

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**LADDY CURTIS VALENTINE and
RICHARD ELVIN KING, individually and
on behalf of those similarly situated,
*Plaintiffs,***

V.

**BRYAN COLLIER, in his official capacity,
ROBERT HERRERA, in his official capacity,
and TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
Defendants.**

[illegible]

Civil Action No. 4:20-cv-01115

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

EXHIBIT A

(VALENTINE I)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 20-20207

United States Court of Appeals
Fifth Circuit

FILED

April 22, 2020

Lyle W. Cayce
Clerk

LADDY CURTIS VALENTINE; RICHARD ELVIN KING,

Plaintiffs-Appellees,

v.

BRYAN COLLIER; ROBERT HERRERA; TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

This case implicates the State of Texas’s response to COVID-19. On April 16, 2020, the United States District Court for the Southern District of Texas issued a reticulated preliminary injunction against the executive director of the Texas prison system and the warden of one of its prisons. The injunction regulates in minute detail the cleaning intervals for common areas, the types of bleach-based disinfectants the prison must use, the alcohol content of hand sanitizer that inmates must receive, mask requirements for inmates, and inmates’ access to tissues (amongst many other things). The district court admitted that its injunction “goes beyond” the recommendations of the Centers

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for Disease Control and Prevention. But in the district court’s view, anything less than this injunction—including, presumably, the CDC guidelines—violates the Eighth Amendment. Pursuant to Federal Rule of Appellate Procedure 8, we stay the injunction pending appeal.

I.

As with every other part of the country, our Nation’s correctional facilities have not escaped the reach of COVID-19. To mitigate the spread of the virus, the Texas Department of Criminal Justice (“TDCJ”) has adopted and implemented several rounds of measures guided by ever-changing CDC recommendations. Plaintiffs are two inmates at the TDCJ Wallace Pack Unit (“Pack Unit”), a prison for the elderly and the infirm. They say TDCJ’s measures don’t go far enough.

On March 30, 2020, Plaintiffs filed a class action lawsuit on behalf of disabled and high-risk Pack Unit inmates against TDCJ, its executive director, and the warden of the Pack Unit. The complaint alleges violations of the Eighth Amendment’s prohibition against cruel and unusual punishment, and of the Americans with Disabilities Act. In addition, Plaintiffs sought a preliminary injunction.

After considering Defendants’ written evidence and Plaintiffs’ live witness testimony, the district court granted that injunction, finding it likely that Plaintiffs could prove an Eighth Amendment violation. The district court enjoined TDCJ to:

- “Provide Plaintiffs and the class members with unrestricted access to hand soap and disposable hand towels to facilitate handwashing.”
- “Provide Plaintiffs and the class members with access to hand sanitizer that contains at least 60% alcohol in the housing areas, cafeteria, clinic, commissary line, pill line, and laundry exchange.”

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- “Provide Plaintiffs and the class members with access to tissues, or if tissues are not available, additional toilet paper above their normal allotment.”
- “Provide cleaning supplies for each housing area, including bleach-based cleaning agents and CDC-recommended disinfectants in sufficient quantities to facilitate frequent cleaning, including in quantities sufficient for each inmate to clean and disinfect the floor and all surfaces of his own housing cubicle, and provide new gloves and masks for each inmate during each time they are cleaning or performing janitorial services.”
- “Provide all inmates and staff members with masks. If TDCJ chooses to provide inmates with cotton masks, such masks must be laundered regularly.”
- “Require common surfaces in housing areas, bathrooms, and the dining hall to be cleaned every thirty minutes from 7 a.m. to 10 p.m. with bleach-based cleaning agents, including table tops, telephones, door handles, and restroom fixtures.”
- “Increase regular cleaning and disinfecting of all common areas and surfaces, including common-use items such as television controls, books, and gym and sports equipment.”
- “Institute a prohibition on new prisoners entering the Pack Unit for the duration of the pandemic. In the alternative, test all new prisoners entering the Pack Unit for COVID-19 or place all new prisoners in quarantine for 14 days if no COVID-19 tests are available.”
- “Limit transportation of Pack Unit inmates out of the prison to transportation involving immediately necessary medical appointments and release from custody.”
- “For transportation necessary for prisoners to receive medical treatment or be released, CDC-recommended social distancing requirements should be strictly enforced in TDCJ buses and vans.”
- “Post signage and information in common areas that provides: (i) general updates and information about the COVID-19 pandemic; (ii) information on how inmates can protect themselves from contracting COVID-19; and (iii) instructions on how to properly wash hands. Among other locations, all signage must be posted in every housing area and above every sink.”

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- “Educate inmates on the COVID-19 pandemic by providing information about the COVID- 19 pandemic, COVID-19 symptoms, COVID-19 transmission, and how to protect oneself from COVID-19. A TDCJ staff person must give an oral presentation or show an educational video with the above-listed information to all inmates, and give all inmates an opportunity to ask questions. Inmates should be provided physical handouts containing COVID-19 educational information, such as the CDC’s ‘Share Facts About COVID-19’ fact sheet already in TDCJ’s possession.”
- “TDCJ must also orally inform all inmates that co-pays for medical treatment are suspended for the duration of the pandemic, and encourage all inmates to seek treatment if they are feeling ill.”
- “TDCJ must, within three (3) days, provide the Plaintiffs and the Court with a detailed plan to test all Pack Unit inmates for COVID-19, prioritizing those who are members of Dorm A and of vulnerable populations that are the most at-risk for serious illness or death from exposure to COVID-19. For any inmates who test positive, TDCJ shall provide a plan to quarantine them while minimizing their exposure to inmates who test negative. TDCJ must also provide a plan for testing all staff who will continue to enter the Pack Unit, and for any staff that test positive, provide a plan for minimizing inmates’ exposure to staff who have tested positive.”

Prelim. Inj. Order at 2–4 [hereinafter PI Order].

In its memorandum opinion explaining this injunction, the district court acknowledged that “many of the measures ordered in the preliminary injunction largely overlap with TDCJ’s COVID-19 policy requirements and recommendations.” D. Ct. Op. at 23. Yet the court believed the injunction necessary “to promote compliance” with TDCJ’s policy, as well as CDC guidelines. *Id.* at 24. Some of the conduct required of Defendants under the injunction goes even further than CDC guidelines. But the district court found that compliance with those guidelines alone could be constitutionally insufficient. *Id.* at 25–26.

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The district court stayed its preliminary injunction until April 22, 2020, at 5 p.m. Defendants timely appealed and sought a stay of the preliminary injunction pending appeal.

II.

When considering a stay, “a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation omitted). The first two factors are the most critical. *Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016).

A.

We start with TDCJ’s likelihood of success on appeal. In a constitutional claim alleging deliberate indifference to the conditions of a prisoner’s confinement, the plaintiff must satisfy both the “subjective and objective requirements” of the Eighth Amendment inquiry. *Farmer v. Brennan*, 511 U.S. 825, 846 (1994). To satisfy the objective requirement, the plaintiff must show an “objectively intolerable risk of harm.” *Ibid.* To satisfy the subjective requirement, the plaintiff must show that the defendant: “(1) was ‘aware of facts from which the inference could be drawn that a substantial risk of serious harm exists’; (2) subjectively ‘dr[e]w the inference’ that the risk existed; and (3) disregarded the risk.” *Cleveland v. Bell*, 938 F.3d 672, 676 (5th Cir. 2019) (quoting *Farmer*, 511 U.S. at 837). The “incidence of diseases or infections, standing alone,” do not “imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks.” *Shepherd v. Dallas Cty.*, 591 F.3d 445, 454 (5th Cir. 2009). Instead, the plaintiff must show a denial of “basic human needs.” *Ibid.* “Deliberate indifference is an extremely

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high standard to meet.” *Cadena v. El Paso Cty.*, 946 F.3d 717, 728 (5th Cir. 2020).

TDCJ is likely to prevail on the merits of its appeal. That’s for two reasons: (1) after accounting for the protective measures TDCJ has taken, the Plaintiffs have not shown a “substantial risk of serious harm” that amounts to “cruel and unusual punishment”; and (2) the district court committed legal error in its application of *Farmer v. Brennan*.

1.

First, the harm analysis. There is no doubt that infectious diseases generally and COVID-19 specifically can pose a risk of serious or fatal harm to prison inmates. TDCJ acknowledges that fact. And it submitted evidence to the district court of the protective measures it has taken as a result.¹ Those protective measures include many of the things the district court ordered—including “access to soap, tissues, gloves, masks, regular cleaning, signage and education, quarantine of new prisoners, and social distancing during transport.” D. Ct. Op. at 24. The legal question is whether the Eighth Amendment requires TDCJ to do more to mitigate the risk of harm.

The district court said yes. It acknowledged the numerous protections TDCJ provided, but it wanted to see “extra measures,” such as providing alcohol-based sanitizer and additional paper products. D. Ct. Op. at 26. The district court further acknowledged that the “extra measures” it required “go[] beyond TDCJ and CDC policies.” *Id.* at 25. Plaintiffs have cited no precedent

¹ The district court made much of the fact that TDCJ did not present “live testimony” at the preliminary-injunction hearing. It’s unclear to us why that matters. It long has been true that parties can present evidence at the preliminary-injunction stage with declarations or affidavits. *See, e.g., Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993). And, of course, it’s the Plaintiffs’ burden to prove their entitlement to an injunction, not the Defendants’ burden to prove the opposite.

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holding that the CDC's recommendations are insufficient to satisfy the Eighth Amendment.

TDCJ also is likely to succeed on appeal insofar as the district court enjoined the State to follow its own laws and procedures. In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), a plaintiff class brought suit under *inter alia* the Eighth Amendment and state law to challenge the conditions at a state facility for people with mental disabilities. *See id.* at 92. The Supreme Court held that the Eleventh Amendment prohibits federal courts from enjoining state facilities to follow state law. *See id.* at 103–23. Here, however, the district court acknowledged that its injunction “largely overlap[ped] with TDCJ’s COVID-19 policy requirements and recommendations.” D. Ct. Op. at 23. In the district court’s view, this was a virtue not a vice because its injunction would “promote compliance” with TDCJ’s own policies. *Id.* at 24. *Pennhurst* plainly prohibits such an injunction.

2.

Second, even assuming that there is a substantial risk of serious harm, the Plaintiffs lack evidence of the Defendants’ subjective deliberate indifference to that risk. In *Farmer v. Brennan*, the Supreme Court held that deliberate indifference requires the defendant to have a subjective “state of mind more blameworthy than negligence,” *Farmer*, 511 U.S. at 835, akin to criminal recklessness, *id.* at 839–40. The district court misapplied this standard. It appeared to think that the question was “whether [the Defendants] reasonably abate[d] the risk” of infection, D. Ct. Op. at 20, or stated differently, “whether and how [TDCJ’s] policy is being administered,” *id.* at 23.

