

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

AARON HOPE, et al.,

Petitioners-Plaintiffs,

vs.

CLAIR DOLL, in his official capacity as
Warden of York County Prison, et al.,

Respondents-Defendants.

Case No. 1:20-cv-00562

Judge John E. Jones III

**PETITIONERS' OPPOSITION AND RESPONSE TO RESPONDENTS'
MOTION TO RECONSIDER THE TEMPORARY RESTRAINING ORDER**

INTRODUCTION

Respondents have failed to allege “manifest errors of law or fact” and thus have not met their high burden to justify setting aside this Court’s April 7 Order granting Plaintiffs’ motion for temporary restraining order. ECF 11. Respondents’ attempt to incorporate by reference legal arguments they recently filed in *Thakker v. Doll*, 1:20-cv-00480, similarly fails to identify manifest errors of law. Perhaps most importantly, Respondents’ motion delaying relief merely heightens the risk to detainees, staff and surrounding communities, as evidenced by developments at the facilities since Petitioners filed this case less than one week ago. At Pike, two female detainees have died, and five others are infected, along with seven correctional officers. Nearly every unit is on “quarantine” (as ICE interprets that term to mean keeping large numbers of potentially infected people together rather than in isolation). York has one confirmed infection, but the many symptomatic detainees cannot get the facility to test them. Respondents’ one declarant, Mr. Dunn, helpfully confirms, either directly or by failing to respond to Petitioners’ claims, the fact that the facilities are not complying with CDC recommendations.

The timing of Respondents’ motion for reconsideration is puzzling, considering that top ICE officials were on Capitol Hill the same day (April 7),

promising lawmakers that they will be releasing medically vulnerable detainees,¹ just like the 22 Petitioners this Court ordered released yesterday morning.² The question is no longer whether COVID-19 will enter these facilities; it has arrived, and with a vengeance at Pike. Given the conditions, York will fare no better. Unless this Court orders the medically vulnerable petitioners released forthwith, their chances of contracting the virus in the petri-dish conditions is near certain, and the consequences are likely to be tragic.

ARGUMENT

A. Respondents' Fail to Meet the Motion to Reconsider Standard

Respondents have not met the standard for reconsideration under Fed. R. Civ. P. 59(e), which “serve[s] primarily to correct manifest errors of law or fact in a prior decision of the court. *York Int’l Corp. v. Liberty Mut. Ins. Co.*, 140 F. Supp. 3d 357, 360-61 (M.D. Pa. 2015) (citing *United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003)). Under Rule 59(e), “a judgment may be altered or amended if the party seeking reconsideration establishes at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment;

¹ See Ex. 28.

² On April 7, 2020, Petitioner Iwan Rahardja notified his undersigned counsel that ICE had released him from custody. Neither Respondents nor their lawyers have notified Petitioners’ counsel. Therefore, only 21 Petitioners remain in detention.

or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.” *Max’s Seafood Café ex rel. Lou–Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir.1999). Respondents do not contend that there is an intervening change in the law or that there is a clear error of law or fact. Consequently, their sole argument is based on allegedly new evidence presented in a declaration by Joseph Dunn, an assistant director of enforcement and removal operations at ICE’s Philadelphia office. Dunn Decl. at ¶¶ 1, 2. As discussed below, Mr. Dunn’s testimony fails to rebut Petitioners’ central arguments that the detention centers do not practice safe social distancing nor follow many critical CDC recommended public health practices. As such, and because reconsideration is considered an extraordinary remedy that should be granted sparingly, this Court should deny the Respondents’ Motion to Reconsider. *See D’Angio v. Borough of Nescopeck*, 56 F.Supp. 2d 502, 504 (M.D.Pa.1999).

B. Respondents’ Evidence Fails to Address, Much Less Refute, Petitioners’ Central Claims, While Admitting that they are not Following CDC Guidelines

Mr. Dunn’s qualifications

As an initial matter, the Dunn declaration is flawed because he neither has the necessary expertise nor relevant first-hand knowledge. As the Philadelphia Assistant Field Officer Director responsible for law enforcement, he has no evident responsibility for, or expertise in, medical care or public health. *Id.* at ¶¶ 1, 2.

Second, he does not contend that he has first-hand information about practices at the facilities, but rather relies on unidentified sources. In his own words, he is “informed” that facilities are following CDC guidance, ¶ 8; “understand[s]” that facilities follow guidance, *id.*; “informed” about screening process, ¶ 9; and “informed” about cohorting practices, ¶ 12. Respondents had ample time during the four days they took to respond to produce declarations from medical professionals who have first-hand knowledge of, and actually oversee, operations at the respective facilities. But even without considering his shortcomings, Mr. Dunn effectively admits the dangerous conditions and practices within the facilities.

