

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

FAVIAN BUSBY, ET AL.,

Plaintiff,

vs.

FLOYD BONNER, JR., ET AL.,

Defendants.

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No.: 2:20-CV-02359-SHL

**RESPONDENTS-DEFENDANTS' MOTION TO DISMISS FIRST AMENDED
PETITION**

Respondents-Defendants, Floyd Bonner, Jr., Shelby County Sheriff and the Shelby County Sheriff's Office, by and through their undersigned counsel, respectfully move the Court to dismiss the Petitioners' First Amended Petition for Writ of Habeas Corpus pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In support of this motion, Respondents-Defendants rely upon their Memorandum in Support of Respondents-Defendants' Motion to Dismiss the First Amended Petition.

Respectfully submitted,

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No.: 2:20-CV-02359-SHL

**RESPONDENTS-DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR
MOTION TO DISMISS THE FIRST AMENDED PETITION**

Respondents-Defendants, Floyd Bonner, Jr., Shelby County Sheriff and the Shelby County Sheriff's Office ("Respondents-Defendants") file this memorandum in support of their motion to dismiss the First Amended Petition. [ECF No. 50.]

BACKGROUND

Petitioners Favian Busby and Michael Edgington originally filed this action on May 20, 2020, seeking class certification of similarly situated pretrial detainees and requesting an order from this Court requiring their release from the Shelby County Jail due to fears that they would contract COVID-19. [ECF No. 1.] In response, Respondents-Defendants filed a motion to dismiss and a response in opposition to Petitioners' motion for class certification. [ECF No. 25.] This Court denied Respondents-Defendants' motion to dismiss and granted Petitioners' motion for class certification. [ECF No. 38.] Subsequently, Petitioners, Favian Busby, Michael Edgington, Russell Leaks, and Joseph Nelson, filed an Amended Petition. [ECF No. 50.]

In said Amended Petition, Petitioners allege there are specific conditions at the Shelby County Jail that make them susceptible to being infected by COVID-19. For example, they allege

that during mealtimes, detainees are required to “line up inches apart.” [ECF No. 50, ¶ 32.] They further claim that they must “use and reuse” the same “high-touch” items, such as telephones and kiosks, but that the jail does not provide disinfectant or other cleaning supplies to sanitize these items. [ECF No. 50, ¶ 33.] They also allege that the jail does not test enough new arrestees for COVID-19 and worry that asymptomatic detainees could be infecting others. [ECF No. 50, ¶ 34.] Petitioners claim that by remaining in the Shelby County Jail, their constitutional rights secured under the Fourteenth Amendment are being violated. [ECF No. 50, ¶¶ 59-68.] They also claim that the Shelby County Jail is violating Title II of the ADA and Section 504 of the Rehabilitation Act. [ECF No. 50, ¶¶ 69-77.]

STANDARD

To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Assuming they are true, a plaintiff’s allegations must be enough to raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555.

Pursuant to Rule 201(b) of the Federal Rules of Evidence, a court must take judicial notice of adjudicative facts if the fact is not subject to reasonable dispute and it can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned. State court proceedings, which are a matter of public record, meet Federal Rule of Evidence 201(b)’s criteria. *Smith v. Maloon*, 2010 U.S. Dist. LEXIS 69709, *16-18 (S.D. Ohio July 13, 2010). The Court may take judicial notice of these state court proceedings without converting a motion to dismiss into

one for summary judgment. *See Scarso v. Cuyahoga Cty. Dep't of Human Service*, 1990 U.S. App. LEXIS 19728 (6th Cir. Nov. 2, 1990) (“In determining the legal efficacy of plaintiff’s complaint, the lower court properly took judicial notice of facts in the public record, specifically the records of state court proceedings.”) (citations omitted); *U.S. v. Board of County Com’rs. of Hamilton Cty.*, 2010 U.S. Dist. LEXIS 2933 (S.D. Ohio Jan. 14, 2010) (taking judicial notice of state court complaint and public statements in consideration of a motion for judgment on the pleadings).

ARGUMENT

A. STATE LAW REMEDIES THAT ARE A PART OF A STANDARD REVIEW PROCESS ARE AVAILABLE FOR PETITIONERS-PLAINTIFFS BUT HAVE NOT BEEN EXHAUSTED.

In their original motion to dismiss, Respondents-Defendants’ moved for dismissal on multiple grounds, including Petitioners-Plaintiffs’ failure to exhaust state law remedies. [ECF No. 25-1.] In denying Respondents-Defendants’ initial motion to dismiss, the Court held that Defendants failed “show that courts in Shelby County have procedures in place for the type of substantive due process grievances Plaintiffs bring to this Court.” [ECF No. 38, PageID 680.] The Court reasoned that an “inmate’s medical condition in the initial bail decision process pervades” Tennessee’ pretrial processing statutes. [ECF No. 38, PageID 681.] Thus, while the Court acknowledged that Tennessee courts regularly entertain motions concerning constitutional grievances, the Court found state law remedies were not available because it could not identify any Tennessee court that had considered a “pretrial inmate’s allegation that her substantive right to medical treatment under the Eighth Amendment was violated.” [ECF No. 38, PageID 682.]

The exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts. *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Thus, state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the

State's established appellate review process. *Id.* State prisoners do not have to invoke "extraordinary" remedies when those remedies are *alternatives* to the standard review process. *Id.* at 844. Thus, in determining whether state law remedies are available, the Court must examine whether a *standard review process* exists by which a petitioner can seek relief. *See, e.g., Fazzini v. Ne.Ohio Corr. Ctr.*, 473 F.3d 229, 236 (6th Cir. 2009).

Admittedly, the COVID-19 pandemic presents a novel situation for both state and federal courts alike. Just because the COVID-19 pandemic is novel, however, does not mean that Tennessee does not have a *standard review process* by which pretrial detainees can challenge the constitutionality of the conditions of their pretrial detention. As previously briefed by Respondents-Defendants, challenging a pretrial detainee's confinement status based upon constitutional grounds is undoubtedly part of the standard review process allowed under Tennessee law. The Tennessee Rules of Appellate Procedure provide a clear, well-established avenue for a pretrial detainee to challenge the conditions of his or her release:

Before or after conviction the prosecution or defendant may obtain review of an order entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals granting, denying, setting or altering conditions of defendant's release. Before conviction, as a prerequisite to review, a written motion for the relief sought on review shall first be presented to the trial court. After conviction and after the action is pending on appeal, a written motion may be made either in the trial court in which judgment was entered or in the appellate court to which the appeal has been taken. On entry of an order granting or denying a motion for a change in bail or other conditions of release, the trial court shall state in writing the reasons for the action taken.

Tenn. R. App. P. 8. Pursuant to the standard review process established by Rule 8, pretrial detainees can challenge the constitutionality of their pretrial detention *and* can obtain immediate review of the trial court's orders on such challenges by Tennessee appellate courts.¹

¹ *See e.g., State v. Burgins*, 464 S.W.3d 298, 307-08 (Tenn. 2015) (considering on appeal pursuant to Rule 8(a) of the Tennessee Rules of Criminal Procedure whether a pre-trial detainee's due process rights as secured by the Fourteenth Amendment were violated when her bond was revoked); *State v. Hill*, 2019 Tenn. Crim. App. LEXIS 643, *6 (Tenn.

