UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

JAMAAL CAMERON; RICHARD BRIGGS; RAJ LEE; MICHAEL CAMERON; MATTHEW SAUNDERS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

MICHAEL BOUCHARD, in his official capacity as Sheriff of Oakland County; CURTIS D. CHILDS, in his official capacity as Commander of Corrective Services; OAKLAND COUNTY, MICHIGAN,

Defendants.

Case 2:20-cv-10949-LVP-MJH

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

The premise of Plaintiffs' Motion is admittedly Plaintiffs' allegation that "Defendants disregard of the known risks of illness and death exposes jail detainees to a highly-fatal infectious disease in violation of their rights under the Eighth and Fourteenth Amendments." (Plaintiff's Motion, p. 3 of 32). The inflammatory allegations repeatedly made by Plaintiffs are interesting considering their own representative, Mr. Jamaal Cameron, admitted under oath that he does not wear the mask supplied by the jail while in his cell where he claims he cannot social distance.

(Exhibit A, Preliminary Injunction Hearing Transcript, pp. 64). Plaintiffs' inflammatory allegations are similarly not borne out by the statistics regarding inmates who have contracted COVID-19 while incarcerated at OCJ. Despite Plaintiffs' allegations to the contrary, the OCJ has done an exemplary job preventing the spread of COVID-19 throughout its facility with is borne out through the lack of inmates who have tested positive. (See Exhibit A, p. 35). As such, Plaintiffs' Motion is based on a false premise and should be denied.

The same arguments set forth in Plaintiffs' Motion for Class Certification were previously asserted by prisoner plaintiffs in *Money v Pritzker*, - - - F Supp 3d - - - 2020 WL 1820660 (ND Ill April 10, 2020). The *Money* court recently denied inmate plaintiffs' motion for class certification in the midst of the COVID-19 pandemic. There is no basis this Court should hold differently in this case.

Plaintiff has the burden of showing that class certification is proper. *Wal-Mart Stores, Inc v Dukes*, 564 US 338; 131 S Ct 338 (2011). In order to satisfy their showing, Plaintiffs must establish their proposed class meets each of the requirements of FRCP 23(a) **and** one of the types set forth in FRCP 23(b). FRCP 23.

A plaintiff's proposed class must first satisfy four requirements: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative

parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. FRCP 23. "Actual, not presumed conformance with Rule 23(a) remains..indispensable, and must be checked through rigorous analysis." *Gooch v Life Investors Ins Co of America*, 672 F3d 402, 417 (6th Cir.2012)(citations and quotations omitted). Additionally, "a limited factual inquiry assuming plaintiff's allegations to be true does not constitute the required **rigorous analysis** we have repeatedly emphasized." *Id* (citations and quotations omitted; emphasis supplied). "Going beyond the pleadings is necessary because a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." See *APB Assoc Inc v Bronco's Saloon, Inc*, 297 FRD 302 (E.D. Mich April 26, 2013) (citing *Wal-Mart Stores*, 131 S Ct at 2552).

A. Class Certification is Improper Because Plaintiffs Cannot Show They Have Exhausted Administrative Remedies

Plaintiffs' have filed suit under 42 U.S.C. § 1983. Because Plaintiffs are all inmates in the Oakland County Jail, their claims are governed by the Prison Litigation Reform Act ("PLRA"). *Cox v Mayer*, 332 F3d 422 (6th Cir.2003). As such, Plaintiffs may not bring an action under § 1983 "until such administrative remedies as are available are exhausted." 42 U.S.C 1997e(a). Exhaustion provides "an agency an

opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court." *Woodford v Ngo*, 548 US 81, 89 (2006)(Citations and quotations omitted). **Proper exhaustion is mandatory**. *Porter v Nussle*, 534 US 516, 524 (2002). "A prison's grievance process - not the PLRA - determines when a prisoner has properly exhausted his or her claim." *Kensu v Mich Dep't of Corrections*, 18-cv-10175, 2020 WL 1698662 *5 (E.D. Mich, April 8, 2020)(citing *Jones v Bock*, 549 US 199 (2007). Threshold individual standing is a prerequisite for all actions, including class actions. *Fallick v Nationwide Mut Ins Co*, 162 F3d 410, 423 (6th Cir.1998). Defendants have a due-process right to challenge the proof used to demonstrate class membership. *Carrera v Bayer Corp*, 727 F3d 300, 307 (3d Cir. 2013).