The district court thus collapsed the objective and subjective components of the Eighth Amendment inquiry established in *Farmer*, treating inadequate

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measures as dispositive of the Defendants’ mental state. Such an approach resembles the standard for civil negligence, which *Farmer* explicitly rejected. Though the district court cited the Defendants’ general awareness of the dangers posed by COVID-19, it cited no evidence that they subjectively believe the measures they are taking are inadequate. To the contrary, the evidence shows that TDCJ has taken and continues to take measures—informed by guidance from the CDC and medical professionals—to abate and control the spread of the virus. *See* Dkt. 36-7 (declaration of TDCJ Health Services Director); Dkt. 36 at 13–20 (compiling evidence of protective measures taken by TDCJ). Although the district court might do things differently, mere “disagreement” with TDCJ’s medical decisions does not establish deliberate indifference. *Cadena*, 946 F.3d at 729.

B.

TDCJ also has shown that it will be irreparably injured absent a stay. *See Nken*, 556 U.S. at 434. When the State is seeking to stay a preliminary injunction, it’s generally enough to say “[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). The Texas Legislature assigned the prerogatives of prison policy to TDCJ. *See, e.g.*, TEX. GOV’T CODE ch. 501. The district court’s injunction prevents the State from effectuating the Legislature’s choice and hence imposes irreparable injury.

Moreover, the Supreme Court has repeatedly warned that “it is ‘difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.’” *Woodford v. Ngo*, 548 U.S. 81, 94 (2006)

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(quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491–92 (1973)); *see also Missouri v. Jenkins*, 495 U.S. 33, 51 (1990). Yet the district court in this case imposed a number of immediate demands on TDCJ. Among these is a plan within three days to test all Pack Unit inmates for COVID-19, as well as a new plan to quarantine those who test positive, distribute physical handouts with COVID-19 information to the inmates, clean common surfaces every thirty minutes for fifteen hours each and every day, and to provide masks to all inmates and staff members. As we’ve said before about such intrusive orders, this one creates “an administrative nightmare” for TDCJ “to comply with the district court’s quotas and deadlines.” *Ruiz v. Estelle*, 650 F.2d 555, 571 (5th Cir. Unit A June 1981). “[T]he burden upon TDC[J] in terms of time, expense, and administrative red tape is too great” while it must respond in other ways to the crisis. *Ibid.*

The harm to TDCJ is particularly acute because the district court’s order interferes with the rapidly changing and flexible system-wide approach that TDCJ has used to respond to the pandemic so far. The TDCJ’s Director of Health Services explained this statewide approach in her declaration. *See* Dkt. 36-7. The Director worked with a team of medical directors to develop Policy B-14.52 in response to COVID-19. *Id.* at 2. TDCJ first implemented that policy on March 20, 2020. It was designed “to adhere to guidance issued” by the CDC. *Ibid.* And the policy was then disseminated to staff, placed in the “Correctional Managed Health Care Infection Control Policy Manual[,] and posted on the TDCJ website.” *Id.* at 3. But just three days later, the CDC updated its guidance, so TDCJ implemented a revised policy on March 27, 2020. *Id.* at 4. More changes came again on April 2, 2020, and again TDCJ disseminated and implemented the updated policy. *Ibid.* And on April 15, 2020, TDCJ disseminated and began implementation of yet *another* policy. *Id.* at 4–5.

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TDCJ's ability to continue to adjust its policies is significantly hampered by the preliminary injunction, which locks in place a set of policies for a crisis that defies fixed approaches. *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11, 28–29 (1905); *In re Abbott*, No. 20-50264, 2020 WL 1685929, at *12 (5th Cir. 2020) (describing COVID-19 as a “massive and rapidly-escalating threat”). And it prevents TDCJ from responding to the COVID-19 threat without a permission slip from the district court. That constitutes irreparable harm.

C.

The remaining two factors of the stay standard are the balance of the harms and the public interest. *See Nken*, 556 U.S. at 426. Both weigh in favor of staying the district court's injunction. There is no doubt that COVID-19 poses risks of harm to all Americans, including those in the Pack Unit. But the question is whether Plaintiffs have shown that they will suffer irreparable injuries *even after* accounting for the protective measures in TDCJ Policy B-14.52. Neither the Plaintiffs nor the district court suggest the evidence satisfies that standard. And “[b]ecause the State is the appealing party, its interest and harm merge with that of the public.” *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (citing *Nken*, 556 U.S. at 435). Therefore, TDCJ has satisfied all four requirements of the stay standard.

III.

Plaintiffs also face several obstacles to relief under the Prison Litigation Reform Act (“PLRA”). Two bear emphasis at this stage: exhaustion and narrowness.

A.

First, exhaustion. The PLRA requires inmates to exhaust “such administrative remedies as are available” before filing suit in federal court to challenge prison conditions. 42 U.S.C. § 1997e(a). This exhaustion obligation

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is mandatory—there are no “futility or other [judicially created] exceptions [to the] statutory exhaustion requirements” *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001). So long as the State’s administrative procedure grants “authority to take *some* action in response to a complaint,” that procedure is considered “available,” even if it cannot provide “the remedial action an inmate demands.” *Id.* at 736 (emphasis added); *see also id.* at 739 (“Congress meant to require procedural exhaustion regardless of the fit between a prisoner’s prayer for relief and the administrative remedies possible.”).

By contrast, a remedy is not “available”—and exhaustion is not required—when:

1. The procedure “operates as a simple dead end” because “the relevant administrative procedure lacks authority to provide any relief,” or “administrative officials have apparent authority, but decline ever to exercise it.”
2. The “administrative scheme [is] so opaque that . . . no reasonable prisoner can use them.”
3. Or when “prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.”

Ross v. Blake, 136 S. Ct. 1850, 1859–60 (2016) (quotation omitted).

Under these standards, Plaintiffs’ suit appears premature. All parties agree that the TDCJ administrative process is open for Plaintiffs’ use. And Plaintiffs do not argue that TDCJ is incapable of providing *some* (albeit inadequate) relief. Nor do they contend that TDCJ always “decline[s] to exercise” its authority, *id.* at 1859, that the scheme is unworkably opaque, or that administrators thwart use of the system, *see id.* at 1859–60. Therefore, according to the standards the Supreme Court has given us, TDCJ’s grievance procedure is “available,” and Plaintiffs were required to exhaust.

The district court disagreed. It considered the TDCJ process too lengthy to provide timely relief, and therefore incapable of use and unavailable under

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the special circumstances of the COVID-19 crisis. *See* D. Ct. Op. at 16. Other inmates have tried this argument before. In *Blake v. Ross*, 787 F.3d 693 (4th Cir. 2015), the court of appeals held that true exhaustion was not required when the inmate had “exhausted his remedies *in a substantive* sense by affording corrections officials time and opportunity to address complaints internally.” *Id.* at 698 (quoting *Macias v. Zenk*, 495 F.3d 37, 43 (2d Cir. 2007)).

The Supreme Court rejected this “special circumstances” exception “as inconsistent with the PLRA.” *Ross*, 136 S. Ct. at 1855. In so holding, the Court noted that the precursor to today’s § 1997e(a) “would require exhaustion only if a State provided ‘plain, speedy, and effective’ remedies” *Id.* at 1858 (quoting § 7(a), 94 Stat. 352 (1980)). By enacting the PLRA (which removed that proviso), Congress rejected this “weak exhaustion provision” in favor of an “invigorated” and absolute “exhaustion provision.” *Ibid.* (quotation omitted). In the Supreme Court’s view, reading a “special circumstances” exception into the PLRA would undo the PLRA and “resurrect” its predecessor. *Ibid.*

The district court’s understanding of the exhaustion requirement similarly revivifies the rejected portions of the old regime. The crux of the court’s concern is that TDCJ has not acted speedily enough. But that was an exception to exhaustion under the old § 1997e(a), not the current one. Moreover, the district court held that TDCJ’s procedure would be unduly lengthy if TDCJ were to use the full time allotted for a response to the grievance under state law. *See* D. Ct. Op. at 17. But the district court never found that TDCJ *would* take the full time if given the chance. The holding that the TDCJ process “presents no ‘possibility of some relief,’” *id.* at 17–18 (citing *Ross*, 136 S. Ct. at 1859), is therefore unsupported by the evidence.

Nor are we persuaded by the district court’s reliance on *Fletcher v. Menard Correctional Center*, 623 F.3d 1171 (7th Cir. 2010). In that case, Judge

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Posner hypothesized that administrative remedies might “offer no possible relief in time to prevent . . . imminent danger from becoming an actual harm.” *Fletcher*, 623 F.3d at 1174. But, in that hypothetical, the State procedure could “offer no *possible* relief” because State law prohibited a response to the grievance until two weeks after it was filed—rendering the procedure of no use to an inmate threatened with death in 24 hours. *Ibid.* (emphasis added). In those circumstances, of course the procedure is unavailable—“it lacks authority to provide any relief,” *Ross*, 136 S. Ct. at 1859, because as a matter of law it cannot respond quickly enough. We need not confront Judge Posner’s hypothetical because TDCJ faces no legal bar to offering timely relief. TDCJ is empowered to act on a grievance any time *up to*—not *after*, as in *Fletcher*—the statutory limit. Relief by TDCJ therefore remains possible (and the procedure available), even if TDCJ has not acted as swiftly as Plaintiffs would like.²

B.

Finally, it appears that the district court’s injunction goes well beyond the limits of what the PLRA would allow even if the Plaintiffs had properly exhausted their claims. The PLRA mandates that “[p]reliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.” 18 U.S.C. § 3626(a)(2). And the PLRA says courts “shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary

² Nor is the possibility of TDCJ action speculative. As noted above in Part II.B, Defendants offered uncontroverted testimony from the Director of TDCJ Health Services that TDCJ adopted an infection control policy as early as March 20, 2020. Dkt. 36-7 at 3. TDCJ’s medical directors have updated the policy periodically in response to ever-evolving CDC guidelines and other input. *Id.* at 4.

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relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief.” *Ibid.*

The district court’s order recited these propositions, *see* PI Order at 1–2, but the injunction’s substance contravenes them. This is a class-action injunction that applies to all inmates—disabled and non-disabled alike—in the Pack Unit. And it’s hard to see how an injunction that prescribes both a prison-wide testing regime and a cleaning schedule down to the half-hour interval is “narrowly drawn” or the “least intrusive means” available. *See id.* at 3–4. So too with the requirement that every single sink have a sign over it with COVID-19 information. *See id.* at 3. These may be salutary health measures. But that level of micromanagement, enforced upon threat of contempt, does not reflect the principles of comity commanded by the PLRA.

* * *

For the foregoing reasons, TDCJ’s motion to stay the preliminary injunction pending appeal is GRANTED. The appeal is EXPEDITED to the next available argument calendar.

