federal Bail Reform Act and its D.C. counterpart require judges to evaluate, on an individualized, defendant-by-defendant basis, (1) the nature and circumstances of the offense charged, (2) the weight of the evidence against the defendant, (3) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release, and (4) the defendant's history and characteristics, including his or her physical and mental condition. *See* 18 U.S.C. § 3142(g); D.C. Code § 23-1322(e). This Court recognized the need for such individualized considerations when determining whether a particular inmate is appropriate for release. *See* Mem. Op. re Joinder of the United States at 7 ("Any large-scale release of inmates would require an analysis of the traditional factors considered for release—the inmate's fitness for conferment and the danger to the community in the case of release.") Such determinations are already being conducted on an expeditious and individualized basis in emergency motions for release under the BRA by judges assigned to the underlying criminal case, who are most familiar with the facts and circumstances presented by such motions. *See, e.g.*, Mem. Op. & Order, No. 19-0194 (D.D.C. May 10, 2020), ECF No. 43 (denying without prejudice motion for release after weighing risk factors, health conditions, and considering presence of COVID-19 in D.C. Jail); Mem. & Order, *United States v. Mitchell*, No. 19-0244 (D.D.C. May 7, 2020), ECF No. 24 (same); Mem. Op. & Order, *United States v. Fletcher*, No. 19-0397 (D.D.C. Apr. 28, 2020) (Kollar-Kotelly, J.), ECF No. 26 (same).

The United States, too, takes these individualized factors into account when seeking detention or litigating a motion for release, including assessing each "defendant's risk from COVID-19" as "a significant factor in [its] analysis." AG Memo at 2. In appropriate cases, the

United States has joined or declined to oppose motions for release by inmates at risk for COVID-19. *See, e.g.*, Jt. Mot. for Immediate Release, *United States v. Piles*, No. 19-0292 (D.D.C. Apr. 1, 2020), ECF No. 152; Jt. Mot. for Immediate Release, *United States v. Talley*, No. 19-0337 (D.D.C. Mar. 30, 2020), ECF No. 17; Jt. Mot. for Immediate Release, No. 19-0296 (D.D.C. Mar. 25, 2020), EF No. 19. As the federal and DC BRAs provide an effective and considered means for inmates to seek release from the Jail, Plaintiffs' request for a court-appointed expert to take the reins of that process away from judges is unnecessary and inappropriate.

III. Plaintiffs have not demonstrated the need for any release of inmates.

A. Conditions at the Jail are improved and the spread of the virus has been curtailed.

While Plaintiffs continue to paint a dire picture of conditions within the D.C. Jail, the reports of the court-appointed amici show that circumstances are improved, and the data show that these improvements have led to a substantial and continued reduction in the spread of COVID-19.

Amici report ongoing and continued improvement by DOC in several key areas. First, inmates in isolation and quarantine are receiving attentive medical care. Amici report that "on both isolation and quarantine housing units, medical staff are conducting routine monitoring of inmates to identify those who need urgent care. For inmates in isolation, the level of monitoring is very high. It frequently includes multiple visits from both nursing staff and advanced medical providers on a daily basis." Amici Oral Rep. at 27. On non-quarantine units, amici report that sick-call forms are now collected daily by a nurse with Unity and triaged by a nurse for urgency. Amici Written Rep. at 10 n.20. A protocol issued on May 5, 2020, provides that all inmates with COVID-19 symptoms will be designated by the Unity nurse as level 1 emergency / urgent care and seen immediately. *Id.* at 10 & Ex. 8. DOC also reports that "sick call providers" are going out onto the tiers to see if there are residents who did not submit a sick-call request who need to be seen (although amici report that they were unable to verify this process). Amici Written Rep. at 11 &

Ex. 4, Attach. at 1. "Such a process, if consistently implemented, would provide inmates who are confined on nonquarantine housing units much greater access to health care than they currently have." *Id.* at 16.

