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May 13, 2020

Francis V. Kenneally, Clerk
Supreme Judicial Court
John Adams Courthouse
1 Pemberton Square, Suite 2500
Boston, MA 02108

RE: Post-Argument Letter in No. SJC-12935 RE: May 8, 2020 Order

Dear Mr. Kenneally:

On behalf of Commissioner Mici, I respond to the Order entered on May 8, 2020 directing the Commissioner of Correction to submit to the Court a post-argument letter answering the following questions:

For the Commissioner of Correction and the Chair of the Massachusetts Parole Board:

1. For each month from January 2019 through the present, what is the number of persons admitted to DOC custody and the number of persons released from DOC custody?

2019 Admissions/Releases(civil, criminal, pre-trial):
January: 562/545
February: 503/524
March: 591/537
April: 588/582
May: 630/709

June: 651/582
July: 624/704
August: 600/646
September:652/582
October: 542/756
November: 402/559
December: 340/471
2019 Totals: 6,685/7,197

2020 Admissions/Releases(civil, criminal, pre-trial):
January: 461/450
February: 437/406
March: 257/415
April: 96/526
Thru May 11: 41/146
2020 Totals: 1,292/1,943

2. Of the number of persons released for each month in 2020, how many were released:

a. because of the completion of their sentence;
January: 119
February: 117
March: 65
April: 130
Thru May 11: 51
2020 Total Completion Of Sentence Releases: 482

b. because of the grant of a parole permit;
January: 52
February: 51
March: 52
April: 141
Thru May 11: 55
2020 Total Parole Permit Releases: 351[1]

[1] These parole totals encompass the following categories: mandatory parole as release to supervision(RTS); mandatory parole as RTS to street; medical parole; parole to federal authority; parole to immigration; parole to out-of-state sentence; parole to street; and parole to warrant.

c. because of other reasons?[2]

January: 253
February: 225
March: 285
April: 225
May: 35

3. Of the number of persons admitted for each month in 2020, what was the reason for their admission (e.g. sentenced by court, parole violation, etc.)?

January:

Civil Admissions (Total: 219)

New Court Commitment	216
Re-admit From Court Release	0
Return From Elopement	1
Return From Escape	2

Criminal Admissions (Total: 190)

From And After Sentence	0
MA Parole Detainer	19
New Court Commitment	160
Parole Violator(MA)	5
Probation Violator	1
Re-Admit From Court Release	2
Received From Federal Authority	1
Received From HOC	2
Return From HOC	1

Pre-Trial Admissions (Total: 52)

MA Parole Detainer	2
Temporary Custody	50

[2] The other reasons include the following: 1)bailed/released on personal recognizance to a warrant; 2)bailed/released on personal recognizance; 3)court release- sentence revoked/stayed/vacated; 4)discharged from parole; 5)escape; 6)habeas to court- did not return; 7)non-DOC inmate to hoc/fed/pd/other state; 8)release from civil commitment to a warrant; 9)release from civil commitment; release from MA parole detainer. Medical paroles are included in the parole permits.

February:

Civil Admissions (Total: 225)

New Court Commitment	224
Re-admit From Court Release	1
Return From Elopement	0
Return From Escape	0

Criminal Admissions (Total: 161)

From And After Sentence	0
MA Parole Detainer	16
New Court Commitment	140
Parole Violator(MA)	3
Probation Violator	0
Re-Admit From Court Release	0
Received From Federal Authority	0
Received From HOC	2
Return From HOC	0

Pre-Trial Admissions (Total: 51)

MA Parole Detainer	0
Temporary Custody	51

March:

Civil Admissions (Total: 138)

New Court Commitment	136
Re-admit From Court Release	0
Return From Elopement	0
Return From Escape	2

Criminal Admissions (Total: 87)

From And After Sentence	0
MA Parole Detainer	12
New Court Commitment	70
Parole Violator(MA)	1
Probation Violator	0
Re-Admit From Court Release	0
Received From Federal Authority	1
Received From HOC	3
Return From HOC	0

Pre-Trial Admissions(Total: 32)

MA Parole Detainer	1
Temporary Custody	31

April:

Civil Admissions (Total: 72)

New Court Commitment	72
Re-admit From Court Release	0
Return From Elopement	0
Return From Escape	0

Criminal Admissions (Total: 15)

From And After Sentence	1
MA Parole Detainer	5
New Court Commitment	4
Parole Violator(MA)	3
Probation Violator	0
Re-Admit From Court Release	0
Received From Federal Authority	0
Received From HOC	0
Return From HOC	2

Pre-Trial Admissions (Total: 9)