In *Kensu*, *supra*, defendant Michigan Department of Corrections ("MDOC") opposed plaintiff's motion for class certification on the basis plaintiff failed to exhaust administrative remedies. This Court denied plaintiff's motion to certify a class because plaintiff was unable to satisfy Rule 23(a). *Id* at *16. In its Opinion, this Court recently stated:

> The Court is therefore faced with the "unappealing prospect of certifying a class only to have [the only] named Plaintiff [] later dismissed from the suit based on a failure to exhaust [his] claims." *Johannes v Washington*, No. 14-cv-11691, 2015 WL 5634446, at *9-10 (E.D. Mich Sept 25, 2015)(declining to certify a class before addressing

> the threshold issue of exhaustion because defendants raised "non-trivial concerns about exhaustion" and "[o]therwise the Court risks certifying a class only to later find that the claims of all six of the class representatives must be dismissed and, therefore, their claims are atypical and they are inadequate class representatives."; see also *Salem v Mich Dep't of Corr*, No. 13-14567, 2016 WL 7409953 (E.D. Mich Dec 22, 2016)(declining to certify a class based on the court's "legitimate concerns" of the exhaustion issue, which led the court to conclude that plaintiffs did not satisfy the Rule 23(a) requirements). *Id.*

Just as this Court refused to certify a class before addressing the issue of exhaustion in *Johannes* and *Salem, supra*, this Court should deny Plaintiffs' Motion in the instant case on the same basis. Plaintiff Jamaal Cameron admitted during the evidentiary hearing that he has not filed a grievance regarding conditions at the Oakland County Jail related to the COVID-19 pandemic. (Exhibit A, pp. 55-56). Mr. Cameron's failure serves to defeat his § 1983 claims (and eliminates standing). The grievance procedure at OCJ is set forth in the Inmate Guide provided to all inmates. (Exhibit B, Excerpt of OCJ Inmate Guide). Specifically, the guide provides, that inmates who wish to complain about living conditions, procedures, facilities or treatment in OCJ may request a grievance **or** submit a complaint in writing. (Exhibit B). Mr. Cameron's claims are deficient in light of his prior signed acknowledgment of the OCJ Inmate Guide wherein he acknowledged he understood the procedure for submitting grievances. (Exhibit C, Executed Acknowledgment). The same analysis applies to the other named Plaintiffs as none of the named Plaintiffs exhausted administrative

remedies. (Exhibit A, p. 215). Moreover, there can be no dispute that the grievance process was available as OCJ has received eight (8) grievances related to the COVID-19 pandemic. (Exhibit A, pp. 215-216). Because the current named Plaintiffs' § 1983 claims will fail due to their failure to properly exhaust administrative remedies, the proffered class is atypical and class certification is improper. *Salem, supra*.

The same analysis applies with respect to Plaintiffs' habeas claims. As discussed extensively in Defendants' Motion to Dismiss, "[A] federal habeas petitioner must first exhaust the remedies available in state court by fairly presenting his federal claims before the state court; the federal court will not review unexhausted claims." *Irick v Bell*, 565 F3d 315, 323 (6th Cir.2009). Plaintiffs' repeated misrepresentation to the Court that state process is not available to Plaintiffs has been disproven through several orders in Michigan state courts and is further disproven by the Michigan Supreme Court's recent Order entered May 8, 2020 in *People v Chandler*, Michigan Supreme Court Case No. 161265. (Exhibit D, Order[1]). Here, none of Plaintiffs have exhausted their claims in Michigan state courts. As such, their habeas claims are deficient and class certification should be denied.

[1] In *Chandler*, the Michigan Supreme Court granted defendant's Motion for Immediate Consideration and vacated the trial court's order denying defendant's motion to modify bail in light of the COVID-19 pandemic.

B. Plaintiffs' Cannot Show Numerosity

Each member of a class must have suffered an **actionable** injury. *Sprague v General Motors Corp*, 133 F3d 388, 397 (6th Cir. 1998). Plaintiffs' Motion refers to the number of possible inmates who could be involved in each class or subclass. However, Plaintiffs' Motion has failed to identify one (1) potential class member who has exhausted administrative or state remedies. While exhaustion is an affirmative defense, it is relevant as the Court is required to conduct a "rigorous analysis" prior to certifying the class. *Gooch, supra*. Moreover, without satisfying the requisite administrative or state remedies, it is impossible for class members to have sustained an **actionable** injury. *Sprague, supra*. Even the most cursory review of Plaintiffs' Motion and the transcript of the preliminary injunction hearing establish that Plaintiffs have not and cannot show they have exhausted the requisite administrative or state remedies. Despite Plaintiffs' acknowledgment that the numerosity requirement requires a "substantial" number of individuals, they have not identified a single potential class member who has exhausted administrative or state remedies. Consequently, Plaintiffs are unable to establish class members are "so numerous" with respect to those that have viable claims. FRCP 23(a).