Tennessee courts do not and cannot cherry pick which constitutional challenges they must consider when hearing challenges to the constitutionality of pretrial detention. *O'Sullivan*, 526 U.S. at 844 (“State courts, like federal courts, are obliged to enforce federal law.”). Pursuant to the standard review process established by Rule 8, pretrial defendants *can* and *do* challenge the constitutionality of their pretrial detention on various constitutional grounds. Even before the COVID-19 pandemic, Tennessee courts heard challenges that detention amounted to “punishment” in violation of a criminal defendant’s substantive and procedural due process rights. *State v. Johnson*, 980 S.W.2d 414, 421 (Tenn. Ct. App. 1998) (holding that “Pre-trial detention that is remedial as distinguished from punitive is permissible provided that the individual is afforded sufficient due process.”); *State v. Hill*, 2019 Tenn. Crim. App. LEXIS 643, *5-6 (Tenn. Crim. App. March 21, 2019) (considering whether the criminal defendant’s pretrial detention was remedial or punitive in violation of his substantive due process right to liberty). Notably, in determining whether a pretrial detainee’s right to be free from “punishment” is being or was violated, Tennessee courts’ considerations include (1) whether the detention served an alternative purpose, and (2) *whether detention is excessive in relation to the purpose*. *State v. Coolidge*, 915 S.W.2d 820, 824 (Tenn. 1995); *see also*, *State v. Larsen*, 2013 Tenn. Crim. App. LEXIS 19, *16-17 (Tenn. Ct. App. Jan. 9, 2013); *State v. Pennington*, 1997 Tenn. Crim. App. LEXIS 1220, *9-10 (Tenn. Ct. App. Sept. 30, 1997). The Tennessee Supreme Court has further explained:

Crim. App. March 21, 2019) (considering on appeal pursuant to Rule 8(a) of the Tennessee Rules of Criminal Procedure whether a pre-trial detainee’s due process rights as secured by the Fourteenth Amendment were violated based upon the trial court’s order concerning the conditions of the detainee’s pre-trial release); *State v. Clouse*, 2001 Tenn. Crim. App. LEXIS 504, *11 (Tenn. Crim. App. July 11, 2001) (considering whether pre-trial detainee’s constitutional right to be free from double jeopardy as secured by the Fifth Amendment was being violated); *State v. Clark*, 2010 Tenn. Crim. App. LEXIS 249, *14 (Tenn. Crim. App. March 18, 2010) (considering whether convicted defendant’s right to a speedy trial as secured by the Sixth Amendment was violated when trial court denied a motion to dismiss for denial of a speedy trial prior to trial); *State v. Leavy*, 1999 Tenn. Crim. App. LEXIS 1296, *7 (Tenn. Crim. App. Dec. 21, 1999) (considering whether convicted defendants’ pre-trial detention was “punitive”).

[I]f a particular condition or restriction of...detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to “punishment.” Conversely, if a restriction or condition is not reasonably related to a legitimate goal -- if it is arbitrary or purposeless -- a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

Doe v. Norris, 751 S.W.2d 834, 838-840 (Tenn. 1988) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

Here, Petitioners’ claim in this case is *exactly* what the aforementioned Tennessee courts considered, namely that their pretrial custody amounts to “punishment” in violation of their Fourteenth Amendment rights. [ECF No. 50, ¶¶ 59-62.] While the COVID-19 pandemic may present new grounds to claim that their pretrial detention is “punitive,” constitutional challenges in Tennessee courts to pretrial detention as “punitive” are nothing new, nor “extraordinary.”

In light of the well-established procedure in Tennessee law for pretrial detainees to challenge the constitutionality of their pretrial detention, numerous pretrial detainees have filed, and Shelby County Criminal Courts have considered, motions to eliminate and/or reduce bonds based upon challenges that conditions in the Shelby County Jail violate a pretrial detainee’s constitutional rights due to COVID-19. For example, attached are three separate motions filed by pretrial detainees in Shelby County Courts seeking release and/or a reduction in bond on grounds that the conditions created by COVID-19 in the Shelby County Jail violate their constitutional rights. Notably, in the case of *State of Tennessee v. Roterrio Johnson*, Case No. 20100946, Roterrio Johnson, specifically argued that denying him pretrial release “during the COVID-19 pandemic could result not only in the loss of [his] health, but also [his] life, reflecting deliberate indifference in violation of due process.”² (Exhibit A). Similarly, in *State of Tennessee v. Jaylon Faulkner*,

² In preparing his motion, Roterrio Johnson utilized a form, prepared by the Shelby County Public Defenders’ Office. Notably, the Shelby County Public Defenders Officer prepared said form motion and provided to pretrial detainees in Shelby County to complete and file at their discretion. The fact that the Shelby County Public Defenders’ Office

Case No. C2002284, Jaylon Faulkner moved for release on the grounds that his pretrial detention violated both the Eighth and Fourteenth Amendments because of the COVID-19 “outbreak” in “prisons and jails.” (Exhibit C). In *State of Tennessee v. Mark Noelker*, Case No. M46350, the sentencing judge reduced Mr. Noelker’s bond from \$1,000,000.00 to \$75,000.00 after Mark Noelker argued his bond was excessive in light of the “Sheriff of Shelby County” being “desirous of reducing the number of inmates at the jail due to the COVID-19 pandemic.” (Exhibit B). These motions reveal that pretrial detainees are utilizing the *standard review process* as set forth by Rule 8 to challenge the constitutionality of their pretrial detention in light of COVID-19, and Shelby County courts *are* considering those challenges.³

Importantly, it is the *petitioner* who has the burden of showing exhaustion. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). The requirement that a habeas petitioner exhaust state-court remedies before seeking relief in federal court “protect[s] the state courts” opportunity to confront initially and resolve constitutional issues arising within their jurisdictions and to limit federal judicial interference in state adjudicatory processes.” *Atkins v. Michigan*, 644 F.2d 543, 546 (6th Cir. 1981). A court must “abstain from the exercise of...jurisdiction if the issues raised in the petition may be resolved either by trial on the merits in the state courts or by other state procedures available to the petitioner.” *Id.* A state prisoner’s federal habeas petition must be dismissed if the prisoner has not exhausted available state remedies concerning any of his federal claims. *Coleman*

prepared such a form, further proves that even the Shelby County Public Defenders’ Office recognizes that pursuant to the standard review process available under Tennessee law, Tennessee courts have and will consider constitutional challenges to pretrial detention due to the COVID-19 pandemic.

³ As previously addressed by Respondents-Defendants, the Tennessee Supreme Court ordered that as part of the standard review process, Tennessee courts *must* specifically consider the effects of COVID-19 in setting or eliminating bond. *See In Re: COVID-19 Pandemic*, ADM2020-00428 (Tenn. March 25, 2020) (ordering all judicial districts to implement plans to reduce the jail population due to the COVID-19 pandemic through “bond reductions *or* eliminations, deferred sentences, and suspended sentences....”); *See also, In re: Covid-19 Pandemic*, No. ADM2020-00428 (Tenn. March 13, 2020).

v. Thompson, 501 U.S. 722, 731 (1991); *Luedtke v. Berkebile*, 704 F.3d 465, 466 (6th Cir. 2013); *Graham v. Snyder*, 68 F. App'x 589, 590 (6th Cir. 2003). In fact, a district court must raise the exhaustion issue *sua sponte* when it clearly appears that habeas claims have not been presented to the state courts. *See Prather v. Rees*, 822 F.2d 1418, 1422 (6th Cir. 1987); *Allen v. Perini*, 424 F.2d 134, 138-39 (6th Cir. 1970).

Here, Petitioners have undoubtedly failed to exhaust state law remedies that are available pursuant to Tennessee's standard review process. Accordingly, their claims must be dismissed as a matter of law.