DOC has also made environmental improvements to promote the health of inmates. Amici report that, while social distancing is not "prevalent" among inmates, there is "some progress and attempts to enforce social distancing" by DOC staff. Amici Oral Rep. at 43. The Jail has posted materials throughout the facilities about the need for social distancing, and staff are being disciplined if they fail to enforce social distancing. *Id.* at 42. And fewer inmates are now being allowed out of their cells at any given time, which has led to "less chaotic" housing units. *Id.* at 43. In addition, inmates "have access at both facilities to cleaning materials and cleaning equipment," though there are complaints about the number of treated paper towels provided to inmates at CDF. Amici Oral Rep. at 40–41. All DOC staff and food-service contractors are required to be trained in the use of personal protective equipment. Amici Written Rep. at 13. DOC is in the process of hiring a full-time sanitarian and, in the meantime, has retained a vendor to audit conditions and make recommendations for improvements, develop a COVID-19 cleaning protocol, and oversee the protocol's implementation by the DOC's cleaning contractor. *Id.* at 14. DOC has also entered into two emergency contracts for environmental HAZMAT-level cleaning services of the common areas of all housing units at the Jail. *Id.* at 15.

Though Plaintiffs still fault the DOC's efforts in some respect, the best measure of those efforts is the results. And it cannot be disputed that there has been a significant and sustained curtailment of the spread of COVID-19 within the D.C. Jail, a critical fact that Plaintiffs ignore. As amici report, "the impact of COVID-19 at the CDF and CTF has changed significantly." Amici Written Rep. at 16. The seven-day average rate of positive COVID-19 tests has been falling at the

CDF for over a month since peaking on April 18, 2020, and at the CTF since peaking on April 5 and 6. Amici Oral Rep. at 7. According to amici, "[a]t both facilities, by mid-May 2020, the rate of new COVID-19 cases had dropped significantly from peak levels." Amici Written Rep. at 16. Given this improvement in conditions as reported by amici and the significant and continued trend in reducing the prevalence of COVID-19 at the Jail, a large-scale release of inmates is unwarranted.

Moreover, the release of inmates would not address the vast majority of the remaining adverse conditions alleged by Plaintiffs, such as a lack of unmonitored access to legal calls on one tier of the isolation unit, insufficient number of treated paper towels provided for cleaning, and the allegedly infrequent collection of sick-call requests by Unity. While Plaintiffs contend that at least some of the remaining issues at the Jail—particularly the fact that social distancing among inmates is not prevalent—are tied to understaffing (not overpopulation), the evidence shows that staffing levels are only increasing. As of May 9, 2020, about 20% of correctional officers and supervisory correctional officers employed by DOC were unavailable for work. Amicus Written Rep. at 8. In the week prior to Amici's written report, however, "numerous correctional staff have returned to work . . ., which has made staffing shortages less acute. Particularly at the CTF . . . it appears staffing shortages are not having as severe an impact as was evidenced in the recent past." Amici Written Rep. at 8.

B. The population of the Jail has declined significantly, and will continue to decline.

Plaintiffs request for a substantial reduction in the Jail population is not only unwarranted due to improved conditions and reduced infection rates at the Jail, it is also unwarranted because it is already happening. As this Court noted in declining to release inmates as part of its temporary restraining order, a signficant reduction in population at the D.C. Jail has already occurred through the adjudication of individual release petitions, greater release discretion afforded to law

enforcement, and a doubling of the maximum number of sentencing credits that a misdemeanant may receive. Mem. Op. re TRO at 26–27. At the time of the Court's order, this had led to the release from custody of all by nine misdemeanants. *Id.* at 27.

The population of the Jail has only declined further since the Court's temporary restraining order. In their May 11 oral presentation, amici reported a "significant reduction" in the population of the Jail since their April report, which they characterized as "material to . . . the clients' consideration" of the environment at the Jail. Amici Oral Rep. at 7. Indeed, today the population of the Jail stands at only 1,331—a reduction of nearly a quarter (over 23%) from the population of 1,739 on March 24, 2020. Sawyer Decl. ¶ 7. Notably, this decrease is in line with the size of the decrease in population reported by the detention facility that Plaintiffs hold out as a model in their preliminary injunction brief. Arlington County Detention Center reported a reduction in its inmate population of 25 to 30%, which Plaintiffs characterize as "ensuring the space and staffing levels to implement social distancing." Pls.' Am. PI Mot. at 1–2.[8] Thus, the reduction in population at the Jail is already in line with Plaintiffs' apparent target.