C. Plaintiffs Cannot Show the Requisite Commonality/Typicality

In order to demonstrate commonality, Plaintiffs must identify a "common contention" that is "capable of classwide resolution - which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc*, 564 US at 350. This court has held that commonality does not exist when determinations "would require individualized inquiries." *Kensu*, 2020 WL 1698662 at *12. See also, *In re Am Med Sys*, 75 F3d 1069, 1085 (6th Cir. 1996)(class certification improper because each plaintiff had a unique complaint); *Holt v Campbell County, Ky*,2012 WL 2069653 (E.D Ky June 8, 2012), (denying class certification with respect to inmates' deliberate indifference claim because discrete factual circumstances precluded commonality and typicality.) The concepts of commonality and typicality "tend to merge in practice." *In re Whirlpool Corp Front-Loading Washer Products Liability Litig*, 722 F3d 838, 853 (6th Cir.2013).

In the context of a request to certify a class in the COVID-19 context, the *Money* court denied plaintiffs' request on the basis that no commonality existed. *Money*, at *15. In denying plaintiffs' request, the court noted:

> The imperative of individualized determinations, recognized by both sides in this case, makes this case inappropriate for class treatment. Each putative class member comes with a unique situation - different crimes,

> sentences, outdates, disciplinary histories, age, medical history, places of incarceration, proximity to infected inmates, availability of a home landing spot, likelihood of transmitting the virus to someone at home detention, likelihood of violation or recidivism and danger to the community. As Plaintiffs point out, commonality 'does not require perfect uniformity.' But it does require more uniformity that these Plaintiffs would have on the only matter "apt to drive the resolution of the litigation..." *Id.* (citations omitted).

Plaintiffs' Motion indicates "the two subclasses... must be released immediately." (Plaintiffs' Response, pp. 2-3). However, Plaintiff's Motion includes three proposed subclasses. Regardless, with respect to plaintiffs' request for release from incarceration (i.e. the "two "subclasses"), the *Money* court noted the above individualized determinations in addition to individualized assessments regarding 1) suitability for release and on what conditions (including relevant analyses regarding criminal history), 2) safety of inmate, 3) safety of inmate's family, 4) safety of public at large, 5) inmate's personal health and/or health history, 6) inmate's family's health (not wanting to put inmate at bigger risk). *Id.* In concluding class certification was not proper, the *Money* court stated, "By its very nature, the process would entail a highly individualized inquiry that is ill-suited to class treatment." *Id.*

The same analysis applies to Plaintiffs' request in this case. All of the above factors requiring individual determinations establish that no commonality exists. In other words, the validity of Plaintiffs' claims cannot be answered in "one stroke."

Wal-Mart, supra. This is especially true in regard to Plaintiffs' request for class certification for purposes of a prisoner release of the "two subclasses." *Money, supra*. The analysis also applies to Plaintiffs' request that a class is certified for purposes other than release. In determining whether Plaintiffs' Eighth or Fourteenth Amendment[2] rights have been violated, individual determinations regarding housing location(s), security class, date of incarceration and cell assignment(s) would all need to be considered. These very considerations would also need to be considered with respect to the "most central common questions of fact" referenced in Plaintiffs' Motion. (See Plaintiffs' Motion, p. 20-21 of 32). Indeed, this is not a situation where a specific policy is at issue that has allegedly affected all class members as was present in the cases cited by Plaintiffs. Additionally, in order to show deliberate indifference, individual determinations as to how Plaintiffs' constitutional rights were violated would need to be made. Simply put, the necessary individual determinations are numerous. As such, commonality does not exist and class certification is

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[2] Plaintiffs have asserted throughout this litigation that the analysis of a pre-trial detainee's rights under the Fourteenth Amendment differ from the rights of a prisoner under the Eighth Amendment. These assertions are contrary to Sixth Circuit precedent. *Ford v County of Grand Traverse*, 535 F3d 483, 495 (2008)("Pretrial detainees, however, are guaranteed the equivalent right to adequate medical treatment by the Due Process Clause of the Fourteenth Amendment and are subject to the same deliberate-indifference standard of care." See also, *McCain v St Clair Cty*, 750 Fed Appx 399, 403 (6th Cir.2018); *Medley v Shelby Cty, Ky*, 742 Fed Appx 958, 961 (6th Cir.2018).

improper.