B. PETITIONERS-PLAINTIFFS CHALLENGE THE CONDITIONS OF THEIR CONFINEMENT – NOT THE “FACT OR DURATION” OF THEIR CONFINEMENT.

A habeas corpus petition under 28 U.S.C. § 2241 is typically “reserved for challenges to the execution of a sentence, such as a computation of parole or sentencing credits....” *Velasco v. Lamanna*, 16 F. App'x 311, 314 (6th Cir. 2001) (citing *Cohen v. United States*, 593 F.2d 766, 770-71 (6th Cir. 1979)); *see Sullivan v. United States*, 90 F. App'x 862, 863 (6th Cir. 2004). Additionally, while the Sixth Circuit has long recognized that pretrial detainees may pursue habeas relief under § 2241, pretrial detainees can do so only in rare, “extraordinary” instances. *Christian v. Wellington*, 739 F.3d 294, 297 (6th Cir. 2014). In fact, the Sixth Circuit has approved consideration of a pretrial § 2241 petition only in three exceptional circumstances: (1) when the petitioner seeks a speedy trial, (2) when a petitioner seeks to avoid a second trial on double jeopardy grounds, and (3) when a petitioner faces prejudice from prior ineffective assistance of counsel and due process violations on retrial. *Turner v. Tennessee*, 858 F.2d 1201, 1204 (6th Cir. 1988), *vacated on other grounds*, 492 U.S. 902, 109 S. Ct. 3208, 106 L. Ed. 2d 559 (1990); *Atkins v. Michigan*, 644 F.2d 543, 545 (6th Cir. 1981); *Delk v. Atkinson*, 665 F.2d 90, 93 (6th Cir. 1981).

Habeas corpus is never available to pre- or post-trial prisoners who complain about the conditions of confinement. *See e.g., Nelson v. Campbell*, 541 U.S. 637, 643 (2004); *Luedtke v. Berkebile*, 704 F.3d 465, 466 (6th Cir. 2013); *Sullivan v. United States*, 90 F. App'x 862, 863 (6th Cir. 2004). *see also, Sanchez v. Dallas County*, 2020 U.S. Dist. LEXIS 90667, *39 (N.D. Tex. May 22, 2020) (holding that a habeas petitioner was the improper vehicle for pre-trial detainees to seek release from jail due to COVID-19); *Barrett v. Carvajal*, 2020 U.S. Dist. LEXIS 84873 (N.D. Ohio May 14, 2020) (holding a complaint that deteriorating conditions in a prison due to COVID-19 was not cognizable under § 2241).

Here, Petitioners make a plethora of complaints about the *conditions of* – not the fact of – their confinement. For example, they allege that during mealtimes, detainees are required to “line up inches apart,” that they have only been provided “one mask,” that they do not receive enough soap, that they must “use and reuse” the same “high-touch” items, such as telephones and kiosks, but that the jail does not provide disinfectant or other cleaning supplies to sanitize these items, that detainees are rarely allowed to clean their cells, that they receive only one set of clean clothes per week, that they must use “unwashed” towels to wipe down surfaces, and that the jail does not test enough new arrestees for COVID-19. [ECF No. 50, ¶¶ 32-34.] Such allegations clearly concern the conditions of the Shelby County Jail, not the “fact” of Petitioners’ confinement. Whatever their conditions of confinement, they are not related to Petitioners’ “fact or duration” of their respective confinements. Thus, a habeas corpus petition under § 2241 is not the proper vehicle for Petitioners’ to present such claims or allegations.

C. IF PETITIONERS-PLAINTIFFS’ CLAIMS ARE COGNIZABLE, THEY MUST BE SUBJECT TO THE REQUIREMENTS FOR RELIEF OUTLINED WITHIN 18 U.S.C. § 3626.

If Petitioners’ claims challenging their conditions of confinement were cognizable in habeas (they are not), then the Prison Litigation Report Act’s (“PLRA”) requirements for prisoner

release orders must apply. *Santana v. United States*, 98 F.3d 752, 756 (3d Cir. 1996); *see also Blair-Bey v. Quick*, 151 F.3d 1036, 1040-42 (D.C. Cir. 1998). “[I]t would defeat the purpose of the PLRA if a prisoner could evade its requirements by simply...joining it with a petition for habeas corpus.” *See Blair-Bey*, 151 F.3d at 1042.

A federal court may not enter a prisoner release order unless there has been a prior order “for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prison release order,” and respondent “has had a reasonable amount of time to comply with the previous court order[.]” 18 U.S.C. § 3626(a)(3)(A). Moreover, only a three-judge court may enter a prison release order and can only do so after a prisoner files an appropriate request. 18 U.S.C. § 3626(3). The three-judge panel may enter such an order “only if the court finds by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right.” 18 U.S.C. § 3626(3). Here, Petitioners should not be allowed to circumvent the PLRA’s unambiguous requirements to obtain release. Petitioners plainly complain about the current prison conditions of the Shelby County Jail. Such complaints fall squarely within the purview of the PLRA. Because Petitioners have failed to comply with the PLRA prior to seeking release, their petition must be dismissed.

D. PETITIONERS’ “UNCONSTITUTIONAL PUNISHMENT” CLAIM FAILS AS A MATTER OF LAW.

Petitioners have improperly attempted to carve out a separate claim for unconstitutional “punishment” in addition to seeking relief from alleged unconstitutional “conditions of confinement” at the Jail. [ECF No. 50, ¶¶ 59-68.] Fourteenth Amendment due process claims “are analyzed under the same rubric as Eighth Amendment claims brought by prisoners.” *Richmond v. Huq*, 885 F.3d 928, 938 (6th Cir. 2018); *Villegas v. Metro. Gov’t of Nashville*, 709 F.3d 563, 568

(6th Cir. 2013); *Cooper v. Montgomery Cty.*, 768 F. App'x. 385, 392 (6th Cir. 2019). Thus, in order to state a claim that prison conditions violate the Constitution, a pretrial detainee-plaintiff must allege that he has been subjected to deprivations so serious that he was deprived of the “minimal civilized measure of life’s necessities” and that jail officials acted wantonly, with deliberate indifference to his serious needs. *Richmond v. Settles*, 450 F. App'x 448, 454-55 (6th Cir. 2011); *see also*, *Martin v. Warren Cty.*, 799 F. App'x 329 (6th Cir. 2020) (determining that a district court did not inappropriately apply the deliberate indifference standard to a pre-trial detainee’s failure to provide adequate medical care claim and confirming, “[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.”); *Cameron v. Bouchard*, 2020 U.S. App. LEXIS 16741, *22 (6th Cir. May 26, 2020) (Bush, J., dissenting) (“In a deliberate indifference claim challenging the conditions of a prisoner’s confinement, the plaintiff must satisfy both the objective and subjective components of the Eighth Amendment inquiry. *The same requirements apply to a pre-trial detainee’s due process rights under the Fourteenth Amendment.*” (internal citations omitted) (emphasis added)); *Taylor v. Madison Cty. Sheriff’s Dep’t*, 2019 U.S. Dist. LEXIS 212614, *4 n.1 (W.D. Tenn. Dec. 10, 2019) (“Although a pretrial detainee’s claim regarding the conditions of his confinement is reviewed under the Fourteenth Amendment’s due process clause, the standard is the same.”); *Swain v. Junior*, 2020 U.S. App. LEXIS 18689, *16 (11th Cir. June 15, 2020) (“Although the plaintiffs’ claim technically arises under the Fourteenth Amendment because they are pretrial detainees rather than convicted prisoners, it is “evaluated under the same standard as a prisoner’s claim of inadequate care under the Eighth Amendment.”). Based upon the above, Petitioners’ claim that Respondents have acted in an unconstitutional manner by simply “continuing to detain” them, fails to state a claim. [ECF No. 50, ¶¶ 59-62.] Accordingly, Petitioners’ claim for “unconstitutional punishment”

outlined within their “First Claim for Relief” must be dismissed. [*Id.*].