Further, the population at the Jail will continue to significantly decline even further in the coming days and weeks due to ongoing and significant efforts on the part of federal agencies. In particular, the Bureau of Prisons ("BOP") and the United States Marshal Service are working together to expeditiously remove the approximately 130 to 160 inmates at the Jail who have been sentenced and committed and are awaiting transfer to their designated BOP facility. Matevousian Decl. ¶ 5. The BOP has identified national quarantine sites to hold designated prisoners for a 14-day period before transporting them to their destination institution to ensure that COVID-19 is not

[8] In their brief, Plaintiffs represent that Arlington reduced its population by "nearly a third." Pls.' Am. PI Mot. at 1. More precisely, the new article cited by Plaintiffs reports a "a 25-30% reduction in prison population" over the course of several months, as reported by a Commonwealth attorney.

newly introduced into any BOP facilities. Sawyer Decl. ¶ 8. In order to expeditiously clear D.C. Jail inmates for transportation to these quarantine sites, on May 20, 2020, the BOP loaned the USMS five fast response testing machines as well as 264 test kits. Matevousian Decl. ¶ 7; Sawyer Decl. ¶ 9. These machines and test kits will allow designated inmates to be tested at the rate of 20 per hour, and inmates testing negative will be transported the day the day they receive their test result. Matevousian Decl. ¶ 7. The first large movement of these inmates to a BOP facility or quarantine site is expected to occur next week. *Id.* ¶ 11. In the meantime, the BOP has accepted a group of 35 to 40 inmates (some of which are pretrial inmates in the custody of the Marshals Service) who are considered high risk for COVID-19 vulnerability, and 15 of those inmates have already been transferred to the Federal Detention Center in Philadelphia, Pennsylvania. *Id.* ¶ 10; Sawyer Decl. ¶ 10. The remaining inmates will also be transferred when it is safe to do so. Sawyer Decl. ¶ 10.

In addition, this week the Marshals Service began working with the United States Attorney's Office for the District of Columbia to conduct a review of the 50 to 100 inmates who are committed to other institutions but are housed temporarily at the D.C. Jail at the request of prosecutors to determine whether any of those inmates may be removed from the Jail and returned to their permanent institution.[9] Sawyer Decl. ¶ 11. And as of April 14, 2020, the Marshals Service is no longer processing federal arrests through DOC facilities and, if those arrestees are ordered detained pretrial, they are not being held at DOC facilities. *Id.* ¶ 13.

[9] Notably, in at least one instance, the Public Defender Service has requested the an inmate *remain* at the D.C. Jail and not be returned to his permanent institution, even though this individual is not due to participate at any proceedings in the District of Columbia until September. Sawyer Decl. ¶ 11.

The United States Parole Commission ("USPC") has also been working to help reduce the population of the D.C. Jail. It has dramatically limited issuing warrants for parole and supervised release violations to only those offenders who pose an imminent risk to public safety. Husk Decl. ¶ 5. The Commission has also applied heightened scrutiny to offenders already in custody to determine whether their release would pose a risk to public safety, a process that has led to the reduction in the number of parole offenders at the Jail by almost half: from 270 as of March 16, 2020, to 121 as of May 22, 2020. *Id.* ¶ 6. Beginning this week, the Commission has also undertaken the process of obtaining a list from the DOC of the approximately 90 offenders who have USPC detainers placed on them and beginning next week will conduct a record review of those offenders to determine whether to maintain those detainers based on the seriousness of the violations, the offender's history of violence and risk to public safety, and an assessment of the amount of time that the Commission could impose for the violations. *Id.* ¶ 13.

In sum, the population of the Jail has already decreased by nearly a quarter and will continue to significantly decrease in the near future. Any further release of inmates is therefore unwarranted, particularly in light of the continued improvements to the Jail's conditions being implemented by DOC and the continued decline in COVID-19 infections at the facility.

* * *

CONCLUSION

For the forgoing reasons, the Court should deny Plaintiffs' motion for a preliminary injunction insofar as it seeks the release of inmates from the D.C. Jail.

Dated: May 22, 2020

Respectfully submitted,

MICHAEL R. SHERWIN
Acting United States Attorney

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*,
Plaintiffs,
v.
QUINCY BOOTH, *et al.*,
Defendants.