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STEPHEN A. HIGGINSON, Circuit Judge, concurring in the judgment:

I agree that Appellants have demonstrated a substantial likelihood of success on their claim that Appellees failed to exhaust prison remedies prior to seeking relief in federal court. Appellees did not submit any grievance request to prison authorities before filing this lawsuit, and I am not aware of any case, nor do Appellees or the district court cite one, in which a prisoner has been deemed compliant with the Prison Litigation Reform Act (PLRA) when there has been no attempt to file a grievance prior to suit in federal court.¹

I write separately, however, to emphasize two points as governments, state and federal, respond to the COVID-19 crisis, which presents enormous and imminent health risks for prisoners and correctional officers alike.

First, the instant stay order does not foreclose the possibility that, upon expedited consideration, our court may nonetheless conclude that a remedy using the Texas Department of Criminal Justice's (TDCJ) grievance system is not "available" because of the immediacy of the COVID-19 medical emergency coupled with statements credited by the district court that prisoners' grievances may not be addressed promptly. If these plaintiffs—geriatric prisoners, many of whom are medically compromised—have no opportunity to expedite systemic medical emergency grievances, our court might hold that prison administrative remedies "operate[] as a simple dead end" giving prison officials apparent authority though they decline to exercise it. *See Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016).² However, here it is undisputed that the

¹ *Cf. United State of America v. Vigna*, No. S1 16-CR-786-3 (NSR), 2020 WL 1900495, at *5 (S.D.N.Y. Apr. 17, 2020) (noting that the court is not aware of any case where an inmate's failure to exhaust has been excused without the inmate "at least submitting a request [to the prison] . . . prior to, or in conjunction with, his or her application to the court").

² *See also Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1174 (7th Cir. 2010); *Nellson v. Barnhart*, No. 20-CV-00756-PAB, 2020 WL 1890670, at *4 (D. Colo. Apr. 16, 2020) (discussing importance of an imminent-danger exception while also noting that the Supreme Court clarified that "total and immediate relief is not the standard for exhaustion, 'the

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plaintiffs sought relief in federal district court *prior* to filing *any* grievance, and Appellees cite no PLRA exhaustion caselaw supporting a not “available” determination *ex ante*.

Second, our reasoning on PLRA’s exhaustion requirement does not foreclose federal prisoners from seeking relief under the First Step Act’s provisions for compassionate release. *See* 18 U.S.C. § 3582(c)(1)(A)(i). Though that statute contains its own administrative exhaustion requirement, several courts have concluded that this requirement is not absolute and that it can be waived by the government or by the court, therefore justifying an exception in the unique circumstances of the COVID-19 pandemic. *See, e.g., United States v. Russo*, No. 16-cr-441 (LJL), 2020 WL 1862294, at *4–5 (S.D.N.Y. Apr. 14, 2020) (holding that, “[d]espite the mandatory nature of [the statute’s] exhaustion requirement,” the exhaustion bar is “not jurisdictional” and can therefore be waived); *United States v. Smith*, No. 12 Cr. 133 (JFK), 2020 WL 1849748, at *2–3 (S.D.N.Y. Apr. 13, 2020) (citing cases); *see also Vigna*, 2020 WL 1900495, at *5–6 (identifying the difficulties of the First Step Act exhaustion question while ultimately deferring a ruling until the petitioner exhausted his remedies); *but see United States v. Raia*, -- F.3d --, No. 20-1033, 2020 WL 1647922, at *2 (3d Cir. Apr. 2, 2020); *United States v. Clark*, No. 17-85-SDD-RLB, 2020 WL 1557397, at *3 (M.D. La. Apr. 1, 2020).³

possibility of some relief is”). *Cf. Muhammad v. Mayfield*, 933 F.3d 993, 1000 (8th Cir. 2019) (identifying the examples in *Ross* as “at least three” of the circumstances where the administrative process may be “unavailable” (emphasis added)); *Williams v. Corr. Officer Priatno*, 829 F.3d 118, 123 n.2 (2d Cir. 2016) (“We note that the three circumstances discussed in *Ross* do not appear to be exhaustive . . .”).

³ I note that, unlike the PLRA, Section 3582 does not limit the exhaustion requirement to “available” remedies. *See* 18 U.S.C. § 3582(c)(1)(A) (authorizing a motion for a sentence reduction “after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility”). The “availability” caveat—PLRA’s “built-in exception to the exhaustion requirement,” *Ross*, 136 S. Ct. at 1855—arguably presents a stronger basis from which to conclude that Appellants were not required to exhaust their remedies here.

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Because Appellants are substantially likely to succeed on their argument that statutory exhaustion of administrative remedies was not even sought prior to filing this lawsuit, I would not reach the merits of Appellees’ ADA and 42 U.S.C. § 1983 claims. Whereas those claims face high legal hurdles,⁴ they also are intensely fact-based.⁵ The district court assessed lay and expert testimony before making extensive and careful findings of fact showing that mitigation deficiencies still exist. D. Ct. Op. at 7–14. However, given the TDCJ’s systemic and ongoing responses to fast-changing guidance, I would reserve for the merits panel the complex question of whether and which of these deficiencies amount to a cognizable violation.

⁴ See *Gobert v. Caldwell*, 463 F.3d 339, 349 (5th Cir. 2006) (holding that “deliberate indifference exists wholly independent of an optimal standard of care”); see also *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (holding that an accommodation is reasonable under the ADA if it provides “meaningful access to the benefit[s] that the [prison] offers”); *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 561 (7th Cir. 1996) (holding that in the prison context, it is appropriate to consider “[s]ecurity concerns, safety concerns, and administrative exigencies”); cf. *Garza v. City of Donna*, 922 F.3d 626, 636–37 (5th Cir. 2019) (holding that a deliberate indifference claim does not “require[] proof that officials *subjectively* intend that the harm occur” (emphasis added)).

⁵ See, e.g., *Banks v. Booth*, No. 1:20-cv-00849 (D.D.C. Apr. 19, 2020) (order granting temporary restraining order in COVID-19 prison context); cf. *Fraher v. Heyne*, No. 1:10-cv-00951-MJS (PC), 2011 WL 5240441, *2 (E.D. Cal. Oct. 31, 2011) (prisoner with preexisting heart condition who was refused a swine flu test could state a claim for violation of constitutional rights).

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Defendants. §**

Civil Action No. 4:20-cv-01115

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

EXHIBIT B

(VALENTINE II)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

June 5, 2020

Lyle W. Cayce
Clerk

No. 20-20207

LADDY CURTIS VALENTINE; RICHARD ELVIN KING,

Plaintiffs - Appellees

v.

BRYAN COLLIER; ROBERT HERRERA; TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,

Defendants - Appellants

Appeal from the United States District Court
for the Southern District of Texas

Before DAVIS, GRAVES, and DUNCAN, Circuit Judges.

PER CURIAM:

The preliminary injunction entered by the district court is VACATED. Based on facts that have been reported to us by the parties since the district court's judgment was entered, we are persuaded that the Texas Department of Criminal Justice ("TDCJ") has substantially complied with the measures ordered by the district court in its preliminary injunction. The case is remanded to the district court for further proceedings on the permanent injunction.

VACATED and REMANDED.

No. 20-20207

W. EUGENE DAVIS, Circuit Judge, concurring in judgment:

I reluctantly concur in the judgment vacating the injunction because conditions have dramatically changed in the prison since the preliminary injunction issued, and vacating the preliminary injunction allows the district court to expeditiously conduct factfinding to determine what relief is necessary under the current circumstances. I write separately to underscore that holding these elderly, ill inmates jammed together in their dormitories, unable to socially distance as the virus continues to rapidly spread, is nothing short of a human tragedy.

The Wallace Pack Unit (“Pack Unit”) is a geriatric prison facility that houses 1248 offenders. Approximately two-thirds of these inmates are 65 and older, and an unspecified number of inmates has one or more comorbidities. Almost all of the inmates are being housed in dormitories that contain 50-100 inmates. Every inmate has a bunk in a cubicle. Each cubicle has a waist-high barrier separating the prisoner on either side. According to Plaintiff Valentine, the inmates are within three to four feet of their neighbor on either side.

At the time of the district court’s hearing on the preliminary injunction on April 16, there was only one confirmed infection: inmate Leonard Clerkly, whose autopsy was released two days prior. Now, six weeks later, the Pack Unit is a vastly different place. As of May 28, TDCJ has reported 191 infections in the Pack Unit.¹ Five inmates have died.

¹ The 191 positive test results are also reported on TDCJ’s website. We have recognized that courts reviewing preliminary injunctions can take judicial notice of subsequent factual developments bearing on the case. Indeed, this court has taken judicial notice of statistics concerning COVID-19 already. *See In re Abbott*, 954 F.3d 772, 779 (5th Cir. 2020). *See also Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) (per curiam) (taking judicial notice of the state agency’s own website); *Flight Engineer’s Int’l Ass’n, AFL-CIO v. Am. Airlines, Inc.*, 303 F.2d 5, 8 (5th Cir. 1962) (noting, on review of a preliminary injunction, that this court could take judicial notice of subsequent action).

No. 20-20207

Many of the facts regarding developments in the Pack Unit since the injunction was entered have not been tested by testimony under oath that has been subjected to cross-examination. I assume the district court will hear evidence on developments that have occurred since its April 16 preliminary injunction that will definitively resolve these issues.²

The Plaintiffs and their fellow inmates are now being held under circumstances that seriously threaten their life. It bears repeating: the Pack Unit is a geriatric prison. Most inmates are over 65 and have multiple, serious health problems. They are among the most vulnerable members of the population to contract COVID-19 and the least likely to survive the infection. They remain on 24-hour lockdown in their dorms, three to four feet from each other. With so many potential spreaders of COVID-19 in the Pack Unit among vulnerable inmates, we can expect several times that number to be infected by July 13, 2020, the date the trial on the permanent injunction is now scheduled.

The experienced trial judge scheduled a hearing on the preliminary injunction days after the case was assigned to him and handled the evolving nature of this proceeding diligently. I have confidence he will consider holding the trial sooner than that date if possible.³

² At the time of the preliminary injunction, the parties disagreed whether the prison grievance system provided available relief so as to require exhaustion of all administrative remedies under § 1997e(a) of the Prison Litigation Reform Act. The parties now dispute whether Valentine exhausted his administrative remedies by seeking informal resolution prior to filing suit. The district court should resolve the apparent factual dispute concerning when Plaintiff Valentine sought administrative relief and whether TDCJ offered any emergency grievance procedures to the inmates.

³ The Supreme Court has emphasized the urgent nature of these proceedings. *See Marlowe v. LeBlanc*, No. 19A1039, 2020 WL 2780803, at *1 (U.S. May 29, 2020) (mem.); *Valentine v. Collier*, 140 S. Ct. 1598, 1600 (2020) (mem.).