D. Adequate Representation

The proposed representatives of the class cannot show they adequately represent the class because they cannot show they have properly exhausted the requisite administrative or available state remedies prior to filing suit. See above subsection A. In other words, the proposed class representatives are improper because they lack standing and the requisite **actionable** injury. Additionally, although Plaintiffs propose a sub-class of pretrial detainees, none of the class representatives are pre-trial detainees and thus are not representative of this "sub-class." "A class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Beattie v CenturyTel, Inc*, 511 F.3d 554, 562 (6th Cir. 2007) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–26, 117 S.Ct. 2231 (1997)). The lack of any class representatives in the "pre-trial detainee" subclass results in inadequate "representation" of this proposed subclass and thus it is not proper. *Id.*

E. Plaintiffs' "Medically Vulnerable" Subclass is Not Sufficiently Defined

In addition to the four requirements set forth in Rule 23(a), implicit in the rule is a class must be sufficiently defined or ascertainable. *Johannes*, at *10. "For a class to be sufficiently defined, the court must be able to resolve the question of whether

class members are included or excluded from the class by reference to objective criteria." *Young v Nationwide Mut Ins Co*, 693 F3d 532, 538-39 (6th Cir.2012). See also, *In re OnStar Contract Litig*, 278 FRD 352, 373 (E.D. Mich 2011)("A class definition should be based on objective criteria so that class members may be identified without individualized fact finding."); *Brashear v Perry Cnty*, 2007 WL 1434876 *2 (E.D. Ky. 2007)("where extensive factual inquiries are required to determine whether individuals are members of a proposed class, class certification is likely improper."). "A plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership[3]." *Carrera v Bayer Corp*, 727 F3d 300, 307 (3d Cir.2013). "The purpose of this requirement is to ensure administrative feasability, including the ability to notify absent class members in order to provide them an opportunity to opt out and avoid the potential collateral estoppel effects of a final judgment." *Kensu*, at *7 (citing *Cole v City of Memphis*, 839 F3d 530, 541 (6th Cir.2016)).

Here, Plaintiff's proposed "Medically Vulnerable" Subclass fails because it is not based on "objective criteria." *Young, supra*. The very definition proposed by Plaintiffs reveals the inability to make determinations based on "objective criteria."

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[3] This also serves to defeat Plaintiffs' request for class certification because "individualized fact-finding" would be required to determine if each class member has exhausted administrative and/or state remedies. *Id.*

Plaintiffs' proposed subclass identifies a broad category of individuals that "experience an underlying medical condition that places them at particular risk of serious illness or death from COVID-19." While Plaintiffs attempt to identify the "underlying medical conditions" that may form the basis of the subclass, even these conditions are ambiguous and subjective. For example, Plaintiffs' proposed class includes "lung disease...or other chronic conditions associated with impaired lung function." Obviously, "other chronic conditions" is subjective and subject to interpretation. The proposed subclass includes "diabetes or other endocrine disorders" without defining "other endocrine disorders." The subclass also includes ambiguous diseases or conditions such as "compromised immune systems" "blood disorders," "inherited metabolic disorders" and "developmental disability." Again, all of these prevent an objective determination as to whether a specific individual meets the criteria of the class and thus the class is improper. *Young, supra*.

F. Rule 23(b) is Not Satisfied

In addition to class certification being improper pursuant to FRCP 23(a), Plaintiffs cannot satisfy FRCP 23(b)(2) or FRCP 23(b)(3). Pursuant to Rule 23(b)(2):

> A class action may be maintained if Rule 23(a) is satisfied and if: ... the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

"The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360. A class action under Rule 23(b)(2) is referred to as a "mandatory" class action because class members do not have an automatic right to notice or a right to opt out of the class. The defining characteristic of a mandatory class is "the homogeneity of the interests of the members of the class." *Romberio v. Unumprovident Corp*., 385 F. App'x 423, 432 (6th Cir. 2009) (quoting *Reeb v. Ohio Dep't of Rehab. & Corr*., 435 F.3d 639, 649 (6th Cir. 2006)). Where Plaintiffs seek a remedy that "would merely initiate a process through which highly individualized determinations of liability and remedy are made," Rule 23(b)(2) is not satisfied. *Jamie S v Milwaukee Pub Sch*, 668 F3d 481, 499 (7th Cir.2012). See also, *Corwin v Lawyers Title Ins Co*, 276 FRD 484, 490 (E.D. Mich 2011).

