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May 12, 2020

Francis V. Kenneally
Clerk, Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Suite 1300
Boston, MA 02108

Re: Foster et al. v. Mici et al., SJC-12935

Dear Clerk Kenneally:

Plaintiffs submit this letter under Mass. R. App. P. 16(l) to address two issues: First, Plaintiffs respond to the Court's question in its Order of May 8 about whether 42 U.S.C. § 1983, was the source of relief in *Brown v. Plata*, 563 U.S. 493 (2011). Second, Plaintiffs bring to the Court's attention a case ordering release of sentenced prisoners under the Eighth Amendment because of COVID-19.

1. Section 1983 was the source of the relief granted in *Brown v. Plata*.

In *Plata*, the Supreme Court reviewed the relief granted in two consolidated cases brought under Section 1983: *Coleman v. Wilson*, 912 F. Supp. 1282, 1293 (E.D. Cal. 1995) ("Plaintiffs, state prisoners who suffer from serious mental disorders, brought suit under 42 U.S.C. § 1983 alleging that the mental health care provided at most institutions within the California Department of Corrections is so inadequate that their rights under the Eighth and Fourteenth Amendments to the United States Constitution are violated."), and *Plata v. Brown*, No. C-01-1352

TEH, 2013 WL 12436093 (N.D. Cal. 2013) (Westlaw background describing "prisoners with serious medical conditions filed class action against California state officials, asserting § 1983 claims for constitutional violations based on alleged inadequate medical care due to prison overcrowding.").[1]

In each case, the district court judge allowed motions to convene a three-judge district court pursuant to Section 3626(B) of the Prison Litigation Reform Act ("PLRA") to decide whether a "prisoner release order" was necessary to remedy the unconstitutional overcrowding. [2] Significantly, the three-judge court proceeding was not a new or separate action. *See Plata v. Schwarzenegger*, No. C-01-1352, 2009 WL 2710323, at *2 (N.D. Cal. 2009) ("PLRA provisions governing three-judge court proceedings clearly demonstrate that these [three-judge court] proceedings are part of preexisting civil actions, not a new action.").

By its express terms, the PLRA does not create a cause of action, but rather puts limits on the remedies a court may order in "any civil action with respect to prison conditions." 18 U.S.C. § 3626(a)(1), (2) and (3). The term "civil action with respect to prison conditions" is defined as "any civil proceeding **arising under Federal law** with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison[.]" 18 USC § 3626(g)(2) (emphasis supplied). Thus, prisoners do not obtain relief under the

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[1]The Amended Complaint in *Plata* can be found at https://www.clearinghouse.net/chDocs/public/PC-CA-0018-0004.pdf. All claims were brought under § 1983 or the Americans with Disabilities Act. The Amended Complaint does not mention the Prison Litigation Reform Act.

[2]The PLRA provides that in Federal court, but not state court, only a three-judge court may enter a "prisoner release order." Section 3626(3)(B). Any order this Court might enter prohibiting Defendants from housing prisoners where they could not live six feet apart, would not qualify as a "prisoner release order." *See Inmates of Suffolk Cnty. Jail v. Sheriff of Suffolk Cnty.*, 952 F. Supp. 869 (D. Mass. 1997), aff'd as modified and remanded, 129 F.3d 649 (1st Cir. 1997) (population cap limiting double-celling was not a "prisoner release order" in the absence of an order to release).

PLRA; their relief comes from the substantive law under which they sue. *See Benjamin v Jacobson*, 172 F.3d 144, 163 (2d Cir. 1999) ("the Act neither alters the scope of substantive rights nor limits the type of relief that may be ordered if that relief is necessary to redress violations of those rights. Rather, the Act forbids forward-looking relief in excess of what the court finds is necessary.").

2. In *Wilson v. Williams*, the court ordered the Federal Bureau of Prisons to evaluate sentenced prisoners for release finding a likelihood of an 8th Amendment violation despite Defendants efforts to mitigate the risk of COVID-19 infection.

At oral argument the Court also asked for citations in addition to *Plata* that involve the claims of sentenced prisoners and have found deliberate indifference despite the defendants' inability to remedy the harm. Plaintiffs refer the court to *Wilson v. Williams*, No. 4:20-CV-00794, 2020 WL 1940882 (N.D. Ohio Apr. 22, 2020), stay denied by No. 20-3447, 2020 WL 2120814 (6th Cir. Apr. 30, 2020) (6th Cir. May 4, 2020) and 2020 WL 2308441 (N.D. Ohio May 8, 2020). Noting that "despite their efforts, the [defendants] fight a losing battle," *id.* at *1, the court found that the prison's dormitory-style structure rendered it unable to implement or enforce CDC-recommended social distancing of at least six feet, *id.* at *9. Accordingly, it issued a preliminary injunction ordering the Federal Bureau of Prisoners to (1) evaluate each prisoner's eligibility for transfer out "through any means, including but not limited to compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough within two (2) weeks;" (2) prioritize this review by the medical threat level; and (3) transfer prisoners who were "ineligible for compassionate release, home release, or parole or community supervision" to another BOP facility where appropriate measures, such as testing and single-cell placement, or social distancing, may be accomplished." 2020 WL 1940882, at *10-11.

Respectfully Submitted,

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