Civil Action No. 20-0849 (CKK)

DECLARATION OF UNITED STATES MARSHALS SERVICE AARON Y. SAWYER, DEPUTY ASSISTANT DIRECTOR

I, Aaron Y. Sawyer, Deputy Assistant Director, Prisoner Operations Division, United States Marshals Service make the following statements under oath and subject to the penalty of perjury:

1. I am employed by the U.S. Department of Justice, United States Marshals Service (USMS), and currently serve as Deputy Assistant Director in the Prisoner Operations Division (POD). I have held this position since March 2020. I previously held the position of Chief Inspector, POD, Office of Detention Operations, and have been employed with the USMS since July 2008.

2. I provide this declaration based on my personal knowledge, belief, reasonable inquiry, and information obtained from various records, systems, databases, other USMS employees, and information portals maintained and relied upon by USMS in the regular course of business.

3. The Prisoner Operations Division establishes national strategies and programs that provide for the prisoner processing, housing, transportation, and care of federal prisoners in a safe, secure, and cost effective manner. As Deputy Assistant Director, I assist in the leadership of the Prisoner Operations Division by providing primary oversight of the care and custody of federal prisoners, providing secure lodging and transportation, evaluating conditions of confinement, providing prisoner medical care in 94 districts, and for all detention management matters pertaining to the housing of federal prisoners remanded into USMS custody.

4. The USMS does not own or maintain detention facilities and must house federal prisoners in its custody within Federal Bureau of Prisons (BOP) pretrial facilities, in state and local detention facilities pursuant to Intergovernmental Agreements (IGA), and in contract jail facilities.

5. The USMS has entered into an IGA to house federal prisoners at the District of Columbia Jail located at 1901 D Street S.E., Washington, D.C. 20003. The USMS uses the term "D.C. Jail" in this declaration to refer to the combination of the Central Detention Facility and

the Correctional Treatment Facility maintained by the District of Columbia Department of Corrections.

6. An IGA is an agreement between the USMS and a state, county, or local government to provide secure custody, safekeeping, housing, subsistence, and care of USMS prisoners in accordance with all state and local laws, standards, regulations, policies, and court orders applicable to the operation of the facility. IGA facilities are required to house USMS prisoners in the manner that they house their own prisoners and in a manner that is consistent with Federal law, Federal Performance Based Detention Standards (FPBDS), and/or any other standards delineated in the agreement. While the USMS provides assistance or advice regarding various standards, the USMS is without the authority to enforce IGA terms, and must rely on the jail's cooperation, and/or remove prisoners in the event a jail fails to meet any of the standards.

7. The total population of the D.C. Jail as of May 22, 2020, is approximately 1,331. This is a significant decrease from a total population of 1,739 as of March 24, 2020. Of the current population, 763 inmates are in the custody of the USMS. Those inmates fall into the following categories:

a. Approximately 157 Waiting Movement

b. Approximately 549 Waiting for cases to resolve

c. Approximately 57 Waiting designation[1]

8. As a result of the spread of COVID-19 at the D.C. Jail, USMS has been working with other federal agencies to significantly reduce the population of the Jail. This process has required the USMS to overcome substantial challenges relating to public sentiment over the relocation of a potentially infected population to new regions and facilities. In addition to these concerns, the USMS has faced challenges with the logistical impact of safely and securely relocating such a population while adhering to all applicable CDC guidelines and federal, state and local regulations. The USMS now must balance the goal of reducing the Jail's population with other important factors, such as security and court availability, ensuring prisoners transferred to other facilities are clear of COVID so as not to introduce the disease to a jail population in a new jurisdiction, as well as limitations on the number of jurisdictions and facilities willing to accept prisoners who are relocated from locations with higher levels of COVID exposure. Notwithstanding these challenges, the USMS has been working diligently to reduce the population of the D.C. Jail.

9. First, and most significantly, USMS has been working with the BOP to remove the approximately 157 federal prisoners who have been designated for transfer to a BOP facility and are waiting movement. The BOP has identified national quarantine sites which will serve as staging locations for the clearance of designated prisoners. These sites will hold inmates throughout a 14-day quarantine period to minimize exposure risks to staff and inmates throughout the agency's network of facilities. In order to expeditiously clear D.C. Jail inmates for transportation to these quarantine sites, the BOP has recently loaned the USMS five Abbott ID NOW instruments for Rapid RNA testing and 264 test kits to test federal prisoners who are

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[1] These numbers are approximated.

located at the D.C. Jail, to ensure a coordinated, safe, and as expedient as possible relocation of these sentenced prisoners. The first group of such prisoners will be transferred beginning next week.