To the extent Plaintiffs seek release orders, "highly individualized determinations" are necessary and thus Rule 23(b)(2) is not satisfied. In the context of state inmates who sought their release during the COVID-19 pandemic, the court in *Mays v Dart*, - - - F3d - - - 2020 WL 1987007 (N.D. Ill April 27, 2020) denied plaintiff's motion for class certification with respect to their claims for release under the PLRA and habeas pursuant to Rule 23(b)(2). *Id.* In denying plaintiffs' motion, the

court noted, "the Court would need to consider the circumstances of the detained persons and any threat they pose to public safety, which plainly would vary from one person to another. This is a process that would render the claim unsuitable to certification under Rule 23(b)(2)..." *Id* at *20. As discussed extensively above, any consideration regarding eligibility for release involves highly individualized determinations including assessments regarding inmate health, safety and threat to the public. Just as the court determined in *Mays*, these determinations preclude Rule 23(b)(2) from being satisfied. Therefore, class certification is not appropriate to the extent Plaintiffs request release from incarceration. FRCP 23(b)(2); *Mays, supra*.

"Rule 23(b)(3) classes ... must meet predominance and superiority requirements, that is, 'questions of law or fact **common to class members** [must] predominate over any questions affecting only individual members' and class treatment must be 'superior to other available methods.' " *Sandusky Wellness Center, LLC v ASD Specialty Healthcare, Inc*, 863 F.3d 460, 466 (6th Cir. 2017)(emphasis supplied). "In discerning whether a putative class meets the predominance inquiry, courts are to assess 'the legal or factual questions that qualify each class member's case as a genuine controversy,' and assess whether those questions are 'subject to generalized proof, and thus applicable to the class as a whole.'" *Id* at 468 (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 594 (1997); *Bridging Communities,*

Inc v. Top Flite Fin, Inc, 843 F.3d 1119, 1124 (6th Cir. 2016)). "'If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question.' " *Id* (quoting *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc*., 821 F.3d 992, 998 (8th Cir. 2016)). The plaintiffs "need not prove that every element can be established by classwide proof," but "the key is to identify the substantive issues that will control the outcome." *Id.* (quotations omitted). The superiority requirement results in classes that are only certified if they "achieve economies of time, effort and expense, and promote...uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Products v Windsor*, 521 US 591, 615 (1997). "Rule 23(b)(3)'s predominance criterion is even more demanding" than the standard for satisfying the requirements of Rule 23(a). *Comcast Corp v Behrend*, 569 US 27, 34 (2013)(citations and quotations omitted).

Here, by the very nature of Plaintiffs' claims, individualized claims predominate over factual and legal issues common to class members. *Sandusky Wellness Center*, *supra*. Plaintiffs make various allegations regarding the conditions of their particular confinement all of which are specific and unique to their personal incarceration. Each class member's claims will need to be reviewed with regard to the nature, extent and veracity of their allegations regarding their confinement. Moreover,

because Defendants have a due-process right to challenge the membership of each class member, they are entitled to perform an **individual** examination as to whether each class member properly exhausted administrative remedies prior to filing suit in accordance with the PLRA and/or habeas. This inquiry alone is highly individualized and cannot be established at the class level. *Bridging Communities, Inc, supra.*

In regard to Plaintiffs' substantive claims, they must show a constitutional violation by showing deliberate indifference in addition to showing a *Monell* claim. Plaintiffs do not allege a written policy exists which is unconstitutional. See, *In re Nassau County Strip Search Cases*, 461 F3d 219 (2d Cir 2006)("when plaintiffs are allegedly aggrieved by a single policy of defendants, such as the blanket policy at issue here, the case presents precisely the type of situation for which the class action device is suited.")(citations and quotations omitted). Thus, the deliberate indifference portion of their claims will involve individualized proofs as to the actions or conduct of individual employees of Oakland County with respect to their conditions of confinement and common questions of law and fact do not predominate over individualized claims. Therefore, class certification should be denied. *Bridging Communities, Inc, supra.*

Finally, Plaintiffs fail to satisfy the superiority requirement. Because Plaintiffs have failed to show that any of the proposed class representatives nor any class

members have exhausted the necessary administrative or state remedies, they are unable to show that a class action would be superior to all other available methods of adjudication. Due to Plaintiffs' failure to exhaust the requisite remedies, class relief is inappropriate as none of the individual claims are proper under the PLRA or habeas. Consequently, Plaintiffs cannot show that proceeding on behalf of a class is superior to litigating Plaintiffs' individual claims.

WHEREFORE, Defendants respectfully request that this Honorable Court deny Plaintiffs' Motion to Certify Class for the reasons set forth above.

Respectfully submitted,

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Dated: May 12, 2020

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2020, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys of record, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: N/A.

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EXHIBIT A

Covid-19?

THE WITNESS: Yes.

THE COURT: Okay. Go ahead.