Failure to Address Facilities’ Inability to Practice Safe Social Distancing

Most importantly, Mr. Dunn does not even attempt to claim that the facilities are implementing the CDC recommended guidance for social distancing, namely by ensuring “6 feet between all individuals, regardless of the presence of symptoms” Amon Decl. at ¶ 42 (ECF 3). The fact that the facility as a whole is not at its maximum capacity does not answer the question whether those who are being detained can practice this primary means of virus prevention. Amon Decl. at ¶ 35 (ECF 3). Mr. Dunn does not refute or even dispute the Petitioners’ verified pleading that they are housed in spaces where it is not possible to maintain six feet of separation from others, *i.e.*, triple celled at Pike, and in rooms clustering up to 60 individuals at York. Indeed, Respondents’ motion attempts to elide this central

feature of Petitioners’ argument by characterizing Petitioners’ claims as “premised . . . on alleged sanitary conditions at the facilities....” Docket No. 12 at ¶ 3. In fact, the importance of social distancing, which underlies the stay-at-home and business-closure orders affecting almost 300 million people in nearly all states, including Pennsylvania, could not be more prominent in Petitioners’ pleadings and Dr. Amon’s expert declaration. *See* Complaint (ECF 1) ¶¶ 40-49, 116-119 53, 55; TRO Memorandum of Law (ECF 6) at 6, 7; Amon Decl. at ¶¶ 33-42, 45-46, 48, 55, 67, 69.

The “Cohorting” Mr. Dunn Describes Contravenes CDC Recommendations

Even where Mr. Dunn provides details of the policies in place at these facilities, his descriptions reveal that ICE’s alleged preventative measures fall short of the CDC’s recommendations. Mr. Dunn claims that the facilities are practicing cohorting, a policy that the CDC identifies as a last resort. The CDC admonishes that facilities must not “cohort confirmed cases with suspected cases or case contacts.” Amon Decl. at ¶ 57 (ECF 3). Yet Mr. Dunn touts a policy that does just that: any person who has had contact with a confirmed case is forced into a common space.³

³ Dunn also claims that individuals who present symptoms will be placed in isolation, where they will be tested. *See* Dunn Decl. at ¶ 11. He further states that people who are diagnosed are placed in an “appropriate setting.” Leaving aside the fact that this assertion contradicts his later statement that individuals in Pike who are symptomatic are quarantined *with their cellmates*, he fails to respond to Petitioners’ concerns that there is insufficient space in detention facilities to isolate

Dunn Decl. at ¶ 12.

At Pike, this means that cellmates of an individual with symptoms are kept in the same quarantined cell as the infected individual. Dunn Decl. at ¶ 22.b. At York, where individuals are housed in dorms, the whole dorm would be subject to such a quarantine. Because detained individuals cannot practice social distancing in these quarantined spaces, the facilities are forcing vulnerable individuals into direct contact with the virus. Amon Decl. at ¶ 61 (ECF 3). In so doing, they are facilitating transmission, including to Petitioners and others who are elderly and/or medically vulnerable, for whom infection may be a death sentence. *Id.* at ¶¶ 61, 70

Screening Practices Ineffective Because Virus Already in Facilities.

Mr. Dunn admits (but understates the extent to which) the virus has already penetrated both facilities. Dunn Decl. at ¶ 21. Five individuals in immigration detention, not to mention correctional officers working in the detention facilities, have already tested positive for COVID-19, *id.*, a stark increase from the one

all symptomatic individuals. *See* Amon Decl. at ¶ 60 (ECF 3) (“Given the rate of spread in detention facilities, there will be many more than 1-4 people with COVID-19 in the detention centers. This limited physical infrastructure will mean that ICE cannot comply with this protocol [for isolating individuals in separate spaces]).” Nor does he provide any detail as to what this “appropriate setting” looks like in the limited space of detention facilities. Again, his omission serves as an admission that ICE has not actually implemented these specific CDC-recommended measures, like isolation rooms.

individual with confirmed infection less than a week ago. Amon Decl. at ¶ 53. What Dunn has failed to mention is that this spread has been lethal: two detainees in Pike have died after exposure to infection at the facility. Ex. 27. Many blocks at Pike are now under quarantine as individuals are reporting COVID-19 symptoms. See Thompson Decl. at ¶¶ 2, 7. Dorms in York have also been put under quarantine, where sick individuals remain without testing. Supp. Decl. Mukhina at ¶¶ 3-4. In the context of inadequate testing, a lack of proven cases is “functionally meaningless” for determining risk of COVID-19 transmission. Golob Decl. (ECF 3-3) at ¶ 7. Despite the government’s failure to test those who are symptomatic and report results, individuals in detention have been informed that they’ve been exposed to the virus. Supp. Decl. Briette at ¶ 4; Supp. Decl. Murray at ¶ 5.