E. PETITIONERS HAVE FAILED TO PROVIDE SUFFICIENT FACTS TO SHOW THAT THEY HAVE SUFFERED DISCRIMINATION IN VIOLATION OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT (“ADA”) OR SECTION 504 OF THE REHABILITATION ACT (“RA”).

Title II of the ADA prohibits a public entity from discriminating against disabled individuals and states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Similarly, Section 504 of the RA protects any “otherwise qualified individual” from “be[ing] excluded from the participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination” under specified programs or activities “solely by reason of her or his disability.” 29 U.S.C. § 794(a).

As a threshold matter, district courts within the Sixth Circuit have recently explained that alleged violations of the ADA are “inappropriate for a habeas corpus case.” *Shaholli v. Deangelo-Kipp*, 2020 U.S. Dist. LEXIS 92014, *27 (E.D. Mich. May 27, 2020) (referencing *Meyers v. Hedgpeth*, 2014 U.S. Dist. LEXIS 67198, (N.D. Cal. May 15, 2014) (“The ADA is not a federal constitutional provision or guarantee.”); *see also Cometa v. Warden*, 2020 U.S. Dist. LEXIS 33630, *4 (E.D. Ky. Feb. 27, 2020) (“[T]he Court will not address the merits of these [Eighth Amendment and ADA] claims because they are not proper in a habeas petition filed pursuant to 28 U.S.C. § 2241.”)). Thus, Petitioners’ ADA/RA theories must fail.

Notwithstanding, “[i]nmates alleging claims under the ADA and the RA must show prison officials took the challenged actions because of the inmate’s alleged disability.” *Finfrock v. Mohr*, 2019 U.S. Dist. LEXIS 192024 (N.D. Ohio Nov. 5, 2019) (citing *Clayton v. Michigan Dep’t of Corr.*, 2017 U.S. App. LEXIS 27251, **5-6 (6th Cir. Aug. 21, 2017) (explaining that “even

accepting as true the inmate's allegation that prison officials denied a request to transfer him to a facility with inpatient mental health treatment, he set forth no allegations to suggest that this denial was due to his HIV status.”)). Here, Petitioners have outlined the dangers of COVID-19 and have asserted that Respondents have generally failed to take appropriate measures to protect all detainees. [See ECF No. 50.] However, Petitioners have failed to allege sufficient facts to establish that Respondents have failed to provide Petitioners with any reasonable accommodations – other than immediate release from Jail⁴ – or that any specific action was taken against Petitioners-Plaintiffs because of their proposed disabilities. Accordingly, Petitioners' ADA and RA claims fail as a matter of law.

CONCLUSION

Based upon the above and upon the record as a whole, this Court should dismiss this matter in its entirety.

Respectfully submitted,

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⁴ Petitioners' requested relief of wholesale release would undoubtedly fundamentally alter the nature of Respondents' jail services. *See* 28 C.F.R. § 35.130(b)(7).

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FILED
2020 APR 22 AM 7:28
IN THE CRIMINAL COURT OF SHELBY COUNTY,
TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION

STATE OF TENNESSEE	No.: 20100946
v.	Set:
Defendant <i>Laterrio Johnson</i>	

**MOTION FOR RECOGNIZANCE RELEASE OR,
IN THE ALTERNATIVE, A REDUCTION IN BAIL**

by and through counsel, respectfully moves this Honorable Court to grant this motion for recognizance release or, in the alternative, a reduction in bail. This motion is made pursuant to the Eighth and Fourteenth Amendments of the United States Constitution, Article I §§ 15 and 16 of the Tennessee Constitution, and the Release from Custody and Bail Reform Act of 1978. In support of this motion, submits the following memorandum of law.

COVID-19 Outbreak

As of March 22, 2020, the new strain of coronavirus which causes COVID-19 has infected over 325,000 people worldwide and 31,772 people in the United States, leading to at least 14,390 deaths worldwide and over 400 deaths in the U.S.¹ On March 11, 2020, the World Health Organization officially classified COVID-19 as a pandemic.² Approximately 20% of people infected with COVID-19 experience life-threatening complications, and between 1% and 3.4% die.³ The numbers of people diagnosed reflect

¹ *Coronavirus Map: Tracking the Spread of the Outbreak*, The New York Times (March 22, 2020), at <https://nyti.ms/2U4kmud> (updating regularly).

² *WHO Characterizes COVID-19 as a Pandemic*, World Health Organization (March 11, 2020) at <https://bit.ly/2W8dwpS>.

³ Vox, *Why Covid-19 is worse than the flu, in one chart*, <https://www.vox.com/science-and-health/2020/3/18/21184992/coronavirus-covid-19-flu-comparison-chart>.

only a portion of those infected;⁴ very few people in the United States have been tested, and many are asymptomatic transmitters.⁵

To date, 66 confirmed cases of coronavirus have been detected in Shelby County, while 505 cases have been confirmed in Tennessee.⁶ Shelby County Mayor Lee Harris and Memphis Mayor Jim Strickland declared states of emergency in Shelby County and Memphis respectively on March 19, 2020.⁷ That same day, after Shelby County's tenth case was announced, Shelby County Health Department Director Alisa Haushalter said that the department was starting to see the "beginnings of community transmission."⁸ The number of people infected is growing exponentially both across the United States and here in Shelby County.

Decisionmakers throughout Shelby County have taken decisive action to combat and minimize community spread of COVID-19. Two weeks ago, a number of institutions, including Shelby County Schools, cancelled classes, closed offices, and instituted work-from-home guidelines.⁹ Last week, pursuant to the declarations of emergency, Memphis restaurants, bars, and gyms were closed.¹⁰ Citizens of Shelby County who have control over their movements are practicing social distancing and self-isolating to prevent contracting or spreading this deadly disease.

⁴ Melissa Healy, *True Number of US Coronavirus Cases is Far Above Official Tally, Scientists Say*, L.A. Times (Mar. 10, 2020), at <https://www.msn.com/en-us/health/medical/true-number-of-us-coronavirus-cases-is-far-above-official-tally-scientists-say/ar-BB110qoA>.

⁵ Roni Caryn Rabin, *They Were Infected with the Coronavirus. They Never Showed Signs*, N.Y. Times (Feb. 26, 2020, updated Mar. 6, 2020), at <https://www.nytimes.com/2020/02/26/health/coronavirus-asymptomatic.html>; Aria Bendix, *A Person Can Carry And Transmit COVID-19 Without Showing Symptoms, Scientists Confirm*, Bus. Insider (Feb. 24, 2020), at <https://www.sciencealert.com/researchers-confirmed-patients-can-transmit-the-coronavirus-without-showing-symptoms>.

⁶ *COVID-19 cases rise to 505 in Tennessee; Shelby County hits 66 cases*, WMC Action News 5 (March 22, 2020) at <https://www.wmcactionnews5.com/2020/03/22/shelby-county-health-dept-covid-cases-rise-shelby-county/>.