BY MR. POTTER:

Q. I'm going to go back to McLaren for a second. Do you -- are you aware of McLaren's capacity in terms of being able to accept inmates who might need hospitalization from the jail?

A. Absolutely.

Q. All right. Has McLaren ever advised you at any time during the pandemic that they did not have capacity for jail inmates?

A. No.

Q. Okay. Do you know if they have capacity currently?

A. Yes, they do.

Q. And you stay in contact with them?

A. Yes.

Q. All right. Okay. Now, moving on to the next question in that paragraph, it says, "They would not discuss the number of confirmed cases."

Okay. Tell the Court how many confirmed cases again are in the jail present as of today.

A. Ten.

Q. And "They would not discuss how cases are confirmed." Tell the Court how you confirmed a Covid-19 case?

A. With a Covid swab.

suffering from corona?

A. No, I told the courts that it was no signs posted --

Q. Do your recall --

A. -- that told me what to do.

Q. Do you recall telling Dr. Paredes that when you first got to the jail your temperature was screened and you were asked questions about corona symptoms?

A. Yes, I did.

Q. And do you recall telling Dr. Paredes that you knew what to do, that you knew to contact medical if you had coronavirus or -- strike that -- if you thought you had symptoms associated with the coronavirus?

A. No, I didn't tell Dr. Paredes that.

Q. He asked you if you have -- develop symptoms do they explain that you are to report symptoms so they can do the testing, you don't recall saying yes to that question?

A. That was over when I was in the east annex. When I got over to the main jail, they didn't come by and check our temperatures on a regular.

Q. So whether they checked your temperature or not, you knew what to do if you thought you had corona symptoms, correct?

A. Yeah.

Q. Last question: Would you agree with me, sir, that at no time have you ever filed a grievance against -- at -- part of your stay at the sheriff's department or at the jail

complaining of any condition at the jail, would you agree with me that?

A. I wasn't offered no grievance. Once I have -- I found out about grievances on the 6th of April.

Q. Could you just answer --

A. The actual grievances, we wasn't given that.

Q. Would you agree --

A. We weren't given that.

Q. Would you agree with me that you never filed a grievance arising out of your -- the conditions of confinement at the jail, would you agree with that?

A. I asked for one. I never got one.

Q. Did you file one? That's my question.

THE COURT: How can you file one if you never got the document to file it on?

MR. POTTER: Well, I'll take that as -- if the Court is going to construe his answer that he hadn't filed one, I'll move on.

BY MR. POTTER:

Q. Do you know how many grievances were filed in 2020 by the inmates about conditions of confinement?

MR. MAYOR: [Indiscernible].

BY MR. POTTER:

Q. You would have no way of knowing that, correct?

A. No.

BY MR. MAYOR:

Q. Last question: You knew when you were going to get -- when you decided to stop serving food, that you'd be sent over to the main jail, but did you think that was right?

A. No, I didn't think it was right, but at the same time, I didn't get no time cut for being a trustee. I didn't even ask to be a trustee. They forced me to be a trustee. They told me I could change my job once I got over there. Well, they never would have changed my job. I was stuck as being a server.

So at first it was okay, but then once they start bringing the operations of making all the food over to the east annex, then I thought, no, 'cause all the food is coming from the main kitchen, which is where the coronavirus is at. So why would I expose myself at they expense, instead of -- you know what I'm saying. So I just had to make a decision.

MR. MAYOR: Nothing further.

THE COURT: I have -- Mr. Potter, before you -- I don't know if you have any follow up. I have a couple -- one other question for Mr. Cameron.

Mr. Cameron, I note that you have on a mask today. Are you given a mask frequently at the jail, the main jail?

THE WITNESS: I got a cloth mask at the main jail, but we don't wear 'em like that in our cells. Only time we wear 'em is when we come out to go to the bathroom.

THE COURT: You only wear the cloth masks when it's

MR. POTTER: Well, we've got -- Tom, stop, please. Thank you. So I just have a very -- not too much more, your Honor.

THE COURT: Okay.

BY MR. POTTER:

Q. Was there -- just recently did you attempt to hold Jamaal -- change Jamaal Cameron's housing assignment?

A. Yes.

Q. All right. And, do you know, did he accept that change?

A. He did not.

Q. He refused?

A. Correct.

Q. And that would have been getting him -- getting him out of the holding tank into a bunk --

A. Yes.

Q. -- assignment. All right. Now, there's been a lot of talk about grievances, okay? Have you -- did you ask the grievance system to be searched for any grievances filed by the Plaintiffs in this case?

A. Yes.

Q. Did you find any grievances from January 1 through the present filed by any of the Plaintiffs in this case regarding any issue, let alone Covid?