Nor will the screening practices Mr. Dunn describes prevent further introduction of the virus into the facilities, or the transportation of the virus back into the surrounding communities by those who leave the facility regularly. Dunn Decl. at ¶¶ 9, 10. The questions asked of new detainees and the temperature screening of staff fail to account for community spread and presymptomatic transmission: “Given presymptomatic transmission, to effectively screen staff, the facilities would have to conduct frequent (daily) tests, implemented at multiple times a day as staff and detainees entered the facility.” Amon Decl. at ¶ 50(d) (ECF 3). Nowhere does Dunn allege such widespread and aggressive testing. And new admissions should be

quarantined for fourteen days, regardless whether symptomatic, Amon Decl. at ¶ 50(d), which does not and, given space limitations, could not happen.

Hygiene Practices Also fall Short of CDC Recommendations

Even Mr. Dunn's description of new masking procedures for all staff at York and Pike is facially problematic. Notably, Mr. Dunn does not allege that masks are given to all detainees. Individuals at York are allegedly given masks only when they leave a cohorted unit or work in the kitchen, and even then they are not given the N-95 masks proven most effective to prevent the spread of the virus. Dunn Decl. at ¶ 22(a).

Mr. Dunn makes no claim that detainees at either facility are provided sterile masks while they are in their cohorts, as recommended by the CDC to prevent spread of infection. *See* Amon Decl. at ¶ 58 (ECF 3). Petitioners confirm that they are not given masks while cohorted in cells. Supp. Decl. Sannoh at ¶ 7. Where they are provided masks, they are given one mask to wear for days on end, creating opportunities for infection from the mask itself. *Id.*; Supp. Decl. De La Pena at ¶ 4; Supp. Decl. Mukhina at ¶ 2; *see also* Amon Decl. at ¶ 58 (ECF 3) (describing necessary sanitization procedures when using masks including replacing mask after each use and washing hands after removing mask).

Even on basic hygiene precautions Mr. Dunn's declaration exposes glaring problems. While he describes how staff are provided with hand sanitizer, he omits

any mention of giving sanitizer to detainees. Dunn Decl. at ¶ 14a-b. Petitioners confirm that they are not receiving sanitizer. Supp. Decl. Briette at ¶ 8; Supp. Decl. Sannoh at ¶ 7.

Mr. Dunn's Declaration Effectively Confirms the Facilities Do not Abide by CDC Guidelines

In sum, Mr. Dunn either admits, or admits by omission, that the facilities are not following the CDC-recommended public health precautions. They are failing to implement the primary means to prevent infectious spread, social distancing, by continuing to house people in dorms and cells where they cannot maintain six feet of separation. Amon Decl. at ¶ 42; This remains true even when individuals exhibit symptoms of COVID-19: instead of isolating those who are infected, Mr. Dunn admits that symptomatic individuals remain in confined spaces with others, Dunn Decl. at ¶ 22(b), and people are cohorted without regard to whether they have contracted the virus or not, *id.* at 12. The CDC specifically disavows this practice because it threatens to facilitate transmission to those who are not yet infected. Amon Decl. at ¶¶ 57, 61 (ECF 3). Screening mechanisms fail to isolate those who may have been exposed but are asymptomatic, Dunn Decl. at ¶ 11, Amon Decl. at ¶ 50 (ECF 3), and lack of widespread testing creates conditions for introduction into facilities that the CDC has warned against. Amon Decl. at ¶ 66 (ECF 3). Nor are the new hygiene measures that have allegedly been implemented sufficient where the facility limits the number of masks and where sanitization supplies like hand

sanitizer are not provided. *See id.* (citing to CDC's recognition that risks are heightened where facilities restrict access to soap and paper towels and prohibit alcohol-based hand sanitizer and many disinfectants). The consequences of these failures manifest in the increasing numbers of symptomatic and infected individuals at York and Pike.⁴

C. Conditions at Pike and York Have Deteriorated and Petitioners Continue to be in Danger

Given the trajectory of this highly contagious and often deadly virus, it is unsurprising that the conditions at both Pike and York have deteriorated, even since Petitioners filed this case less than a week ago, on April 3.