⁷ *Civil Emergency: Memphis mayor orders bars and gyms to close, restaurants to close dining areas*, WMC Action News 5 (March 19, 2020) at <https://www.wmcactionnews5.com/2020/03/19/memphis-mayor-declares-civil-emergency-ordering-restaurants-bars-gyms-close/>; Maya Smith, *Coronavirus: Mayor Harris Declares State of Emergency, County Sees Early Indications of Community Spread*, Memphis Flyer (March 19, 2020) at <https://www.memphisflyer.com/NewsBlog/archives/2020/03/19/covid-19-mayor-harris-declares-state-of-emergency-county-sees-early-indications-of-community-spread>.

⁸ *Id.*

⁹ *Id.*; Zachary Downs, *SCS closes district offices, employees work from home due to coronavirus*, WREG (March 15, 2020) at <https://wreg.com/news/scso-closes-district-offices-employees-work-from-home-due-to-coronavirus/>.

¹⁰ Bill Dries and Jennifer Biggs, *State of emergency: Strickland closes restaurants, bars, gyms*, Daily Memphian (March 20, 2020) at <https://dailyMemphian.com/section/coronavirus/article/11934/strickland-moves-city-to-state-of-civil-emergency>.

Decisionmakers also recognized that there was a significant, inherent potential for community spread to occur at Shelby County Jail and the Criminal Justice Complex. On March 12, 2020, Shelby County Government suspended in-person visitation for incarcerated individuals, citing the “unique risks in our county jails and prisons” and the fact that “[d]ue to the frequent daily interactions between the public and those incarcerated, employees and those in detention are at an increased risk of infection.”¹¹ Pursuant to an order issued by the Tennessee Supreme Court on March 13, 2020, Shelby County General Sessions and Criminal Courts suspended all in-person proceedings other than proceedings necessary to protect constitutional rights of criminal defendants from March 16, 2020 to March 31, 2020.¹²

CDC models project that between 160 and 240 million people in the United States could become infected over the course of the epidemic, and as many as 200,000 to 1.7 million could die.¹³ More than the number of COVID-19 cases, health experts fear a scenario where the health care system becomes overwhelmed by a sudden explosion of illness that requires more people to be hospitalized than it can handle.¹⁴ In that scenario, people will die simply because there will not be enough ventilators or hospital beds to keep them alive. Based on CDC models, 2.4 million to 21 million people could require hospitalization over the course of the epidemic, while the U.S. currently has only 925,000 staffed hospital beds.¹⁵ Early intervention is critical in order to “flatten the curve” – to slow the rate of infection, prevent overloading of hospitals and shortages of ventilators, and ultimately, to reduce deaths.¹⁶

¹¹ WMC, *Shelby County cancels non-essential government meetings, jail visitations*, WMC Action News 5 (March 12, 2020), at <https://www.wmcactionnews5.com/2020/03/13/shelby-county-cancels-non-essential-government-meetings-jail-visitations/>.

¹² *In re: COVID-19 Pandemic*, No. ADM2020-00428 (Tenn. 2020).

¹³ Sheri Fink, *Worst-Case Estimates for Coronavirus Deaths*, New York Times (March 18, 2020) at <https://www.nytimes.com/2020/03/13/us/coronavirus-deaths-estimate.html>.

¹⁴ *Explainer: Prisons and Jails are Particularly Vulnerable to COVID-19 Outbreaks*, The Justice Collaborative, last visited March 15, 2020 at <https://thejusticecollaborative.com/wp-content/uploads/2020/03/TJCVulnerabilityofPrisonsandJailstoCOVID19Explainer.pdf>.

¹⁵ *Worst-Case Estimates for Coronavirus Deaths*, *supra*.

¹⁶ Nicholas Kristof and Stuart A. Thompson, *How Much Worse the Coronavirus Could Get, in Charts*, The New York Times (March 13, 2020) at <https://www.nytimes.com/interactive/2020/03/13/opinion/coronavirus-trump-response.html?searchResultPosition=2>.

Spread of COVID-19 in Carceral Settings

It is not a matter of if but when the coronavirus will enter prisons and jails.¹⁷ Outbreaks of the flu regularly occur in jails, and during the H1N1 epidemic in 2009, many jails and prisons dealt with high numbers of cases.¹⁸ In China, officials have confirmed the coronavirus spreading at a rapid pace in Chinese prisons, counting 500 cases.¹⁹ We are beginning to see confirmed coronavirus cases in correctional facilities across the United States. As of March 22, 2020, thirty-eight people at New York City's Rikers Island jail complex have tested positive for the novel coronavirus.²⁰ Prison officers and staff in Pennsylvania, California, Michigan, Washington, Wisconsin, and the federal prison system have also tested positive.²¹ Here in Shelby County, already, two inmates at the Shelby County Correctional Center have been isolated and are being tested for the virus.²² It stands to reason that we can expect high numbers of cases in the Shelby County Jail as a result of the COVID-19 pandemic.

Conditions of pretrial confinement create the ideal environment for the transmission of contagious disease.²³ During pandemics, jail facilities become "ticking time bombs" as "[m]any people crowded together, often suffering from diseases that weaken their immune systems, form a potential breeding ground and reservoir for diseases."²⁴ According to public health experts, not only are incarcerated individuals "at

¹⁷ Nicole Wetsman, *Prisons and jails are vulnerable to COVID-19 outbreaks*, The Verge (March 7, 2020), at <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap>.

¹⁸ *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, *supra*, at <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap>.

¹⁹ Rhea Mahbubani, *Chinese Jails Have Become Hotbeds of Coronavirus As More Than 500 Cases Have Erupted, Prompting the Ouster of Several Officials*, Business Insider (Feb. 21, 2020) at <https://bit.ly/2vSzSRT>.

²⁰ Justin Wise, *Top official says New York City coronavirus jail outbreak is a crisis, dozens infected*, The Hill (March 22, 2020) at <https://thehill.com/homenews/state-watch/488855-top-official-says-new-york-city-coronavirus-jail-outbreak-is-a-crisis>.

²¹ *Id.*; Zusha Elinson and Deanna Paul, *Jails Release Prisoners, Fearing Coronavirus Outbreak*, Wall Street Journal (March 22, 2020) at <https://www.wsj.com/articles/jails-release-prisoners-fearing-coronavirus-outbreak-11584885600?ns=prod/accounts-wsj>.

²² *Shelby County inmates isolated, undergoing testing for coronavirus*, WMC Action News 5 (March 16, 2020) at <https://www.wmcactionnews5.com/2020/03/16/shelby-county-inmates-isolated-undergoing-testing-coronavirus/>.

²³ Joseph A. Bick (2007). *Infection Control in Jails and Prisons*. *Clinical Infectious Diseases* 45 (8): 1047-1055, at <https://doi.org/10.1086/521910>.

²⁴ See Saint Louis University, "Ticking Time Bomb," *Prisons Unprepared For Flu Pandemic*, ScienceDaily (2006), <https://www.sciencedaily.com/releases/2006/09/060915012301.htm>.

special risk of infection, given their living situations,” but they “may also be less able to participate in proactive measures to keep themselves safe”; as a result, “infection control is challenging in these settings.”²⁵ As Dr. Jaimie Meyer, an expert in public health in jails and prisons, recently explained, “[T]he risk posed by COVID-19 in jails and prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.” *See* Exhibit 1, Declaration of Dr. Jaimie Meyer (“Meyer Decl.”) ¶ 7 (Mar. 15, 2020). This is due to a number of factors: the close proximity of individuals in those facilities; their reduced ability to protect themselves through social distancing; the lack of necessary medical and hygiene supplies ranging from hand sanitizer to protective equipment; ventilation systems that encourage the spread of airborne diseases; difficulties quarantining individuals who become ill; the increased susceptibility of the population in jails and prisons; the fact that jails and prisons normally have to rely heavily on outside hospitals that will become unavailable during a pandemic; and loss of both medical and correctional staff to illness. *Id.* ¶¶ 7-19.²⁶

It is also common that incarcerated individuals have the most compromised health and immune defenses. Many people who are incarcerated have chronic medical conditions, which make them vulnerable to the severe consequences of COVID-19. About forty percent of all inmates are estimated to have at least one chronic health condition, such as asthma, diabetes, or HIV.²⁷

²⁵ “Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States,” (March 2, 2020), at https://law.yale.edu/sites/default/files/area/center/ghjp/documents/final_covid-19_letter_from_public_health_and_legal_experts.pdf.