10. Second, USMS has been working to remove approximately 37 inmates at D.C. Jail who are considered high risk for COVID-19 vulnerability. Fifteen of these high risk inmates have already been transferred to the Federal Detention Center located in Philadelphia, Pennsylvania (FDC Philadelphia). The remaining high risk inmates will be transferred to an appropriate facility when it is safe to do so.

11. Third, beginning this week, the USMS has been working with the U.S. Attorney's Office to review approximately 50-100 prisoners housed at DC Jail pursuant to an Attorney Special Request to identify those prisoners who may be returned to their designated facility. An Attorney Special Request is a request from a United States Attorney's Office pursuant to 18 U.S.C. §3621(d) for the production of inmates held within the custody of the BOP. USMS understands that, in response to an inquiry from the United States Attorney's Office, the Public Defender Service requested that at least one inmate subject to an ASR remain in the D.C. Jail despite the fact that the proceeding for which that inmate is needed is not scheduled to take place until September.

12. Finally, as of April 14, 2020, new federal arrests are not being processed through DOC facilities; and, if the arrestee is ordered to be detained pre-trial, they are not being held at DOC facilities. Prior to April 14, 2020, such prisoners from the District Court for the District of Columbia, as well as prisoners from the District of Maryland would have been detained pretrial in DOC facilities.

13. The USMS continues to monitor the DC response to the COVID pandemic within their facilities, and to assess what resources are available to assist in any population reduction by removal of prisoners by USMS.

Date: ___5/22/2020_____

Aaron Y. Sawyer, Deputy Assistant Director
Prisoner Operations Division
United States Marshals Service

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

EDWARD BANKS

et al.,

Petitioners,

v.

QUINCY BOOTH, in his official capacity as Director, D.C. Department of Corrections,

et al.,

Defendants.

Civil Action No. 1:20-cv-00849-CKK

DECLARATION OF ANDRE MATEVOUSIAN

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

1. I am a citizen of the United States. I am currently employed by the Federal Bureau of Prisons (BOP) of the United States Department of Justice, as the Acting Assistant Director of the BOP's Correctional Programs Division in Central Office, located in Washington, D.C.

2. The Correctional Programs Division (CPD) develops activities and programs designed to appropriately classify inmates and promote the skills necessary to facilitate the successful reintegration of inmates into their communities upon release. CPD provides national policy direction and daily operational oversight of institution correctional services; intelligence gathering; counter terrorism efforts; management of inmates placed in the Federal Witness Security Program; inmate transportation; inmate sentence computations and designations; emergency preparedness; inmate discipline; and the review of sexually dangerous offenders. CPD staff are also responsible for planning, monitoring, and providing the delivery of programs and services such as case management, correctional systems, the agency's Victim and Witness Notification Program and the collection of court-ordered obligations through the Inmate Financial Responsibility Program. Additionally, the Correctional Programs Division is the liaison with Immigration Customs Enforcement and the U.S. Marshals Service. As Acting Assistant Director, I provide leadership and management oversight of the Correctional Programs Division.

3. The BOP is charged with the care and custody of federal offenders sentenced to a term of imprisonment. *See* 18 U.S.C. § 4042. Additionally, by virtue of Section 11201 of Chapter 1 of Subtitle C of Title XI of the National Capital Revitalization and Self-Government Improvement Act of 1997 (Revitalization Act),

enacted August 5, 1997, Pub. L. No. 105-33, the BOP also administers the imprisonment terms of felony offenders convicted under the D.C. criminal code (including the parole violators). The BOP has broad authority to provide for the "custody, care, subsistence, education, treatment and training" of D.C. Code felony offenders in its custody "consistent with the sentence[s] imposed." D.C. Code § 24-101(a)-(b).

4. Upon judgment and commitment in federal district court, or for those D.C. criminal code felony offenders in the Superior Court for the District of Columbia, the BOP has the sole responsibility in determining where an offender will be designated for service of his or her sentence in accordance with BOP Program Statement 5100.08, *Inmate Security and Custody Classification Manual. See* www.bop.gov via the Resources/Policy & Forms tab.