No. 20-20207

JAMES E. GRAVES, JR., Circuit Judge, specially concurring:

While I concur in the majority opinion, I write separately to note that a motions panel of this court previously found that Plaintiffs are unlikely to succeed on the merits of their claims. For substantially the same reasons given by the district court, I disagree with that analysis.¹ As the district court rightly noted, “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Turner v. Safley*, 482 U.S. 78, 84 (1987).

¹ See *Trevino v. Davis*, 861 F.3d 545, 548 n.1 (5th Cir. 2017) (“[A] merits panel is not bound by a motions panel.”) (citation omitted).

No. 20-20207

STUART KYLE DUNCAN, Circuit Judge, concurring in the judgment in part:

I respectfully concur in the result reached by the majority, which vacates the preliminary injunction and remands for further proceedings. For my part, I would also reverse the district court's judgment granting the preliminary injunction. I would do so solely for the reasons expressed by the motions panel in *Valentine v. Collier*, 956 F.3d 797, 801–06 (5th Cir. 2020). *See also Marlowe v. LeBlanc*, --- F.3d ---, 2020 WL 2043425, at *2–4 (5th Cir. Apr. 27, 2020); *Swain v. Junior*, 948 F.3d 1081, 1088–92 (11th Cir. 2020). I express no definitive opinion on the impact of the interim factual developments discussed in Judge Davis's concurrence. I note only that, just as our panel received updates on the spread of COVID-19 in the Wallace Pack Unit, we also received updates detailing TDCJ's evolving responses to the infection, including increased testing, infection-control measures, and inmate treatment and isolation. All these developments will be subject to adversarial testing in the permanent injunction proceedings.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**LADDY CURTIS VALENTINE and
RICHARD ELVIN KING, individually and
on behalf of those similarly situated,
*Plaintiffs,***

V.

**BRYAN COLLIER, in his official capacity,
ROBERT HERRERA, in his official capacity,
and TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
Defendants.**

§ § § § § § § § § § § § § § § §

Civil Action No. 4:20-cv-01115

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

EXHIBIT C

(VALENTINE GRIEVANCE 03.31.2020)

AFFIDAVIT

THE STATE OF TEXAS §

COUNTY OF WALKER §

BEFORE ME, the undersigned authority, on this day personally appeared Frances Gattis, who, being by me duly sworn, deposed as follows:

My name is Frances Gattis, and I am a Deputy Division Director of the Administrative Review and Risk Management Division of the Texas Department of Criminal Justice (TDCJ), a governmental agency. My duties include overseeing the management of the Offender Grievance department. I am executing this affidavit as part of my assigned duties and responsibilities. I am over 21 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated.

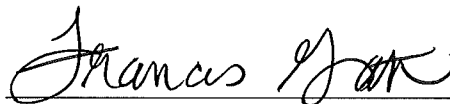
The Texas Department of Criminal Justice stores information about offender grievances in its mainframe database. The entries of such records are made and stored as a regularly conducted activity and regular practice of the TDCJ, and were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.

I have searched, or have caused a search to be conducted, for grievances filed by offender Laddy Valentine, TDCJ #01782033.

Laddy Valentine has filed one (1) grievance during the past three years (note: records retention for grievances is only three years), and it was filed on April 1, 2020. Attached is a true and correct copy of said grievance and related investigative documents.

I declare under penalty of perjury that the foregoing is true and correct.

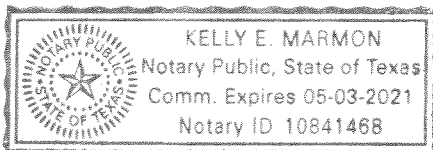
“Further Affiant sayeth not.”



Frances Gattis

Deputy Division Director
Administrative Review and Risk Management
Texas Department of Criminal Justice

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned notary public, on the 1st day of May 2020.


NOTARY PUBLIC, STATE OF TEXAS

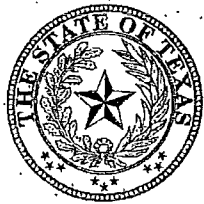
Kelly E. Marmon

Notary's Printed Name

My Commission Expires:

May 3, 2021

DEFENDANTS' DISCLOSURE - 0637



(EMERGENCY)
GRIEVANCE

Texas Department of Criminal Justice

STEP 1

OFFENDER
GRIEVANCE FORM

Offender Name: Laddy C. Valentine TDCJ # 1782033
Unit: PAC UNIT Housing Assignment: D 14-6
Unit where incident occurred: PAC UNIT, 2400 Wallace Pack
Rd. NAWASOTA TX 77868

OFFICE USE ONLY	
Grievance #:	<u>2020098479</u>
Date Received:	<u>APR 01 2020</u>
Date Due:	<u>5/11/20</u>
Grievance Code:	<u>503</u>
Investigator ID #:	<u>I21047</u>
Extension Date:	
Date Retd to Offender:	<u>APR 22 2020</u>

You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.

Who did you talk to (name, title)? Submitted 1-60 to Mr Selby/Unit Safety When? 27 Mar 20

What was their response? No response as of this date.

What action was taken? N/A

State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate

ON 27 March 20, I submitted to Unit Safety Officer, Mr. Selby,
an attempt to informally resolve the lack of hand sanitizing solutions
for individual use within the Dormitory as well as additional
cleaning supplies for individual cubicles. It has been five days and
the issue remains unresolved. I am therefore, filing an emergency
grievance, Step 1, for hand sanitization supplies, gloves, masks and
additional cleaning supplies such as bleach and ammonia based cleaners,
to be issued individually for prevention and suppression of contagions,
specifically COVID-19.

Action Requested to resolve your Complaint.

Immediate issue of personal hand sanitizers, additional cleaning supplies for community areas and personal cubicles.

Offender Signature: *[Signature]*

Date: *31 March 2020*

Grievance Response:

Your grievance has been received and investigated. The Wallace Pack Unit is following all necessary precautions to help minimize the exposure to COVID-19. Staff is following all guidelines The Wallace Pack Unit has designated protocols to keep staff and offenders safe during this time. The Wallace Pack Unit is promoting social distancing on the recreation yards, dayrooms, hallways, and showers when possible. All staff and incoming offenders have their temperatures taken prior to entering the facility. Hand sanitizer is only necessary if soap is not available and the Wallace Pack Unit has an ample supply of soap. The Wallace Pack Unit also began issuing cloth mask to offenders on 4/14/20 and as of 4/15/20 all offenders on the Wallace Pack Unit received a cloth mask. No further action warranted at this time.

Signature Authority: *[Signature]*

Date: *4/22/20*

If you are dissatisfied with the Step 1 response, you may submit a Step 2 (I-128) to the Unit Grievance Investigator within 15 days from the date of the Step 1 response. State the reason for appeal on the Step 2 Form.

Returned because: *Resubmit this form when the corrections are made.

- ☐ 1. Grievable time period has expired.
- ☐ 2. Submission in excess of 1 every 7 days. *
- ☐ 3. Originals not submitted. *
- ☐ 4. Inappropriate/Excessive attachments. *
- ☐ 5. No documented attempt at informal resolution. *
- ☐ 6. No requested relief is stated. *
- ☐ 7. Malicious use of vulgar, indecent, or physically threatening language. *
- ☐ 8. The issue presented is not grievable.
- ☐ 9. Redundant, Refer to grievance # _____
- ☐ 10. Illegible/Incomprehensible. *
- ☐ 11. Inappropriate. *

UGI Printed Name/Signature: _____

Application of the screening criteria for this grievance is not expected to adversely affect the offender's health.

Medical Signature Authority: _____

OFFICE USE ONLY

Initial Submission UGI Initials: _____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____

2nd Submission UGI Initials: _____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____

3rd Submission UGI Initials: _____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____

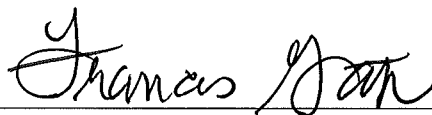
DECLARATION OF **FRANCES GATTIS**

"I am over 21 years of age, of sound mind, capable of making this declaration, and personally acquainted with the facts herein stated.

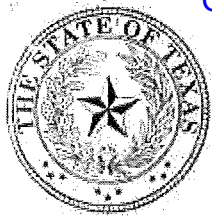
I am the custodian of records for the Offender Grievance Department, a part of the Texas Department of Criminal Justice (TDCJ) located in Huntsville, Texas. Attached are true and correct copies of *the grievance records for offender King, Richard TDCJ#00516700, Cause Number 4:20-CV-1115, for the time period of 03/01/20 to 05/04/20*, which are kept by the TDCJ in the regular course of its business activity. The entries of such records were made as a regularly conducted activity and a regular practice of the TDCJ, and were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.

My name is **Frances Gattis** and I am an employee of the TDCJ, a governmental agency. I am executing this declaration as part of my assigned duties and responsibilities. I declare under penalty of perjury that the foregoing is true and correct."

Executed in **Walker** County, State of Texas, on the 7th day of **May, 2020**.

A handwritten signature in black ink, appearing to read "Frances Gattis", written over a horizontal line.

Frances Gattis
Deputy Division Director
Administrative Review & Risk Management
Texas Department of Criminal Justice



APAC
STEP 1

OFFENDER GRIEVANCE FORM

Grievance #:	2020099042
Date Received:	APR 02 2020
Date Due:	05/12/20
Grievance Code:	200
Investigator ID #:	I2047
Extension Date:	
Date Retd to Offender:	MAY 04 2020

Offender Name: RICHARD KING TDCJ # 516700
 Unit: Pack Housing Assignment: E-18-02
 Unit where incident occurred: Pack

You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.

Who did you talk to (name, title)? N/A When? _____

What was their response? _____

What action was taken? _____

State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate

THIS GRIEVANCE IS AGAINST STATE CLASSIFICATION who CONTINUES TO MOVE OFFENDERS FROM OTHER UNITS TO THE PACK UNIT DURING THIS CORONAVIRUS PANDEMIC. ALL THE WAY FROM THE PRESIDENT OF THE UNITED STATES TO THE GOVERNOR OF TEXAS TO MAYORS OF THE CITIES & TOWNS ARE URGING PEOPLE TO STAY AT HOME AND LIMIT THEIR CONTACT WITH OTHER PEOPLE. HOWEVER, CLASSIFICATION PAYS NO ATTENTION AND MOVES OFFENDERS ON CROWDED BUSES. PACK UNIT IS OVERWHELMING HOUSED BY OLDER OFFENDERS WITH SERIOUS MEDICAL CONDITIONS THE MAKE THEM THE MAIN ONES DYING FROM THIS VIRUS. YET JUST YESTERDAY APRIL 1, 2020 OVER TEN (10) NEW OFFENDERS WERE BROUGHT ONTO THE PACK UNIT.

THIS SHOWS A TOTAL DISREGARD FOR THE LIVES OF OFFENDERS ON THE PACK UNIT.