²⁶ “The pathway for transmission of pandemic influenza between jails and the community is a two-way street. Jails process millions of bookings per year. Infected individuals coming from the community may be housed with healthy inmates and will come into contact with correctional officers, which can spread infection throughout a facility. On release from jail, infected inmates can also spread infection into the community where they reside.” *Pandemic Influenza and Jail Facilities and Populations*, American Journal of Public Health, October, 2009; *See also* Dr. Anne Spaulding, Coronavirus and the Correctional Facility: for Correctional Staff Leadership, Mar. 9, 2020, https://www.ncchc.org/filebin/news/COVID_for_CF_Administrators_3.9.2020.pdf

²⁷ *Chronic and Infectious Diseases in Justice-Involved Populations*, The Center for Prisoner Health and Human Rights (last visited March 15, 2020), at <https://www.prisonerhealth.org/educational-resources/factsheets-2/chronic-and-infectious-diseases-in-justice-involved-populations/>.

The Shelby County Jail currently houses more than 2,000 inmates at 201 Poplar and more than 200 inmates at Jail East.²⁸ According to the Shelby County Sheriff's Office, more than half of the people released from the Shelby County Jail have been there less than 72 hours.²⁹ As additional people are arrested who have been out in the community as the coronavirus spreads, they will be brought into the Shelby County Jail and held with the existing population, potentially bringing COVID-19 into a population held in large numbers and close quarters. Hundreds of employees – including correctional officers, food service workers, and medical staff – constantly cycle in and out of the jail during three shift changes per day, seven days a week. Similarly, if there is an outbreak in the jail, people coming in from the outside community will return to the community having been exposed to the coronavirus, potentially exposing many more people.

The pathway for transmission of pandemic influenza between jails and the community is a two-way street.³⁰ People regularly cycle in and out, jail employees leave and return each day, and visitors regularly stream through. Viruses of all kinds have multiple entry points in jail facilities, and viruses that enter tend to spread fast. The constant cycling of people in and out of the jail³¹ makes containment impossible, even if visitations are stopped.³² Science also shows that, within jails and prisons, isolation, segregation, and lockdown are ineffective against COVID-19, Meyer Decl. ¶ 10. COVID-19 can survive in the air, so separation in a facility where there is still other movement of people, and occasional interaction, will not contain it. Further, the reality is that some contact with others, whether through close proximity or actual contact, is inevitable. Kitchen staff, intake staff, officers and medical staff all interact with incarcerated people as a matter of course, even on lockdown. The common fallacy that

²⁸ Marc Perrusquia, *Coronavirus threatens vulnerable jail population*, Daily Memphian (March 20, 2020), at <https://dailyMemphian.com/article/11884/coronavirus-threatens-vulnerable-jail-population>.

²⁹ *Response to COVID-19 Should Include Detention Facilities*, Just City (March 13, 2020), at t.e2ma.net.

³⁰ *Pandemic Influenza and Jail Facilities and Populations*, American Journal of Public Health, October, 2009; See also Dr. Anne Spaulding, *Coronavirus and the Correctional Facility: for Correctional Staff Leadership*, Mar. 9, 2020, https://www.ncchc.org/filebin/news/COVID_for_CF_Administrators_3.9.2020.pdf

³¹ See Peter Wagner & Emily Widra, "No need to wait for pandemics: The public health case for criminal justice reform," Prison Policy Initiative (Mar. 6, 2020), <https://www.prisonpolicy.org/blog/2020/03/06/pandemic>.

³² Premal Dharia, *The Coronavirus Could Spark a Humanitarian Disaster in Jails and Prisons*, Slate (Mar. 11, 2020), at <https://slate.com/news-and-politics/2020/03/coronavirus-civil-rights-jails-and-prisons.html>

inmates are safer in jail or prison than they would be in the community is contradicted by all available scientific evidence: to the contrary, inmates are in far greater danger of contracting and becoming seriously ill from COVID-19 in a carceral setting.

Imminent Threat to the Jail Population and the Community

There is a vastly greater capacity to prevent and treat illness outside of a carceral setting than in jail. Incarcerated individuals, if held, “will be at substantial risk of exposure and serious health consequences, including death.”³³ In turn, the spread of COVID-19 in the Shelby County Jail will create a concentrated risk of infection to the community.

Inmates are not guaranteed to receive the same quality of medical care in jail that they would receive in the community. Although an incarcerated person can request to see a member of the medical staff, those requests take significant time to process. Furthermore, Wellpath, the company contracted to provide healthcare in the Shelby County Jail, is the subject of two recent lawsuits alleging that its response to medical needs is not always timely and proper.³⁴ These are only the latest of hundreds of similar lawsuits against the company over the past decade.³⁵ The Shelby County Jail medical facilities will be unable to accommodate the large numbers of inmates who will likely become sick during an outbreak. An outbreak in the Shelby County Jail could not only spur the growth of the disease in the surrounding communities, but further tax the medical system upon which the community relies.

Worldwide, officials have taken action based on the imminent threat of COVID-19 to incarcerated populations. Courts across Iran have granted 54,000 inmates furlough as part of the measures to contain coronavirus across the country.³⁶ Secretary of State Mike Pompeo has called for Iran to release Americans detained there because of the

³³ *COVID-19 in New York Correctional Facilities: Backgrounder*, The Justice Collaborative, last visited March 15, 2020 at <https://thejusticecollaborative.com>.

³⁴ Yolanda Jones, *Second inmate files suit against Shelby County jail health provider*, The Daily Memphian (March 5, 2020) at <https://dailymemphian.com/section/metro/article/11218/wellpath-correct-care-solutions-shelby-county-jail>.

³⁵ *Id.*

³⁶ Claudia Lauer and Colleen Long, *US Prisons, Jails On Alert for Spread of Coronavirus*, The Associated Press (Mar. 7, 2020), at <https://apnews.com/af98b0a38aaabedbc059092db356697>.

“deeply troubling” “[r]eports that COVID-19 has spread to Iranian prisons,” noting that “[t]heir detention amid increasingly deteriorating conditions defies basic human decency.”³⁷

Nationwide, local governments are releasing thousands of inmates in an unprecedented effort to prevent a coronavirus outbreak in crowded jails and prisons.³⁸ In Los Angeles County, Sheriff Alex Villanueva reduced the jail population by 600 by asking police to cite and release low-level offenders and by releasing inmates with fewer than 30 days left on their sentences.³⁹ In Alameda County, at the joint request of the Presiding Judge, Public Defender, and District Attorney, 247 inmates were approved for early release after their sentences were modified and 67 inmates were released by the court on their own recognizance.⁴⁰ In San Francisco, District Attorney Chesa Boudin directed his prosecutors not to oppose motions to release pretrial detainees facing misdemeanor charges or drug-related felony charges and to strongly consider time served plea deals.⁴¹ In Boulder, Colorado, the District Attorney’s Office filed motions recommending release of some inmates with compromised immune systems or serious health conditions and inmates with less than 45 days left to serve.⁴² In Tampa, Sheriff Chad Chronister released 164 inmates accused of low-level, non-violent crimes to reduce the risk of spreading the virus.⁴³ In Cincinnati, the jail population was reduced by nearly 600 inmates in the past week, due in part to the fact that County Prosecutor Joe Deters

³⁷ Jennifer Hansler and Kylie Atwood, *Pompeo calls for humanitarian release of wrongfully detained Americans in Iran amid coronavirus outbreak*, CNN (Mar. 10, 2020) at <https://cnn.it/2W4OpV7>.