Most significantly, Mr. Dunn fails to mention that two detainees at Pike have now died. Ex. 27. Mr. Dunn also substantially understates the amount of contagion, acknowledging only four ICE detainees at Pike have COVID-19. Dunn Decl. at ¶ 21. In fact, however, five detainees, in addition to the two who passed away, have tested positive, as have seven staff members. Ex. 27. Yesterday (April 7), the person in the cell next to Petitioner De La Pena tested positive for COVID-19, and Pike

⁴ Mr. Dunn also recites, at length, the Petitioners' purported criminal histories. Putting aside that some of his representations are imprecise or inaccurate, the focus on past criminal conduct is a red herring. Almost all the Petitioners have non-violent convictions (and some merely have pending charges, no convictions). For the few Petitioners that do, they are dated and/or they have taken steps towards rehabilitation. Importantly, for those with convictions, they have already completed their criminal sentences. There is no reason to deny their release given the myriad supervision tools ICE have at their disposal.

officials have left him in the cell, with his cellmates. Supp. Decl. De La Pena at ¶ 1. Petitioner Rodriguez has COVID-19 symptoms since March 29, including breathing problems, a cough and a fever, but prison officials have not tested or quarantined him, nor has he been seen by a physician. See Thompson Decl. at ¶ 5. Three correctional officers have quit in the last few days, Supp. Decl. De La Pena at ¶ 3, causing a staffing shortage. Supp. Decl. Murray at ¶ 4. Apparently, there is only one block that does not have someone who tested positive for COVID-19. Supp. Decl. Briette at ¶ 2.

At York, at least one detainee has tested positive for COVID-19. Ex. 37; *see also* Supp. Decl. Mukhina at ¶ 4. The COs are nervous too; they told Petitioner Gebretnisae that it is “too risky and that we shouldn’t be here.” Supp. Decl. Gebretnisae at ¶ 11. And while COs have been provided masks, most of the time they wear them on their foreheads, leaving their mouths uncovered. Supp. Decl. Paul at ¶ 3. Detainees are not provided with gloves except to clean, except that today one Petitioner received gloves to call his lawyer. Supp. Decl. Paul at ¶ 3; Supp. Decl. Gebretnisae at ¶ 2.

Petitioners at Pike report that they continue to be unable to meaningfully engage in **social distancing**. *See e.g.* Supp. Decl. Briette at ¶ 2 (recreation with many other men). Detainees continue to be triple celled, even if they have COVID-19 symptoms. Supp. Decl. Murray at ¶ 6; Thompson Decl. at ¶ 7. Even where, like in

Petitioner De La Pena's block, only one cell is let out at a time, "half his block" has fevers and his cell is next to someone who tested positive for COVID-19. Supp. Decl. De La Pena at ¶ 2. At York, Petitioners are likewise unable to practice social distancing. *See e.g.* ECF 3-8 at ¶ 10 ("I am on a lock with around 56 other women. Imagine that, 56 people sharing 4 showers, six sinks, and six toilets. This is a recipe for disaster."); Supp. Decl. Paul at ¶ 5 (confirming he is still housed with 42 men); *see also* ECF 3-15 at ¶ 12.

Lack of adequate **personal protective equipment** continues to be a problem. While detainees have been provided masks at Pike, they have been told to reuse them and their gloves because they are in short supply. Supp. Decl. De La Pena at ¶¶ 5, 8; Thompson Decl. at ¶¶ 2, 5; Supp. Decl. Briette ¶ 6. York also began providing masks to some blocks but they are in short supply and detainees have been told to reuse them. Supp. Decl. Dembo Sannoh at ¶ 7; Supp. Decl. Paul at ¶ 3. Other blocks do not have masks. Supp. Decl. Gebretnisae at ¶ 2. On the women's side, staff began wearing masks last week, but none were made available to detainees until April 5, 2020. Supp. Decl. Mukhina at ¶ 5. This was two days after a detainee on their block tested positive for COVID-19 and more than one week after the woman first exhibited symptoms. *Id.* at ¶ 2; ECF 6-8.

Hygiene has also gotten worse. At Pike, Petitioner Murray describes how they ran out of soap on April 5 and he was unable to thoroughly wash his hands for several

days. Murray Decl. at ¶ 3. Pike ran out of cleaner, forcing detainees to wait for hours until more was provided. Supp. Decl. Brisette at ¶ 8. The showers are cleaned once a day, which means multiple users shower between cleanings. *Id.* at ¶ 9. The food on Petitioner De La Pena's block is served by a detainee who has a fever; the same detainee also cleans his block. Supp. Decl. De La Pena at ¶ 9, 10. Detainees are not provided with hand sanitizer. Thompson Decl. at ¶ 11. At York, detainees also do not have sanitizer. Supp. Decl. Gebretnisae at ¶ 8; Supp. Decl. Paul at ¶ 4. Petitioners also report insect infestation. *Id.* at ¶ 11 (black worms or maggots in the shower); Supp. Decl. Sannoh at ¶ 9 (flies).