Action Requested to resolve your Complaint. STOP BRINGING IN OFFENDERS FROM OTHER PRISONS UNTIL THIS CORONAVIRUS IS UNDER CONTROL

Offender Signature: Richard Ruiz 516700 Date: 2 APRIL 2020

Grievance Response:

Your grievance has been received and investigated. Per Classification, Unit Classification has no control over offenders arriving at the Pack Unit. Due to the COVID-19 pandemic, as of April 9, 2020, chain was suspended until further notice. No further action warranted at this time.

Signature Authority: [Signature] Date: _____

If you are dissatisfied with the Step 1 response, you may submit a Step 2 (I-128) to the Unit Grievance Investigator within 15 days from the date of the Step 1 response. State the reason for appeal on the Step 2 Form.

Returned because: *Resubmit this form when the corrections are made.

- ☐ 1. Grievable time period has expired.
- ☐ 2. Submission in excess of 1 every 7 days. *
- ☐ 3. Originals not submitted. *
- ☐ 4. Inappropriate/Excessive attachments. *
- ☐ 5. No documented attempt at informal resolution. *
- ☐ 6. No requested relief is stated. *
- ☐ 7. Malicious use of vulgar, indecent, or physically threatening language. *
- ☐ 8. The issue presented is not grievable.
- ☐ 9. Redundant, Refer to grievance # _____
- ☐ 10. Illegible/Incomprehensible. *
- ☐ 11. Inappropriate. *

UGI Printed Name/Signature: _____

Application of the screening criteria for this grievance is not expected to adversely affect the offender's health.

Medical Signature Authority: _____

I-127 Back (Revised 11-2010)

OFFICE USE ONLY

Initial Submission UGI Initials: _____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____

2nd Submission UGI Initials: _____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____

3rd Submission UGI Initials: _____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____

Appendix F

DEFENDANTS' DISCLOSURE - 0647

EXHIBIT E

(VALENTINE GRIEVANCE 05.10.2020)

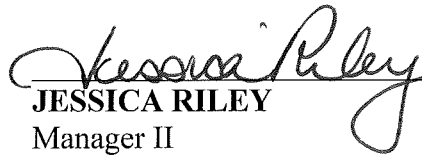
DECLARATION OF JESSICA RILEY

"I am over 21 years of age, of sound mind, capable of making this declaration, and personally acquainted with the facts herein stated.

I am a Manager II in the Administrative Review and Risk Management Division, a part of the Texas Department of Criminal Justice (TDCJ) located in Huntsville, Texas. Attached is a true and correct copy of the *Step 2 grievance #2020119641 filed by Laddy Valentine and received on June 10, 2020*. The attached record is kept by the TDCJ in the regular course of its business activity. The entry of such record was made as a regularly conducted activity and a regular practice of the TDCJ, and was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.

My name is Jessica Riley and I am an employee of the TDCJ, a governmental agency. I am executing this declaration as part of my assigned duties and responsibilities. I declare under penalty of perjury that the foregoing is true and correct."

Executed in WALKER County, State of Texas, on the 23rd day of June, 2020.


JESSICA RILEY
Manager II
Administrative Review and Risk
Management Division
Texas Department of Criminal Justice



Texas Department of Criminal Justice

STEP 2

OFFENDER
GRIEVANCE FORM

Offender Name: Laddy C. Valentine TDCJ # 1782033
 Unit: PAC Housing Assignment: D14-6
 Unit where incident occurred: PAC Unit

OFFICE USE ONLY

Grievance #: 202019641
 UGI Recd Date: JUN 11 2020
 HQ Recd Date: JUN 12 2020
 Date Due: 6-25
 Grievance Code: 608
 Investigator ID#: _____
 Extension Date: _____

You must attach the completed Step 1 Grievance that has been signed by the Warden for your Step 2 appeal to be accepted. You may not appeal to Step 2 with a Step 1 that has been returned unprocessed.

Give reason for appeal (Be Specific). I am dissatisfied with the response at Step 1 because...

The response to my step 1 Grievance is unsatisfactory. The COVID-19 virus continues to change. Persons who have tested negative have become sick while persons who tested positive have not even showed symptoms. Also, the virus continues to be brought in by staff and the preventive measures in place are inadequate. All inmates and staff should be retested due to error.

Offender Signature: _____

Date: 6-9-20

Grievance Response: _____

A review of the Step 1 medical grievance has been completed regarding your report you are being denied access to testing for COVID-19.

According to the documentation, the appellate review of the medical grievance supports the response provided at the Step 1 level. You were tested at the same time as all the offenders on the unit. There is no documentation to indicate you have been denied proper medical care.

Review of the documentation indicates you did not attempt informal resolution of your medical concerns with supervisory staff. The unit facility has a complaint process in place. Should you feel your medical concerns require further evaluation you may submit a Sick Call Request to the medical department.

STEP II MEDICAL GRIEVANCE PROGRAM
OFFICE OF PROFESSIONAL STANDARDS
TDCJ HEALTH SERVICES DIVISION

Signature Authority: _____

Date: 6-17-20Returned because: **Resubmit this form when corrections are made.*

- ☐ 1. Grievable time period has expired.
- ☐ 2. Illegible/Incomprehensible.*
- ☐ 3. Originals not submitted.*
- ☐ 4. Inappropriate/Excessive attachments.*
- ☐ 5. Malicious use of vulgar, indecent, or physically threatening language.
- ☐ 6. Inappropriate.*

CGO Staff Signature: _____

OFFICE USE ONLY**Initial Submission****CGO Initials:** _____

Date UGI Recd: _____

Date CGO Recd: _____

(check one) ☐ Screened ☐ Improperly Submitted

Comments: _____

Date Returned to Offender: _____

2nd Submission**CGO Initials:** _____

Date UGI Recd: _____

Date CGO Recd: _____

(check one) ☐ Screened ☐ Improperly Submitted

Comments: _____

Date Returned to Offender: _____

3rd Submission**CGO Initials:** _____

Date UGI Recd: _____

Date CGO Recd: _____

(check one) ☐ Screened ☐ Improperly Submitted

Comments: _____

Date Returned to Offender: _____

EMERGENCY GRIEVANCE



Texas Department of Criminal Justice

STEP 1 OFFENDER GRIEVANCE FORM

OFFICE USE ONLY

Grievance #: 2020119641
 Date Received: MAY 12 2020
 Date Due: 6/24/20
 Grievance Code: 608
 Investigator ID #: 12433
 Extension Date: _____
 Date Retd to Offender: JUN 02 2020

Offender Name: Laddy C. Valentine TDCJ # 1782033
 Unit: Poc Housing Assignment: D14-6
 Unit where incident occurred: Poc Unit

You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.

Who did you talk to (name, title)? MR. Ken Stecker through I-60 When? Wednesday 1 May 20
 What was their response? No Response I-60 For Informal Resolution NOT Returned
 What action was taken? No Action taken

State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate

Request immediate testing for COVID-19 virus. Throughout the Nation and State Test kits for COVID-19 are available. However we have been given no information concerning scheduled testing. With the expanding pandemic, as well as increasing illness within the Poc Unit, and based on my vulnerability as outlined by the CXC, I Request an immediate COVID-19 Test.

Action Requested to resolve your Complaint.

Immediate Testing

Offender Signature:

[Signature]

Date:

10 May 20

Grievance Response:

Patient was tested for covid-19 along with all offender population by TDCJ from 5/12/20-5/15/20. Submit a sick call if you have further medical issues. No further action warranted.

Signature Authority:

KStokew

Date:

5/19/20

If you are dissatisfied with the Step 1 response, you may submit a Step 2 (I-128) to the Unit Grievance Investigator within 15 days from the date of the Step 1 response. State the reason for appeal on the Step 2 Form.

Returned because: *Resubmit this form when the corrections are made.

- ☐ 1. Grievable time period has expired.
- ☐ 2. Submission in excess of 1 every 7 days. *
- ☐ 3. Originals not submitted. *
- ☐ 4. Inappropriate/Excessive attachments. *
- ☐ 5. No documented attempt at informal resolution. *
- ☐ 6. No requested relief is stated. *
- ☐ 7. Malicious use of vulgar, indecent, or physically threatening language. *
- ☐ 8. The issue presented is not grievable.
- ☐ 9. Redundant, Refer to grievance # _____
- ☐ 10. Illegible/Incomprehensible. *
- ☐ 11. Inappropriate. *

UGI Printed Name/Signature: _____

Application of the screening criteria for this grievance is not expected to adversely affect the offender's health.

Medical Signature Authority: _____

I-127 Back (Revised 11-2010)

OFFICE USE ONLY

Initial Submission

UGI Initials: _____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____

2nd Submission

UGI Initials: _____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____

3rd Submission

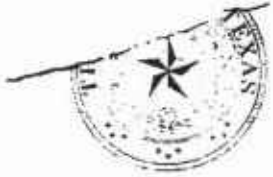
UGI Initials: _____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____



ACCEPT AS
ORIGINAL
Texas Department of Criminal Justice

STEP 2

OFFENDER GRIEVANCE FORM

Offender Name: Lackly C. Valentine TDCJ #: 1782033
 Unit: PAC Housing Assignment: D14-6
 Unit where incident occurred: PAC Unit

OFFICE USE ONLY

Grievance #: 2020119641
 UGI Recd Date: JUN 10 2020
 HQ Recd Date: JUN 10 2020
 Date Due: 6-25
 Grievance Code: 608/930
 Investigator ID#: _____
 Extension Date: _____

You must attach the completed Step 1 Grievance that has been signed by the Warden for your Step 2 appeal to be accepted. You may not appeal to Step 2 until a Step 1 that has been returned in process.

Give reason for appeal (Be Specific). *I am dissatisfied with the response at Step 1 because*

The response to my step 1 Grievance is unsatisfactory. The COVID-19 virus continues to change. Persons who have tested negative have become sick while persons who tested positive have not even showed symptoms. Also, the virus continues to be brought in by staff and the preventive measures in place are inadequate. All inmates and staff should be retested due to error.