5. Upon information and belief, there are, currently, approximately 130-160 inmates located at the D.C. Jail that have been sentenced and committed to custody by either the United States District Court for the District of Columbia or the Superior Court for the District of Columbia and who are awaiting transfer to their designated BOP facilities.[1] This number fluctuates as more of the inmates at the D.C. Jail are sentenced and committed to custody. For ease of reference and for purposes of this declaration, these inmates will be collectively referred to as "the BOP inmates."

6. On May 14, 2020 the U.S. Marshals Service officials and BOP officials, including myself, met at BOP Central Office to discuss the depopulation of the D.C. Jail. As a result of that meeting, the BOP and the U.S. Marshals Service determined a methodical plan to safely transfer the BOP inmates to BOP facilities in order to assist with the depopulation of the D.C. Jail.

[1] The BOP does not own or operate D.C. Jail.

7. Specifically, the BOP has provided the U.S. Marshals Service with five (5) Abbott ID NOW instruments for Rapid RNA testing and 264 test kits to test the BOP inmates who are located at the D.C. Jail. The U.S. Marshals Service obtained the instruments on May 20, 2020 and provided them to D.C. Jail. D.C. Jail staff are responsible for testing the BOP inmates. The five instruments will allow for 20 BOP inmates to be tested in an hour,[2] the morning of the anticipated transfer to determine if they are COVID-19 negative. If a BOP inmate tests positive for COVID-19 on the morning of the anticipated transfer, the inmate will remain at D.C. Jail and await safe transfer until he has tested negative. It is imperative that testing occur the morning prior to transfer to mitigate the risk of exposure of COVID-19 to other individuals.

8. If the BOP inmate has tested negative for COVID-19, he will be transferred that day to the appropriate BOP facility/quarantine site.

9. Transfer will occur either via an airlift or bus, depending on the location of the appropriate BOP facility. Inmates will be adequately distanced from one another on the mode of transportation to mitigate the risk of COVID-19 exposure.

10. In cooperation with the U.S. Marshals Service, the BOP has agreed to accept approximately 35-40 inmates at D.C. Jail who are considered high risk for COVID-19 vulnerability.[3] Fifteen of these high risk inmates have already been transferred to the Federal Detention Center located in Philadelphia, Pennsylvania (FDC Philadelphia). The remaining high risk inmates will be transferred to an appropriate BOP facility when it is safe to do so.

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[2] Testing of a sample takes fifteen minutes per sample, allowing for four tests per hour, per instrument. Two personnel, per instrument, are required to administer the tests.

[3] These high risk inmates are BOP inmates as well as pre-trial inmates in the custody of the U.S. Marshals Service.

11. Currently, it anticipated that the first large movement of BOP inmates from D.C. Jail to an appropriate BOP facility/quarantine site will occur next week.

Executed on this 22nd day of May, 2020.

Andre Matevousian, Acting Assistant Director
Correctional Programs Division
Federal Bureau of Prisons
Washington, D.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDWARD BANKS, *et al.*,
Plaintiffs,
v.
QUINCY BOOTH, *et al.*,
Defendants.

Civil Action No. 20-0849 (CKK)

DECLARATION OF STEPHEN J. HUSK
UNITED STATES PAROLE COMMISSION

I, Stephen J. Husk, Acting Chief of Staff, United States Parole Commission make the following statement under oath and subject to the penalty of perjury:

1. I am the Acting Chief of Staff for the U.S. Parole Commission, 90 K St., NE, Washington, DC 20530. I have held this position for 8 months. Previously, I was the Administrator for Case Operations, U.S. Parole Commission, for 17 years and supervised the activities of the Commission's hearing examiners and the scheduling of hearings conducted by the U.S. Parole Commission.

2. In the position of Acting Chief of Staff, I work closely with the U.S. Parole Commission's Case Operations section, which reviews cases and schedules hearings, and the Commissioners, who make release and revocation decisions. I also regularly attend the District of Columbia Criminal Justice Coordinating Council meetings on behalf of the Parole Commission and keep informed of the number of offenders in the D.C. Department of Corrections that are under the Parole Commission's jurisdiction. I make this statement based on my personal knowledge and my review of documents and records kept by the Commission in the regular course of its business.