A. No.

Q. And did you in that search find Covid-related grievances

filed by other inmates?

A. There were eight unsanitary conditions that I recall.

Q. That were filed by other inmates?

A. Yes.

Q. And there was eight?

A. Yes.

Q. All right. And what was the popular -- or the total of these grievances that were searched from the beginning of the year through a few days ago?

A. 276, I believe was the number for total grievances year to date.

Q. All right. Now, there's been talk here --

MR. POTTER: Your Honor, I'm going to now go into the dispute over the last paragraph or the paragraph in the stipulated agreement regarding the threatening of inmates and whether we can transfer, okay?

THE COURT: Okay.

MR. POTTER: Unless you want me to save that. I mean, I'd rather get it done now.

BY MR. POTTER:

Q. So are you willing -- strike that. Tell the Court what discipline is utilized in the east annex for inmates who don't respect the privilege of being over there?

A. It does depend on what --

THE COURT: I'm sorry, hang on. I'm sorry, I'm

EXHIBIT B

SECTION II REPORTING SEXUAL MISCONDUCT

The Oakland County Sheriff's Office has a Zero Tolerance standard that prohibits incidents of sexual activity in any form and Sexual Harassment, including inmates, employees, support staff or any person in the facility, even if parties have consented. Any type of occurrence must be reported and will result in immediate investigation, charges and/or disciplinary action. SEXUAL ABUSE OR SEXUAL RELATIONS OF ANY KIND WILL **NOT** BE TOLERATED WHETHER FORCEABLE OR CONSENSUAL. IMMEDIATELY REPORT ANY INCIDENT OF OR SUSPICION OF SEXUAL MISCONDUCT OR SEXUAL HARASSMENT. This Office will aggressively pursue any reported incidents and/or complaints.

You can report, in writing or verbally, any occurrence of sexual harassment, sexual abuse or sexual relations of any kind immediately to Corrections deputies, nurses, caseworkers, volunteers or any staff within the facility. They will immediately notify the Sergeant. An investigation will be conducted. All information will be held in confidence. You may also confidentially disclose any incidents by sending a kite or grievance form to the Prison Rape Elimination Act (PREA) Coordinator, or by making a telephone report via the inmate phone system.

Disciplinary action will be taken in all cases of false reports.

REPORT SEXUAL MISCONDUCT IMMEDIATELY. The only way offenders can be stopped is if they are reported.

SECTION III GRIEVANCE PROCESS

A. GRIEVANCE PROCEDURE

If any prisoner wishes to complain regarding the living conditions, procedures, facilities or treatment in the Oakland County Jail, you may request a grievance form or submit a complaint (indicate grievance) in writing to: Corrections Grievance Coordinator. Submit this grievance through your housing area Supervisor within fifteen (15) days of the alleged event/condition. All grievances will be reviewed and investigated. You will receive a written response to your formal grievance(s).

Only one grievance topic per grievance form will be accepted. A group of inmates are not permitted to submit a grievance on one grievance form. Should you be unsatisfied by the response and/or remedy provided, you may appeal your grievance to the Captain of Corrective Services within five (5) working days. All appeal decisions made by the Captain are final.

EXHIBIT C

COUNTY OF OAKLAND

OFFICE OF THE SHERIFF

MICHAEL J. BOUCHARD

Receipt of Inmate Guide

I have received a copy of and understand the Oakland County Sheriff's Office Inmate Guide.

I am aware of and understand the zero tolerance standard of any type of sexual misconduct or harassment and know how to report any incidents.

X _____
Inmate's Signature

3·10·2020
Date of Issuance

1201 N TELEGRAPH RD BLDG 10E, PONTIAC, MI 48341-1044 248/858-5000

Scanned with CamScanner

EXHIBIT D

Order

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

May 8, 2020

161265 & (11)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 161265
COA: 353445
Oakland CC: 2020-273750-FH

DONALD WALLACE CHANDLER,
Defendant-Appellant.

_____/

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the April 21, 2020 order of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the April 14, 2020 order of the Oakland Circuit Court that denied the defendant's emergency motion to modify bail. The trial court abused its discretion by failing to give adequate consideration to Administrative Order No. 2020-1 (issued March 15, 2020), which directs courts to consider the public health factors arising out of the present public health emergency to mitigate the spread of COVID-19. The record does not support the trial court's conclusory determination that the defendant is likely to fail to appear for future proceedings; nor does it establish that he poses a danger to the public if granted pretrial release. We REMAND this case to the Oakland Circuit Court for further proceedings not inconsistent with this order.

We do not retain jurisdiction.

CAVANAGH, J. (*concurring*).