Offender Signature: _____

Date: 6-9-20

Grievance Response: _____

Signature Authority: _____

Date: _____

Returned because: **Resubmit this form when corrections are made.*

- ☐ 1. Grievable time period has expired.
- ☐ 2. Illegible/Incomprehensible.*
- ☐ 3. Originals not submitted.*
- ☐ 4. Inappropriate/Excessive attachments.*
- ☐ 5. Malicious use of vulgar, indecent, or physically threatening language.
- ☐ 6. Inappropriate.*

CGO Staff Signature: _____

OFFICE USE ONLY**Initial Submission**

CGO Initials: _____

Date U/GI Recd: _____

Date CGO Recd: _____

(check one) _____ Screened _____ Improperly Submitted

Comments: _____

Date Returned to Offender: _____

2nd Submission

CGO Initials: _____

Date U/GI Recd: _____

Date CGO Recd: _____

(check one) _____ Screened _____ Improperly Submitted

Comments: _____

Date Returned to Offender: _____

3rd Submission

CGO Initials: _____

Date U/GI Recd: _____

Date CGO Recd: _____

(check one) _____ Screened _____ Improperly Submitted

Comments: _____

Date Returned to Offender: _____



EMERGENCY GRIEVANCE
Texas Department of Criminal Justice

**STEP 1 OFFENDER
 GRIEVANCE FORM**

OFFICE USE ONLY

Grievance #: 2220119641
 Date Received: MAY 12 2020
 Date Due: 4/24/20
 Grievance Code: 608/930
 Investigator ID #: 12433
 Extension Date: _____
 Date Retd to Offender: JUN 02 2020

Offender Name: Laddy C. Valentine TDCJ # 1782033
 Unit: Poc Housing Assignment: D14-6
 Unit where incident occurred: Poc Unit

You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.

Who did you talk to (name, title)? Mr Ken Staeker through I-60 When? on or about 1 May 20
 What was their response? No Response I-60 Fee Internal Resolution NOT Returned
 What action was taken? No Action taken

State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate

Request immediate testing for COVID-19 virus. Throughout the Nation and State Test Kits for COVID-19 are available. However we have been given no information concerning scheduled testing. With the expanding pandemic as well as increasing illness within the Poc Unit, and based on my vulnerability as outlined by the CDC, I Request an immediate COVID-19 Test.

Action Requested to resolve your Complaint.

Immediate Testing

Offender Signature:

[Signature]

Date: *10 May 20*

Grievance Response:

Patient was tested for covid-19 along with all offender population by TDCJ from 5/12/20-5/15/20. Submit a sick call if you have further medical issues. No further action warranted.

Signature Authority:

K. Stokew

Date: *5/19/20*

If you are dissatisfied with the Step 1 response, you may submit a Step 2 (I-128) to the Unit Grievance Investigator within 15 days from the date of the Step 1 response. State the reason for appeal on the Step 2 Form.

Returned because: *Resubmit this form when the corrections are made.

- ☐ 1. Grievable time period has expired.
- ☐ 2. Submission in excess of 1 every 7 days. *
- ☐ 3. Originals not submitted. *
- ☐ 4. Inappropriate/Excessive attachments. *
- ☐ 5. No documented attempt at informal resolution. *
- ☐ 6. No requested relief is stated. *
- ☐ 7. Malicious use of vulgar, indecent, or physically threatening language. *
- ☐ 8. The issue presented is not grievable.
- ☐ 9. Redundant. Refer to grievance # _____
- ☐ 10. Illegible/Incomprehensible. *
- ☐ 11. Inappropriate. *

UGI Printed Name/Signature: _____

Application of the screening criteria for this grievance is not expected to adversely affect the offender's health.

Medical Signature Authority: _____

I-127 Back (Revised 11-2010)

OFFICE USE ONLY

Initial Submission	UGI Initials: _____
Grievance #:	_____
Screening Criteria Used:	_____
Date Recd from Offender:	_____
Date Returned to Offender:	_____
2nd Submission	UGI Initials: _____
Grievance #:	_____
Screening Criteria Used:	_____
Date Recd from Offender:	_____
Date Returned to Offender:	_____
3rd Submission	UGI Initials: _____
Grievance #:	_____
Screening Criteria Used:	_____
Date Recd from Offender:	_____
Date Returned to Offender:	_____

Appendix F

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**LADDY CURTIS VALENTINE and
RICHARD ELVIN KING, individually and
on behalf of those similarly situated,
*Plaintiffs,***

V.

**BRYAN COLLIER, in his official capacity,
ROBERT HERRERA, in his official capacity,
and TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
Defendants.**

[illegible]

Civil Action No. 4:20-cv-01115

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

EXHIBIT F

(KING GRIEVANCE 05.12.2020)

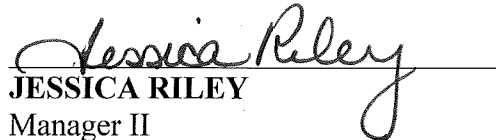
DECLARATION OF JESSICA RILEY

"I am over 21 years of age, of sound mind, capable of making this declaration, and personally acquainted with the facts herein stated.

I am a Manager II in the Administrative Review and Risk Management Division, a part of the Texas Department of Criminal Justice (TDCJ) located in Huntsville, Texas. Attached is a true and correct copy of the *pending Step 2 grievance #2020120907 filed by Richard King and received on June 30, 2020*. The attached record is kept by the TDCJ in the regular course of its business activity. The entry of such record was made as a regularly conducted activity and a regular practice of the TDCJ, and was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.

My name is Jessica Riley and I am an employee of the TDCJ, a governmental agency. I am executing this declaration as part of my assigned duties and responsibilities. I declare under penalty of perjury that the foregoing is true and correct."

Executed in WALKER County, State of Texas, on the 30th day of June, 2020.


JESSICA RILEY
Manager II
Administrative Review and Risk
Management Division
Texas Department of Criminal Justice



Texas Department of Criminal Justice

STEP 2

OFFENDER
GRIEVANCE FORM

Offender Name: RICHARD KING TDCJ # 516700
 Unit: PACK Housing Assignment: E-18-02
 Unit where incident occurred: PACK

OFFICE USE ONLY

Grievance #: 2020120907
 LC Reed Date: 6-30-2020
 HQ Reed Date: 6-30-2020
 Date Due: 7-15-2020
 Grievance Code: 930/503
 Investigator ID: _____
 Extension Date: _____

You must attach the completed Step 1 Grievance that has been signed by the Warden for your Step 2 appeal to be accepted. You may not appeal to Step 2 with a Step 1 that has not been accepted.

Give reason for appeal (Be Specific). I am dissatisfied with the response at Step 1 because...

THE 1 1/2 GALLONS OF BLEACH IN THE MORNING AND 1 1/2 GALLONS OF DOUBLE "D" IN THE AFTERNOON IS NOT ENOUGH TO CLEAN AND SANITIZE 2 DORMS WITH APPROXIMATELY 140 OFFENDERS AND THEIR HOUSING AREAS.

ALSO THE QUANTITY OF DOUBLE "D" PER SHIFT IS NOT ADEQUATE TO CLEAN & SANITIZE THE BATHROOMS AND OTHER AREAS.

Offender Signature: _____

Date: 6-24-20

Grievance Response: _____

Signature Authority: _____

Date: _____

Returned because: *Resubmit this form when corrections are made.

- ☐ 1. Grievable time period has expired.
- ☐ 2. Illegible/Incomprehensible.*
- ☐ 3. Originals not submitted. *
- ☐ 4. Inappropriate/Excessive attachments.*
- ☐ 5. Malicious use of vulgar, indecent, or physically threatening language.
- ☐ 6. Inappropriate.*

CGO Staff Signature: _____

OFFICE USE ONLY**Initial Submission**

CGO Initials: _____

Date UGI Recd: _____

Date CGO Recd: _____

(check one) ☐ Screened ☐ Improperly Submitted

Comments: _____

Date Returned to Offender: _____

2nd Submission

CGO Initials: _____

Date UGI Recd: _____

Date CGO Recd: _____

(check one) ☐ Screened ☐ Improperly Submitted

Comments: _____

Date Returned to Offender: _____

3rd Submission

CGO Initials: _____

Date UGI Recd: _____

Date CGO Recd: _____

(check one) ☐ Screened ☐ Improperly Submitted

Comments: _____

Date Returned to Offender: _____



Texas Department of Criminal Justice

STEP 1

OFFENDER
GRIEVANCE FORM

OFFICE USE ONLY

Grievance #: 2020120907Date Received: MAY 14 2020Date Due: 6-23-20Grievance Code: 503Investigator ID #: J2433

Extension Date: _____

Date Retd to Offender: JUN 15 2020

Offender Name: RICHARD KING TDCJ # 516700
 Unit: PACK I Housing Assignment: E-18-02
 Unit where incident occurred: PACK I

You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.

Who did you talk to (name, title): MS. MAXEY - PROPERTY & CHEMICALS When: 5-12-20

What was their response? THIS IS THE WAY IT HAS ALWAYS BEEN DONE.

What action was taken? NONE

State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate

I ASKED MS. MAXEY WHO DETERMINED HOW MUCH CHEMICALS WERE ISSUED TO THE DORM JANITORS FOR CLEANING. HER ANSWER WAS AS STATED ABOVE, "THIS IS THE WAY IT HAS ALWAYS BEEN DONE."

I THINK THIS IS A VERY UNUSAL TIME TO BE DOING THINGS AS WE HAVE ALWAYS DONE THEM. JANITOR ARE ISSUED ONE OUNCE OF POWDER BLEACH, POURED INTO A HOP BUCKET WITH WATER IN IT, ABOUT TWO OUNCES OF POWDERED BIPPY AND TWO OUNCES OF LIQUID DOUBLE D. DISINFECTANT. THIS DOUBLE D COMES TO THE UNIT AS A CONCENTRATE AND THE CHEMICAL ROOM DILUTES IT BEFORE ISSUING IT TO THE DORM JANITORS. THEN WE HAVE TO DILUTE IT FURTHER TO MAKE A 16 OUNCE BOTTLE. AND IS SUPPOSE TO LAST FOR A 12 HOUR SHIFT. NOT ENOUGH DISINFECTANT TO PROPERLY DISINFECT AND SANITIZE A DORM.

Action Requested to resolve your Complaint.

TO BE GIVEN ENOUGH DISINFECTANT TO PROPERLY CLEAN AND SANITIZE OUR DORMS

Offender Signature: Richard Ruy

Date: 5-12-20

Grievance Response:

Your grievance has been received and investigated. It has been revealed that each hallway is given 1 ½ gallons of bleach water in the morning, also 1 ½ of double D water in the evening. The hallway officer also has 32 ozs of double D in their bottle at the desk for the offender to use. No further action warranted at this time.

Signature Authority: [Signature]

Date: 6/12/20

If you are dissatisfied with the Step 1 response, you may submit a Step 2 (I-128) to the Unit Grievance Investigator within 15 days from the date of the Step 1 response. State the reason for appeal on the Step 2 Form.

Returned because: *Resubmit this form when the corrections are made.

- ☐ 1. Grievable time period has expired.
- ☐ 2. Submission in excess of 1 every 7 days. *
- ☐ 3. Originals not submitted. *
- ☐ 4. Inappropriate/Excessive attachments. *
- ☐ 5. No documented attempt at informal resolution. *
- ☐ 6. No requested relief is stated. *
- ☐ 7. Malicious use of vulgar, indecent, or physically threatening language. *
- ☐ 8. The issue presented is not grievable.
- ☐ 9. Redundant. Refer to grievance # _____
- ☐ 10. Illegible/Incomprehensible. *
- ☐ 11. Inappropriate. *

GI Printed Name/Signature: _____

Application of the screening criteria for this grievance is not expected to adversely affect the offender's health.