3. The offenders at the D.C. Department of Corrections ("DOC") Central Detention Facility ("CDF") and the Correctional Treatment Facility ("CTF") under the jurisdiction of the United States Parole Commission ("USPC") consist of (1) D.C. Code sentenced parole violators (who committed their offense before 8/5/2000), (2) D.C. Code sentenced supervised release violators (who committed their offense on or after 8/5/2000), and (3) prisoners under the USPC's jurisdiction who violated the rules of the halfway house and are awaiting return to a Bureau of Prisons ("BOP") facility.

4. Offenders who are arrested on a USPC warrant and are placed at the CDF or CTF are scheduled for a probable cause hearing within 5 days of arrest at which time the Commission considers whether to either (1) release and reinstate them to supervision, (2) proceed with a revocation decision on the record, which is an expedited process, or (3) schedule an in-person revocation hearing.

5. Starting on or about mid-March 2020, in response to the COVID-19 pandemic, the USPC took steps to reduce the number of prisoners in CDF and CTF, first, by limiting its issuance of new warrants to only offenders that pose an imminent risk to public safety, and second, by giving heightened scrutiny to offenders to determine whether their release would pose a risk to public safety.

6. As a result of these efforts, the population of offenders under the USPC's jurisdiction in CDF and CTF has been reduced by more than half: from 270 as of March 16, 2020, to 121 as of May 22, 2020.

7. As part of its efforts to apply heightened scrutiny, on or about April 3, 2020, the Commission began reviewing supervised release violator cases to consider reducing the prison term imposed by the USPC for offenders age 60 or older or who suffer from a documented medical condition that makes him/her unusually susceptible to the COVID-19 virus, is not serving a violation term resulting from a new crime of violence (including misdemeanor domestic violence or any sex abuse charge) or for possessing a firearm, has maintained clear conduct during the service of the violator term, and has a release plan that has already been approved by Supervision Officials.

8. In addition, during April 2020, using a roster provided by the DOC, Commission staff individually reviewed each prisoner confined at CDF or CTF on a USPC matter and considered them for possible early release.

9. In addition to these reviews, the USPC also applies heightened scrutiny at probable cause hearings and attempts to reinstate the offender to supervision or resolve the violation behavior on the record . The May 1, 2020 data from the DOC shows that, of the prisoners identified by the DOC as "parole violators" (which USPC understands to include both parole violators and supervised release violators), 35 are awaiting scheduling of a local revocation hearing to contest the alleged violations. Many of these hearings were scheduled before the national emergency was declared and have been continued until the parties needed for the hearing, e.g., the victim, witnesses, supervision officer, attorney, are able to attend the hearing in a safe manner. The USPC has reviewed these cases and determined that they should not be released.

10. The same data shows that there are 14 offenders who remain in custody awaiting institutional revocation hearings. They would ordinarily be transferred to FDC Philadelphia for this hearing, but the Commission will commence these hearings at the Jail in June unless they are transferred before that time.

11. The data also shows that there are 61 offenders that remain at CDF and CTF serving a violator term imposed by the Commission following revocation of parole or supervised release and are awaiting transfer to a BOP institution and 1 offender who had been placed in a residential reentry center ("RRC")by the BOP and, after violating the rules of the RRC has been returned to the CDF or CTF pending transfer to a BOP institution and consideration by the Parole Commission for rescission of his parole date.

12. Some offenders in DOC custody are in pretrial status, serving misdemeanor sentences, or have been sentenced and are awaiting transfer to a BOP institution and the USPC has issued a warrant because the criminal conduct resulting in their conviction and sentence is also

considered to be a violation of parole or supervised release. These individuals are referred to as being subject to a "detainer."

13. This week, the USPC obtained a list from the DOC of approximately 90 offenders who have USPC detainers placed on them and will begin the process of reviewing these cases next week with a projected completion within 3 weeks or soon thereafter. During this review, the USPC will apply its heightened scrutiny to see if the warrant may be rescinded and the detainer removed.

14. If, before this review is complete, an offender is transferred to a BOP institution, the USPC detainer will transfer with the offender and will not prevent their transfer out of the DC DOC. The review will continue after they have been transferred.

15. If an offender who has a USPC warrant placed as a detainer is released by this or any other court, or released by operation of law, the USPC's warrant will be executed and they will be placed on a probable cause hearing docket within 5 days or reviewed for release by the USPC. For this review, the USPC will take the offender's risk to public safety into account, and will also consider the reasons that they were released.

Date: ____05/22/2020_____ _____

Stephen J. Husk, Acting Chief of Staff