³⁸ Zusha Elinson and Deanna Paul, *Jails Release Prisoners, Fearing Coronavirus Outbreak*, Wall Street Journal (March 22, 2020), at <https://www.wsj.com/articles/jails-release-prisoners-fearing-coronavirus-outbreak-11584885600?ns=prod/accounts-wsj>.

³⁹ *Id.*

⁴⁰ Jeff Shuttleworth, *Santa Rita Jail releases hundreds of inmates to reduce coronavirus spread*, Bay City News (March 19, 2020), at <https://sfbayca.com/2020/03/19/santa-rita-jail-releases-hundreds-of-inmates-to-reduce-coronavirus-spread/>.

⁴¹ Darwin Bond Graham, *San Francisco Officials Push to Reduce Jail Population to Prevent Coronavirus Outbreak*, The Appeal (March 11, 2020), at <https://theappeal.org/coronavirus-san-francisco-reduce-jail-population/>.

⁴² Elise Schmelzer, *Denver, Boulder law enforcement arresting fewer people to avoid introducing coronavirus to jails*, Denver Post (March 16, 2020), at <https://www.denverpost.com/2020/03/16/colorado-coronavirus-jails-arrests/>.

⁴³ Tony Marerro, *Hillsborough sheriff releases 164 county jail inmates to reduce coronavirus risk*, Tampa Bay Times (March 19, 2020), at <https://www.tampabay.com/news/hillsborough/2020/03/19/hillsborough-sheriff-releases-164-county-jail-inmates-to-reduce-coronavirus-risk/>.

announced that his office would seek recognizance bonds in all nonviolent cases.⁴⁴ In Philadelphia, District Attorney Larry Krasner is requesting the early release of six categories of people: (1) people who have served their minimum sentence and are eligible for parole (2) People who are serving their sentence and are worthy of early parole; (3) People who are elderly, ill, and/or infirm; (4) People who are being held pre-trial for non-violent and misdemeanor offenses simply because they could not afford bail; (5) People who are good candidates for alternative detention, such as house arrest or GPS monitoring; (6) Juvenile offenders who are deemed to pose no safety threat to the public.⁴⁵ In Austin, Texas, Travis County Attorney David Escamilla is suspending prosecution of minor nonviolent offenses.⁴⁶ These actions have all been taken preemptively – none of these jurisdictions have a confirmed case of coronavirus in their respective jail or prison facilities – in recognition of the fact that decreasing the jail population now will save lives in the immediate future.

In Dr. Meyer's words, "[r]educing the size of the population in jails and prisons is crucially important to reducing the level of risk both for those within those facilities and for the community at large." Meyer Decl. ¶ 37. There are a tremendous number of people currently in custody, including *Ronterio Johnson* who could be safely released and who, if held, will be at substantial risk of exposure and serious health consequences, including death. The number of individuals held in pretrial detention must be reduced in order to effectively combat COVID-19 transmission.

**Unnecessary Detention during this Pandemic Constitutes
Deliberate Indifference in Violation of Due Process and
Implicates the Eighth Amendment's Prohibitions on
Excessive Bail and Cruel and Unusual Punishment**

⁴⁴ Sarah Brookbank, Cameron Knight and Kevin Grasha, *Sheriff Jim Neil: Jail population reduced to prevent potential spread of COVID-19*, Cincinnati.com (March 20, 2020), at <https://www.cincinnati.com/story/news/2020/03/20/sheriff-jim-neil-jail-population-reduced-prevent-potential-spread-covid-19/2883159001/>.

⁴⁵ *Philly DA Larry Krasner urges for early release of low-risk prisoners to prevent spread of COVID-19*, Fox 29 Philadelphia (March 19, 2020), at <https://www.fox29.com/news/philly-da-larry-krasner-urges-for-early-release-of-low-risk-prisoners-to-prevent-spread-of-covid-19>.

⁴⁶ Brant Bingamon, *For Now, County Jail Succeeds in Keeping Out COVID-19*, The Austin Chronicle (March 20, 2020), at <https://www.austinchronicle.com/daily/news/2020-03-20/for-now-county-jail-succeeds-in-keeping-out-covid-19/>.

“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987). The United States Constitution provides for bail, and the Tennessee Constitution explicitly recognizes pretrial bail as a fundamental constitutional right, guaranteeing “[t]hat all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great.” Tenn. Const. art. I, § 15. A person’s fundamental liberty interest in pre-trial release is protected by the Due Process provisions of the Fourteenth Amendment and Article I, § 8 of the Tennessee Constitution as well as the Eighth Amendment’s prohibition against “excessive bail.” Both the United States Supreme Court and the Tennessee Supreme Court have held that pretrial liberty of one merely accused of a crime is a fundamental right, and denial “inflicts a ‘grievous loss’ on the [defendant] and often on others...” *State v. Burgins*, 464 S.W.3d 298, 307 (Tenn. 2015) (citations omitted). There is a strong possibility that denial of pretrial liberty to Ronterrio Johnson during the COVID-19 pandemic could result not only in the loss of Ronterrio Johnson’s health, but also their life, reflecting deliberate indifference in violation of due process. And in the case of a “time served” sentence during service of which a defendant contracts COVID-19, it may also constitute cruel and unusual punishment under the Eighth Amendment.

Conclusion

Before any court in the Western District of Tennessee may set bail with a monetary condition, it must first determine by at least a preponderance of the evidence “whether a non-monetary condition or combination of conditions of release could assure [defendant’s] appearance at trial and the safety of the public.” *Weatherspoon v. Oldham*, No. 17-CV-2535-SHM-CGC, 2018 WL 1053548, (W.D. Tenn. Feb. 26, 2018). In particular, the Court must find “that no condition or combination of conditions of release could satisfy the purposes of bail, to assure the defendant’s appearance at trial or hearing and the safety of the public.” *Id.* Here, the State has not even attempted to show that *no* non-monetary conditions of release would assure Ronterrio Johnson’s appearance and public safety, and no court has made any such finding, much less by a preponderance

of the evidence.

Much more importantly, though, leaving Ronterrio Johnson in circumstances which increase the likelihood of preventable, sustained illness – and possibly death – is not only inhumane, but will ultimately impose a higher burden on the health system and pose a greater risk to the citizens of Shelby County. There is no reason to continue to detain Ronterrio Johnson when there are non-financial alternative conditions of release that could reasonably assure their presence at trial and when no court has found that Ronterrio Johnson poses a severe risk of flight or a danger to the community that cannot be mitigated by conditions other than pretrial detention.

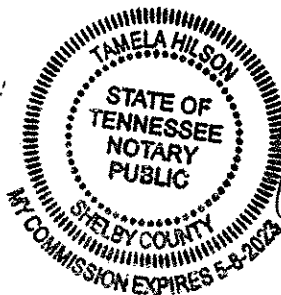
For the foregoing reasons, Ronterrio Johnson moves this Court to enter an order releasing them on their own recognizance.