Medical Signature Authority: _____

OFFICE USE ONLY

Initial Submission	UGI Initials: _____
Grievance #: _____	
Screening Criteria Used: _____	
Date Read from Offender: _____	
Date Returned to Offender: _____	
2nd Submission	UGI Initials: _____
Grievance #: _____	
Screening Criteria Used: _____	
Date Read from Offender: _____	
Date Returned to Offender: _____	
3rd Submission	UGI Initials: _____
Grievance #: _____	
Screening Criteria Used: _____	
Date Read from Offender: _____	
Date Returned to Offender: _____	

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**LADDY CURTIS VALENTINE and
RICHARD ELVIN KING, individually and
on behalf of those similarly situated,
*Plaintiffs,***

V.

**BRYAN COLLIER, in his official capacity,
ROBERT HERRERA, in his official capacity,
and TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
Defendants.**

[illegible]

Civil Action No. 4:20-cv-01115

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

EXHIBIT G

(VALENTINE GRIEVANCE 05.19.2020)

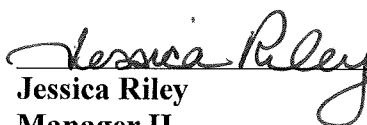
DECLARATION OF JESSICA RILEY

"I am over 21 years of age, of sound mind, capable of making this declaration, and personally acquainted with the facts herein stated.

I am a Manager II in the Administrative Review and Risk Management Division of the Texas Department of Criminal justice (TDCJ), a part of the TDCJ located in Huntsville, Texas. Attached are true and correct copies of *three pending grievances filed by Laddy Valentine, TDCJ #1782033, since April 27, 2020*, which are kept by the TDCJ in the regular course of its business activity. The entries of such records were made as a regularly conducted activity and a regular practice of the TDCJ, and were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.

My name is JESSICA RILEY and I am an employee of the TDCJ, a governmental agency. I am executing this declaration as part of my assigned duties and responsibilities. I declare under penalty of perjury that the foregoing is true and correct."

Executed in WALKER County, State of Texas, on the 26th day of MAY, 2020.

_____

Jessica Riley

Manager II

Administrative Review and Risk Management

Texas Department of Criminal Justice



Texas Department of Criminal Justice

OFFICE USE ONLY

STEP 1 OFFENDER GRIEVANCE FORM

EMERGENCY GRIEVANCE

Offender Name: LADDY C. VALENTINE TDCJ # 1782033Unit: PAC Housing Assignment: D14-6Unit where incident occurred: PAC UNITGrievance #: 202024948Date Received: MAY 21 2020Date Due: 6-30-20Grievance Code: 506Investigator ID #: 12433

Extension Date: _____

Date Retd to Offender: _____

You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.

Who did you talk to (name, title)? Sgt. Hurd When? 19 May 20What was their response? Didn't have an answerWhat action was taken? None

State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate

Why didn't staff utilize the space available within 14 Dorm for "Social Distancing", when cubicles were empty in abundance, approximately 19 before numerous inmates tested positive for COVID-19 protein? For weeks prior to testing up until, approximately 5 days, post-testing ample bed space was available to distance some inmates as others were removed due to fever or other Covid-19 symptoms. However, no action was taken, even though the CDC and the State of Texas continually warned to social distance for months. Why such a blatant indifference to the health and lives of inmates when proactive measures could have eliminated suffering and possibly saved lives?

~~EMERGENCY RESPONSE~~

Action Requested to resolve your Complaint.

Take protective steps to contain and protect those in harms way!

Offender Signature:

Date:

Grievance Response:

Signature Authority:

Date:

If you are dissatisfied with the Step 1 response, you may submit a Step 2 (I-128) to the Unit Grievance Investigator within 15 days from the date of the Step 1 response. State the reason for appeal on the Step 2 Form.

Returned because: *Resubmit this form when the corrections are made.

- ☐ 1. Grievable time period has expired.
- ☐ 2. Submission in excess of 1 every 7 days. *
- ☐ 3. Originals not submitted. *
- ☐ 4. Inappropriate/Excessive attachments. *
- ☐ 5. No documented attempt at informal resolution. *
- ☐ 6. No requested relief is stated. *
- ☐ 7. Malicious use of vulgar, indecent, or physically threatening language. *
- ☐ 8. The issue presented is not grievable.
- ☐ 9. Redundant, Refer to grievance # _____
- ☐ 10. Illegible/Incomprehensible. *
- ☐ 11. Inappropriate. *

UGI Printed Name/Signature: _____

Application of the screening criteria for this grievance is not expected to adversely affect the offender's health.

Medical Signature Authority: _____

I-127 Back (Revised 11-2010)

OFFICE USE ONLY

Initial Submission UGI Initials: _____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____

2nd Submission UGI Initials: _____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____

3rd Submission UGI Initials: _____

Grievance #: _____

Screening Criteria Used: _____

Date Recd from Offender: _____

Date Returned to Offender: _____

Appendix F

DEFS 3RD SUPPL DISCLOSURE - 2387

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

LADDY CURTIS VALENTINE and §
RICHARD ELVIN KING, individually and §
on behalf of those similarly situated, §
Plaintiffs, §

V.

**BRYAN COLLIER, in his official capacity, §
ROBERT HERRERA, in his official capacity, §
and TEXAS DEPARTMENT OF §
CRIMINAL JUSTICE, §
Defendants. §**

Civil Action No. 4:20-cv-01115

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

EXHIBIT H

(DEPO EXCERPTS OF BRYAN COLLIER 06.04.2020)

ORAL DEPOSITION OF BRYAN COLLIER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LADDY CURTIS VALENTINE
and RICHARD ELVIN KING,
individually and on
behalf of those similarly
situated,

Plaintiffs,

VS.

BRYAN COLLIER, in his
official capacity; ROBERT
HERRERA, in his official
capacity; and TEXAS
DEPARTMENT OF CRIMINAL
JUSTICE,

Defendants.

* Case No. 4:20-cv-01115

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Hon. Keith P. Ellison

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ORAL AND VIDEOTAPED DEPOSITION OF
BRYAN COLLIER

June 4, 2020

(Reported Remotely)

ORAL AND VIDEOTAPED DEPOSITION of BRYAN COLLIER,
produced as a witness at the instance of the
Plaintiffs, and duly sworn, was taken in the
above-styled and numbered cause on the 4th day of
June, 2020, from 10:11 a.m. to 4:17 p.m., via
videoconference, before Holly P. Burns, CSR, RMR, CRR,
in and for the State of Texas, reported by machine
shorthand, at the offices of Texas Department of
Criminal Justice, Huntsville, Texas, pursuant to the
Federal Rules of Civil Procedure, Seventeenth Emergency
Order Regarding the COVID-19 State of Disaster, and the
provisions stated on the record or attached hereto.

Job No. 67601

ORAL DEPOSITION OF BRYAN COLLIER

Page 24

1 A. The facilities division, as I recall, because
2 they were working more than one project that was
3 similar, expedited their work at that site. The
4 specific work detail, if I'm not mistaken, it wasn't in
10:41 5 the dorm -- it wasn't in the housing. It was more in
6 the medical area of the -- or the -- but not
7 necessarily, in other words, in the dorm cubicles or in
8 that housing but in other parts of the building that
9 they needed to complete.

10:41 10 Q. Sure, and I'm talking about the empty dorm
11 that you were talking about at the Pack Unit. What did
12 you do to get that ready to provide additional space
13 and in response to COVID-19 in this early March time
14 period?

10:41 15 A. The facilities division expedited their work
16 to complete the remaining pieces that they had to
17 finish at that dorm, and I believe that related to,
18 again, not the actual areas where the bunks are but
19 more toward where the medical staff would be and/or
10:42 20 other areas of the dorm. So, they expedited work to
21 get the dorm complete.

22 Q. When did you first -- when did TDCJ first use
23 that additional space at the Pack Unit that you were
24 aware was there back on March 4th during these
10:42 25 meetings?

ORAL DEPOSITION OF BRYAN COLLIER

Page 25

1 MS. VASQUEZ: Objection. Vague.

2 A. I don't recall the specific date. I know we
3 did not move offenders from Estelle or any other unit
4 to that location, and the Pack Unit ultimately used
10:42 5 that location.

6 Q. (BY MR. KEVILLE) Sure, and that's my
7 question. When did the Pack Unit first move offenders
8 into this empty dorm in order to provide more social
9 distancing in response to COVID-19?

10:43 10 A. I don't -- I'm not aware of that specific
11 date.

12 Q. These instructions that you talked about to
13 get the facilities work expedited, were these also
14 instructions that were made with no e-mails or no
10:43 15 records?

16 MS. VASQUEZ: Objection. Argumentative.

17 A. They were direct conversations with Cody
18 Ginsel, who is the director of the facilities division.
19 I do not know if he formulated e-mails or other
10:43 20 instruction to staff to complete that, that location,
21 because we were also completing one just very similar
22 location at Stiles, at the Stiles Unit.

23 Q. (BY MR. KEVILLE) How did Cody Ginsel get
24 these instructions? Was he at the meeting on
10:43 25 March 4th?

ORAL DEPOSITION OF BRYAN COLLIER

Page 102

1 offender where soap and the area where they can wash
2 their hands should be if there's a question of that. I
3 would also hope that the safety officer -- if the
4 offender indicated some specificity about his cleaning
13:39 5 supply need, that that could be something that we could
6 resolve, but I don't know what was within that request.

7 Q. (BY MR. KEVILLE) Okay. Have you or anyone
8 underneath you given any thought to relaxing the
9 prohibition on hand sanitizer in response to addressing
13:39 10 COVID-19?

11 MS. VASQUEZ: Objection. Vague.

12 A. We have considered and discussed the use of
13 hand sanitizer within our facilities.

14 Q. (BY MR. KEVILLE) Mr. Valentine -- I don't
13:39 15 know if you're aware -- uses a walker. Were you aware
16 of that?

17 A. I have become aware of that. I was not --
18 well, yes, I am aware of that.

19 Q. Mr. Valentine stated the reason he wanted hand
13:40 20 sanitizer is because, having a walker, it's difficult
21 for him to get to a sink to be able to wash his hands
22 frequently. Are you aware of that?

23 MS. VASQUEZ: Objection. Personal
24 knowledge. Sidebar.

13:40 25 A. No, sir, I'm not aware of that.

ORAL DEPOSITION OF BRYAN COLLIER

Page 131

1 by Warden Herrera. TDCJ and yourself did not make any
2 recommendations to make adaptations -- adaptations to the
3 CDC guidance based on the elderly population at the
4 Pack?