I concur in the Court's order vacating the trial court's order and reversing the Court of Appeals' judgment. I agree with Justice MARKMAN that under Administrative Order 2020-1, a trial court should balance existing legal factors with public-health factors arising out of the present state of emergency in making pretrial detention decisions. Here, the trial court abused its discretion in balancing those factors. Defendant filed emergency motions to reduce his bail, citing reports that numerous inmates and corrections officers at the Oakland County Jail had tested positive for COVID-19 and emphasizing his particular susceptibility to COVID-19 due to his age and a seizure disorder (noting that he had suffered a seizure in the jail in February of 2020). Counsel for defendant informed the trial court that he could not obtain medical documentation of defendant's condition because he could not visit defendant in jail to obtain the necessary releases, and he suggested that the trial court question defendant directly about his condition. The trial court denied the motion without examining defendant. The trial

court concluded that defendant was a flight risk, despite the fact that defendant had no history of absconding on bond or failing to appear for court, and based only on defendant's presumed incentive to avoid punishment—an incentive present in virtually every case. When these considerations are balanced with defendant's willingness and ability to post a reasonable personal-recognizance bond and his agreement to wear a GPS tether, I believe the trial court abused its discretion in light of Administrative Order 2020-1.

MARKMAN, J. (*dissenting*).

I respectfully dissent from the present order vacating the trial court's order and reversing the Court of Appeals' judgment. Because I do not believe the trial court here abused its discretion, or that the Court of Appeals erred in affirming the trial court, I would deny leave to appeal.

Defendant has been charged as a fourth-offense habitual offender with being a felon in possession of a firearm, possessing a firearm during the commission of a felony, possessing a loaded firearm in a motor vehicle, and second-offense driving while his license was suspended. Defendant has been in the Oakland County Jail since January 3, 2020, unable to post the $25,000 cash or surety bond set by the trial court. The trial court has since denied defendant's emergency motion to reduce bail, finding "the issue of his potential flight [to be] significant" because "he knows that he is facing a mandatory two years if he's convicted." The court further determined that, given his prior convictions, defendant failed to persuade the court that he would not pose a threat to public safety if released. In a split decision, the Court of Appeals denied defendant's emergency motion to review bail.

The majority concludes that the "trial court abused its discretion by failing to give adequate consideration to Administrative Order No. 2020-1 (issued March 15, 2020)," which directs courts to "take into careful consideration public health factors arising out of the present state of emergency . . . in making pretrial release decisions[.]" I disagree. The trial court here *did* specifically consider such factors and correctly observed that defendant did not present any evidence that he is particularly vulnerable to COVID-19. Rather, defendant summarily asserts that he suffers from seizures, but he has presented neither evidence in support of this assertion nor evidence explaining why any such seizures would render him more vulnerable to COVID-19.

The majority also concludes that the "record does not support the trial court's conclusory determination that the defendant is likely to fail to appear for future proceedings; nor does it establish that he poses a danger to the public if granted pretrial release." Again, I disagree. Defendant's prior criminal history consists of stalking, fleeing and eluding, driving while under the influence of alcohol, and three counts of larceny in a building. His current charges involve him, while on probation, being in the possession of a loaded semi-automatic rifle while driving with a suspended license.

Given both this habitual criminal history and the gravity of the present charges, I cannot agree that the trial court abused its discretion in finding either that defendant poses a danger to the community or that he poses a flight risk. It is not the purpose of Administrative Order No. 2020-1 to preclude the consideration of factors already long extant in our law to maintain public safety, but to require that consideration *also* be given to factors that are relevant to the present public health emergency. Such an assessment has been undertaken by the trial court and, in my judgment, it has not abused its discretion in so doing.

Where Administrative Order 2020-1 specifies that, "[d]uring the state of emergency, trial courts should be mindful that taking reasonable steps to protect the public is more important than strict adherence to normal operating procedures or time guidelines standards," I do not understand the order to mean: (a) that trial courts are precluded in their pretrial release decisions from taking into account existing legal factors (e.g., risk to public safety and risk of flight) that are designed to "protect the public"; (b) that it constitutes an "abuse of discretion" by the trial court to balance existing factors, *required to be considered under law*, with newly added factors, "*urged*" *to be considered under an administrative order*; or (c) that "protection of the public" does not reasonably encompass the safeguarding of persons, not only who are incarcerated, but also persons who are *not* incarcerated (i.e., witnesses and members of the public) from the criminal conduct of persons being considered for pretrial release.

For these reasons, I would deny leave to appeal.

ZAHRA, J., joins the statement of MARKMAN, J.

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 8, 2020

Clerk