Despite Mr. Dunn's claims that healthcare is accessible, Petitioners continue to report **profound deficiencies in medical care**. At Pike, Petitioner Rodriguez has not been seen by a doctor for his COVID-19 symptoms, despite multiple requests. Thompson Decl. at ¶¶ 3, 4. And at York, a woman, who at the time was symptomatic and now is confirmed with COVID-19, was left in the women's block (about 56 women) for several days prior to receiving medical attention, despite repeated requests. Supp. Decl. Mukhina at ¶ 5; ECF 3-8 at ¶ 10. Petitioners have also not received adequate medical care—or even attention—despite repeated requests. *See e.g.* Supp. Decl. Sannoh at ¶ 3; Supp. Decl. Paul at ¶¶ 7, 8 (describing how nurse told him would have appointment with doctor weeks ago but has not been seen).

In sum, Petitioners’ supplemental declarations confirm not only that the problems originally alleged in the verified complaint persist, but have worsened. And the increasing number of positive tests, symptomatic people and deaths are undeniable, which likely is why Respondents have not done so.

D. Respondents’ Legal Arguments Fail to Identify a Manifest Error of Law

Respondents’ legal arguments, incorporated by reference from *Thakker v. Doll*, largely restate arguments already raised and rejected by this Court and the many courts around the country that have ordered ICE to release detainees. Nonetheless, Petitioners address in greater depth one argument, not because it is more persuasive but because it has not been addressed sufficiently.

As a threshold matter, Respondents’ contention that Petitioners are challenging the conditions of their confinement – in the sense of seeking different or more favorable conditions – is incorrect. Petitioners seek immediate release on the ground that there are no conditions of confinement, short of release, sufficient to prevent a violation of their Constitutional rights. Such a claim lies at the very core of habeas. *See Camacho Lopez v. Lowe*, Civil Action No. 3:20-CV-563, Doc. 11 (M.D. Pa. April 7, 2020), slip op. at 9 (“When a petitioner seeks immediate release from custody, the ‘sole federal remedy’ lies in habeas corpus”) (quoting *Preiser v. Rodriguez*, 411 U.S. 475 (1973)).

Even construing Petitioners' claim as a challenge to conditions of confinement, Respondents' argument fails. Respondents concede that neither the Supreme Court nor the Third Circuit has foreclosed challenging conditions of confinement via habeas (Opp. at 26, Thakker). Indeed, they further concede that the Third Circuit has approved such challenges under what they characterize as "exceptional factual and legal circumstances." *Id.* at 26-27 (citing *Ali v. Gibson*, 631 F.2d 1126, 1128 (3d Cir. 1980) and *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235, 241-43 (3d Cir. 2005)).

On April 7, Chief Judge Conner, relying upon *Ali* and *Woodall*, held that an ICE detainee's claim that he was infected with the virus causing COVID-19 and was not receiving appropriate treatment was cognizable in habeas. *Camacho Lopez*, slip op. at 12-13. That holding applies with equal force here. See also *Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 1663133, at *7-8 (D. Md. Apr. 3, 2020) (claim by ICE detainees seeking release on the ground that their exposure to COVID-19 while in detention violated their Constitutional rights was properly brought under sec. 2241).

Defendants' argument proves entirely too much. They argue both that Petitioners' claims are not cognizable in habeas, and that release is categorically unavailable in a civil action – and therefore is never available at all. Opp. at 44-48. The former claim is wrong, as just demonstrated; the latter claim disregards, and is

contrary to, binding Supreme Court precedent. *See Brown v. Plata*, 563 U.S. 493 (2011) (affirming prisoner release order where overcrowding was the “primary cause” of violation of prisoners’ right to adequate medical and mental health care).

CONCLUSION

Every minute matters. Petitioners ask this Court to reinstate its Order for remaining Petitioners’ immediate release, before it is too late.

Dated: April 8, 2020

Respectfully Submitted,

/s/ Will W. Sachse

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**Petition for permission to file pro hac vice forthcoming*

***Admitted pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Response to Respondents' Motion for Reconsideration on counsel of record via the Court's ECF filing system.

Dated: April 8, 2020

/s/ Vanessa L. Stine

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