Respectfully submitted,

Ronterrio Johnson

Certificate of Service

I do hereby certify that I have delivered a copy of the foregoing motion and memorandum to the District Attorney General's Office by hand and/or electronic delivery this 15th day of April, 2020.



Tamela Hilson
Commission Expires 5/8/2023

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
2020 JUN -8 PM 12:30

STATE OF TENNESSEE CLERK

v.

BY

MARK NOELKER

M- 46351
H2001756
Booking No. 20010376
Division 1

MOTION TO REDUCE BOND

COMES NOW the Defendant, Mark Noelker, and would respectfully move to reduce the bond presently set at \$1,000,000.00 and would show to the Court as follows:

1. That the defendant is charged with solicitation to commit murder, a class B felony;
2. That if convicted, defendant would be classified as a Range 1 offender and have a possible punishment of 8-12 years at 30%;
3. That defendant has a minimal criminal history, his last arrest was in 2002 and has always appeared in Court;
4. That defendant is employed by UPS and has held that position for more than 20 years;
5. That defendant maintains his innocence in this case;
6. That defendant has lived in this community his entire life;
7. That defendant's financial condition is such that there is a need for him to continue his employment so he may support his children;
8. That defendant has a large family in Memphis, Tennessee and maintains a close relationship with his family;

9. That defendant is of good character and good mental condition;
10. That defendant's employer and family vouch for his reliability;
11. That the Bail Reform Act of 1978 provides that bail should be set in the least onerous conditions reasonably needed to assure Defendant's appearance in Court and amount of bail be set as low as necessary to insure defendant's as required;
12. That the Sheriff of Shelby County is desirous of reducing the number of inmates at the jail due to the COVID-19 Pandemic this country is experiencing;
13. That the bail, as presently set, is excessive and in violation of the 8th Amendment of the United States Constitution and Article 1 of the Tennessee Constitution;
14. That the Defendant was Held to the State on June 5, 2020.

WHEREFORE, PREMISES CONSIDERED, defendant prays that this Court set a reasonable bond consistent with the United State Constitution, the Tennessee Constitution and the Bail Reform Act of 1978.

Respectfully submitted,



BALLIN, BALLIN & FISHMAN, P.C.

Leslie I. Ballin, Esq.

200 Jefferson Avenue, Suite 1250

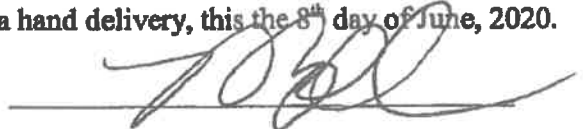
Memphis, TN 38103

(901) 525-6278

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the Shelby County Attorney General's Office, 201 Poplar Avenue, 11th, Memphis, TN 38103, via United States mail, first class postage prepaid, or via hand delivery, this the 8th day of June, 2020.



IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
DIVISION 5

STATE OF TENNESSEE

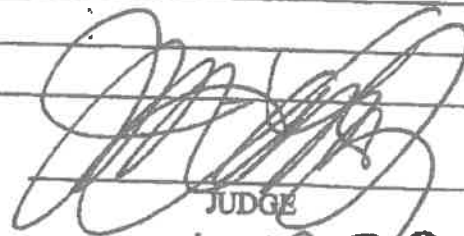
VS. Mark Noelker

NO. M46351
C2002098

ORDER

THE FOLLOWING ACTION OR CHANGE OF STATUS IS HEREBY ORDERED

That the def's bond, (1,000,000)
be reduced to 75,000.


JUDGE

DATED: 6-18-20

Filed 6-18-20
Heidi Kuhn, Clerk
BY [Signature] D.C.

CC7-94 CC7-94

Jaylon Faulkner
201 OS 601/H 2001667

criminal Court of shelby
county, Tennessee
For The ~~Thirtieth~~ Thirtieth
At memphis Division

Do to COVID-19 I Been
Here at 201 sence April 1st, I have not Been tested
for the virus at all I have asthma, also asma. so
right now I dont know if I have the virus or not
I have not Been tested I feel I should Be able to
file a lawsuit, my mom pass do to COVID-19 virus
The chaplest Did not Do there Job right at all They
Did not look into it at all. I was not able to tend
In here funeral or wait or anything Do to lack of the
chaplest Here at 201 poplar.
Here at 201 we not supplied hand sanitizer- or anything
like that we was giving one mask, thats collecting
Dirt we have not Been giving a change of mask at all
I have Health Issues I feel that me Been Here at
201 is not safe ~~more~~ for me, I Was Gonna make
Bond But my mom pass off of cober-19 virus And
she was gonna make ~~more~~ my bond, she the only
Person I had

Motion For Recognizance Release or In the Alternative, A Reduction In Bail

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In the criminal court of Shelby County Tennessee  
For the Thirtieth Judicial District At Memphis Division.  
By and through Counsel, respectfully moves this Honorable  
Court to Grant this motion for recognizance release or  
In the alternative, a reduction in Bail. This motion is  
made pursuant to the Eighth and Fourteenth  
Amendments of the United States Constitution Article  
I § 3 15 and 16 of Tennessee Constitution, and the  
release from custody and Bail reform Act of 1978.  
In Jails and prisons is significantly higher than in the  
community, CDC models project that Between 160 and 240  
million people in the United States could become infected  
over the course of the epidemic, and as many as 200,000 to  
1.7 million could die. It is not a matter of if But when  
the coronavirus will enter prisons and Jails. Out Break of  
the flu regularly occur in Jails, and during the H1N1 epidemic  
in 2009. Many Jails and prisons Dealt with high numbers  
of cases. Inmates are not guaranteed to receive the same  
quality of medical care in Jail that they would receive  
in the community. Only a portion of those infected, very  
few people in the United States have been tested and many  
are asymptomatic transmitters.

There are a tremendous number of people currently in custody, including who could be safely released and who if held, will be at substantial risk of exposure and serious health consequences including death. The number of individuals held in pretrial detention must be reduced in order to effectively combat COVID-19 transmission. There is a vastly greater capacity to prevent and treat illness outside of a carceral setting in jail. Incarcerated individuals, if held, will be at substantial risk of exposure and serious health consequences, including death. The number of people infected is growing exponentially both across the United States and here in Shelby County. It is also common that incarcerated individuals have the most compromised health and immune defenses. Many people who are incarcerated have chronic medical conditions which make them vulnerable to the severe consequences of COVID-19. About forty percent of all inmates are estimated to have at least one chronic health condition such as asthma, Diabetes, or HIV.

## Case Information

C2002284 | The State of Tennessee vs JAYLON FAULKNER

|             |                                  |                  |
|-------------|----------------------------------|------------------|
| Case Number | Court                            | Judicial Officer |
| C2002284    | Division VII                     | Coffee, Lee V    |
| File Date   | Case Type                        | Case Status      |
| 06/15/2020  | Unindicted Motion/Petition Cases | Active or Open   |

## Party

Defendant  
FAULKNER, JAYLON

DOB  
06/05/2001

Race  
Black

## Charge

Charges  
FAULKNER, JAYLON

|   | Description                    | Statute    | Level            | Date       |
|---|--------------------------------|------------|------------------|------------|
| 1 | MOTION FOR BAIL/BOND REDUCTION | 11-11-1111 | Civil Ordinances | 06/15/2020 |

## Events and Hearings

06/15/2020 Other Motions, Petition, Writ