14:18 5 MS. VASQUEZ: Objection. Misstates prior
6 testimony. Overbroad and vague.

7 A. As I said earlier, what we have done with the
8 older population is during our protocol, as we ramped
9 up things like masks, we provided it to those offenders
14:18 10 first. We also have target tested those. We've
11 also -- now that we are doing testing of larger groups
12 of offenders, are specifically targeting units with
13 that population, those that are older as well as those
14 who have more chronic health conditions, which could be
14:18 15 at a higher level of risk.

16 Q. (BY MR. KEVILLE) When you say, "We're now
17 doing that," what are the things you're now doing, and
18 when did you start doing them?

19 A. We did masks for offenders that were 65 and
14:19 20 older back in April. We later gave those to all the
21 population, but the first population to get it were
22 those over 65.

23 We also did target testing on units that
24 had high numbers of positive tests, and that target
14:19 25 testing, which was done by UTMB, was specifically

ORAL DEPOSITION OF BRYAN COLLIER

Page 132

1 targeting offenders that were older or more vulnerable
2 due to health conditions. When we had the ability,
3 based on the acquiring of tests by the State, to do
4 much larger scale testing, such as the mass testing we
14:19 5 are doing now, we targeted units specifically with
6 older populations as well as those with more vulnerable
7 health conditions as well as those, more specifically,
8 those units that had positive employees or offenders
9 with those populations and then ultimately any unit
14:20 10 that had that population on it regardless of a positive
11 test or not.

12 Q. All the things you're talking about are things
13 that you've done across all of the facilities, correct?

14 A. Yes, sir.

14:20 15 Q. And, so, my question is: TDCJ did nothing to
16 adapt the guidance to the Pack Unit specifically in
17 their population?

18 MS. VASQUEZ: Objection. Misstates prior
19 testimony. Not reasonably limited in scope.

14:20 20 A. The way you say that, it sounds as if you're
21 asking me to say that the Pack Unit did not implement
22 the CDC guidelines, and that's certainly not the truth.

23 Q. (BY MR. KEVILLE) No. No. I'm asking you,
24 for the Pack Unit specifically, did TDCJ make any
14:20 25 specific adaptations to the CDC guidelines for the Pack

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

LADDY CURTIS VALENTINE and §
RICHARD ELVIN KING, individually and §
on behalf of those similarly situated, §
Plaintiffs, §

V.

BRYAN COLLIER, in his official capacity, §
ROBERT HERRERA, in his official capacity, §
and TEXAS DEPARTMENT OF §
CRIMINAL JUSTICE, §
Defendants. §

Civil Action No. 4:20-cv-01115

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

EXHIBIT I

(DEPO EXCERPTS OF ROBERT HERRERA 05.19.2020)

Robert Herrera - 5/19/2020

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LADDY CURTIS VALENTINE
and RICHARD ELVIN
KING, individually and
on behalf of those
similarly situated,

Plaintiffs,

v.

BRYAN COLLIER, in his
official capacity,
ROBERT HERRERA, in his
official capacity, and
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,

Defendants.

Case No.
4:20-cv-01115

Honorable
Keith P. Ellison

REMOTE VIDEO-RECORDED DEPOSITION OF

ROBERT HERRERA

VOLUME 1

Tuesday, May 19, 2020

Reported by Susan Perry Miller,

CSR-TX, CCR-LA, CSR-CA-13648

NCRA RDR, CRR, CRC

WRIGHT WATSON & ASSOCIATES

1250 South Capital of Texas Highway, Building 3, Suite 400 Austin, Texas 78746 (512) 474-4363

Robert Herrera - 5/19/2020

1 with spray bottles and disinfect the entire dorm,
2 and then each individual offender can obtain a spray
3 bottle to go in there and spray his individual
4 cubicle.

5 Q. So what did you do to disinfect
6 Mr. Clerkly's dorm?

7 A. Do what, now?

8 Q. What did you do to disinfect
9 Mr. Clerkly's dorm?

10 A. Used the bleach solution, go in there
11 and spray it down.

12 Q. Who?

13 A. Who what?

14 Q. Who did that? Who used the solution to
15 do things?

16 A. It's either an officer or an offender
17 under the supervision of an officer.

18 Q. That's like the inmates who do
19 janitorial duties?

20 A. That could be one of them, yes.

21 Q. Was an officer involved in cleaning
22 Mr. Clerkly's dorm?

23 A. I'm sure that there was an officer
24 involved, a staff member involved in one way or the
25 other.

WRIGHT WATSON & ASSOCIATES

Robert Herrera - 5/19/2020

1 another -- well, we can take a break in five
2 minutes, all right?

3 BY MR. EDWARDS:

4 Q. Sir, you were aware that there was an
5 empty dorm that could have been utilized to increase
6 social distancing, right?

7 A. Are you referring -- which dorms are you
8 referring to, sir?

9 Q. I don't know. Was there an empty dorm
10 or not?

11 A. There was.

12 Q. And prior to the injunction hearing, it
13 wasn't being used to increase social distancing, was
14 it?

15 A. It wasn't being used because -- part of
16 it may have been because it was still under
17 construction and we still had construction being
18 done on that side of the building.

19 Q. Is it being used now?

20 A. Yes, it is.

21 MS. VASQUEZ: Jeff, it's been an
22 hour. We need a break, please.

23 THE WITNESS: If y'all don't mind, I
24 do need one.

25 MR. EDWARDS: That's fine, we'll

WRIGHT WATSON & ASSOCIATES

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**LADDY CURTIS VALENTINE and
RICHARD ELVIN KING, individually and
on behalf of those similarly situated,
*Plaintiffs,***

V.

**BRYAN COLLIER, in his official capacity,
ROBERT HERRERA, in his official capacity,
and TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
Defendants.**

[illegible]

Civil Action No. 4:20-cv-01115

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

EXHIBIT J

(DEPO EXCERPTS OF RICHARD KING 05.27.2020)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LADDY CURTIS VALENTINE and *
RICHARD ELVIN KING, *
individually and on behalf *
of those similarly situated, *
Plaintiffs, *

v. *

Civil Action
No. 4:20-cv-01115

BRYAN COLLIER, in his *
official capacity, ROBERT *
HERRERA, in his official *
capacity, And TEXAS *
DEPARTMENT OF CRIMINAL *
JUSTICE, *
Defendant. *

REMOTE ORAL DEPOSITION OF

RICHARD KING

MAY 27, 2020

REMOTE ORAL DEPOSITION of RICHARD KING, produced as
a witness at the instance of the Defendants, and duly
sworn, was taken in the above-styled and numbered cause
on Wednesday, May 27, 2020, from 10:08 a.m. to 4:01 p.m.
Central Time, before Steven Stogel, CSR in and for the
State of Texas, remotely reported via Machine Shorthand,
pursuant to the Federal Rules of Civil Procedure.

1 A. Yes.

2 Q. Meaning there was no attempt at informal
3 resolution?

4 A. Yes.

5 Q. And on the second page, Bates numbered 0647,
6 you still received a response from the unit saying that,
7 "Your grievance has been received and investigated. Per
8 classification, unit classification has no control over
9 offenders arriving at the Pack Unit. Due to the
10 COVID-19 pandemic, as of April 9, 2020, chain was
11 suspended until further notice. No further action
12 warranted at this time."

13 Is that what it says?

14 A. Yes.

15 Q. So, you would agree with me that even though
16 you didn't attempt informal resolution, your grievance
17 was still processed. Correct?

18 A. Yes.

19 Q. Do you believe that TDCJ has the authority to
20 stop inmate transfers into the Pack Unit?

21 A. TDCJ? You mean the prison system?

22 Q. Yes.

23 A. Of course they -- of course they do.

24 Q. Okay.

25 A. Yes.

1 **Q. Who?**

2 A. I couldn't tell you who. Like I said earlier,
3 we're liable to have four or five, six different
4 officers working outside our door at any one given time.
5 I mean, they come and go. They -- they relieve each
6 other. They -- one gets a call somewhere else.
7 Somebody comes to take his place for a short while. And
8 they change every day. I mean, we don't -- we very
9 seldom have the same officer working. So I don't -- I
10 don't know who.

11 **Q. How many times have you asked an officer for**
12 **additional chemicals during your shift?**

13 A. Maybe two times.

14 **Q. And what was their response?**

15 A. "The chemicals, Ms. Maxey handles that."

16 **Q. And so can you go to Ms. Maxey and ask her for**
17 **more chemicals?**

18 A. No.

19 **Q. Did you ask them to ask Ms. Maxey for more**
20 **chemicals?**

21 A. No, I didn't ask them that, no.

22 **Q. Do you believe Ms. Maxey has the authority**
23 **to -- or the Pack Unit has the authority to give you**
24 **more chemicals if you ask for it?**

25 A. I would hope so. I don't -- I don't know.

1 **Q. Do you have any reason to believe that the**
2 **Pack Unit does not have the authority to give you more**
3 **chemicals if you ask for it?**

4 A. I don't see why they wouldn't have the
5 authority.

6 **Q. When was the first time that you ran out of**
7 **chemicals during your shift?**

8 A. Well, we basically run out of chemicals every
9 day.

10 **Q. So would it be safe to say that you would have**
11 **run out of chemicals on your first day of working as a**
12 **janitor around April 13th?**

13 A. Yeah, possibly. I mean, yeah.

14 **Q. But you didn't raise that with TDCJ or anyone**
15 **from TDCJ, including Ms. Maxey, until somewhere**
16 **around -- let me see. You filed your grievance on**
17 **May 12th, and you said that you talked to Ms. Maxey**
18 **about it and asked her for more chemicals a week before**
19 **that. So that was about three weeks after you had been**
20 **running out of chemicals on a daily basis?**

21 MR. MEDLOCK: Object to form.

22 A. No, because I -- I mentioned to Ms. Maxey a
23 number of times about we needed more chemicals.

24 **Q. (By Ms. Vasquez) Well, earlier --**

25 A. And I --

1 THE REPORTER: Off the record at 3:14.

2 (Recess from 3:14 p.m. to 3:20 p.m.)

3 THE REPORTER: We are back on the record
4 at 3:20 p.m.

5 Q. (By Ms. Vasquez) Mr. King, you filed a
6 grievance about the transfers into Pack around
7 April 2nd. Correct?

8 A. Yes.

9 Q. And you said since then the transfers have
10 stopped?

11 A. Yes.

12 Q. All right. The grievance you submitted about
13 your -- the cleaning chemicals, that was just filed on
14 May 12th?

15 A. Yes.

16 Q. Have you received a response yet?

17 A. No.

18 Q. Okay. So that grievance is still in process.
19 Right?

20 A. Yes.

21 Q. Regarding the cleaning chemicals, what are you
22 not receiving -- or what are you not being able to clean
23 as a result of running out of those chemicals halfway
24 through your shifts?

25 A. We -- there's hail the size of golf balls it