MA Parole Detainer	0
Temporary Custody	9

Thru May 11:

Civil Admissions (Total: 29)

New Court Commitment	29
Re-admit From Court Release	0
Return From Elopement	0
Return From Escape	0

Criminal Admissions (Total: 12)

From And After Sentence	1
MA Parole Detainer	4
New Court Commitment	2
Parole Violator(MA)	4

Probation Violator	0
Re-Admit From Court Release	0
Received From Federal Authority	0
Received From HOC	1
Return From HOC	0

Pre-Trial Admissions (Total: 0)

MA Parole Detainer	0
Temporary Custody	0

4. If the number of persons released was significantly lower in April 2020 than in earlier months, what were the reason(s) for the reduction?

Releases in April 2020 increased to 526 from an average of 423 in the preceding months of 2020.[3]

For the Commissioner of Correction:

1. What is the longest period of lockdown in recent memory in any DOC facility?

[3] See Exhibit A attached, a chart of admissions and releases for the months of February through April for the years 2018-2020.

The overall number of releases for April 2020 may be lower than that of April 2019, but there is a higher rate of releases when adjusted for DOC's population. April 2019 had 582 releases, and DOC's average custody population for the first quarter of 2019 was 8,458. The rate of release for April 2019 was 6.88% compared to the average population for that time. April 2020 had 526 releases, but the average custody population for this month was 7,546. The rate of release for April 2020 was 6.97% compared to April's average population, so there has been a slightly higher rate of release for April 2020 than April 2019 when adjusted for population.

Of the 526 releases in April 2020, 141 (26.8%) were because of the grant of a parole permit. Note also that this 141 is almost a threefold increase over the March 2020 parole permits (52, with January and February as 52 and 51 respectively).

DOC does not have the authority to release inmates absent completion of their sentence (130 releases for this reason in April 2020) or receipt of a parole permit (141 releases for this reason in April 2020). The biggest driver of release of sentenced inmates has always been completion of sentences, over which DOC has no control. The dramatic (almost three-fold) increase in parole permits from March 2020 (52) to April 2020 (141) demonstrates that the Parole Board is finding inmates suitable for parole, and they are being released accordingly. Note also that the number of parole releases in April 2020 (141) was higher than the number of releases because of sentence completion (13) for likely the first time ever.

The longest lockdown in recent memory at a DOC facility lasted four-plus months (April 3, 1995 - August 1995) incidental to a mass prison disturbance at MCI-Cedar Junction at Walpole. A correction officer was stabbed and beaten by ten to twelve inmates. It was determined that the situation could not be controlled, and the safety of inmates and staff could not be maintained, short of locking down the facility. Haverty v. Commissioner of Correction, 2003 WL 25530367(Mass.Super. February 7, 2003), attached hereto as Exhibit B.

2. At oral argument, it was represented that the DOC now has available approximately 10,000 COVID-19 tests and that it plans to use them in some form of testing program. What is the number of tests available at this time? When did large-scale testing become available to DOC? What is the DOC's testing plan and the timeline for implementation? Does the DOC have access to a sufficient number of tests to implement the plan? To whom would the tests be administered under the plan (e.g., inmates, correctional officers, other staff) and using what criteria (e.g., symptomatic, non-symptomatic, relevant contact with someone who tested positive, by facility, etc.)?

On March 19, 2020, the first COVID-19 test was performed on a patient at the Massachusetts Treatment Center after that patient presented with symptoms. Initially, and consistent with CDC and DPH guidelines, testing was done per the protocol and medical judgment of the medical vendor at each facility and included inmates who were symptomatic, or non-symptomatic but a "close contact" of anyone who tested positive. Large-scale mobile testing became available as of April 22, 2020, when MCI-Framingham became the first facility to be offered institution-wide testing.

DOC's testing plan consists of tests already administered and future tests. Any staff member may have a test at any time. In addition to the attached testing plan, testing is and has been available at every site for any symptomatic inmate.

At the time of oral argument in this case, voluntary tests had been offered to all inmates/patients and staff and administered at the following facilities:

MCI-Framingham
South Middlesex Correctional Center
MCI-Shirley
Massachusetts Treatment Center
Lemuel Shattuck Hospital

Since the oral argument, voluntary tests have been offered/administered to all inmates/patients and staff at the following facilities:

Bridgewater State Hospital[4]
Old Colony Correctional Center[5]

Voluntary testing for inmates/patients and staff is planned for the following remaining DOC facilities as follows:

May 13-15 - North Central Correctional Institution (929 inmates; 328 full-time employees(FTEs))
May 17 and 18 - MCI-Concord (587 inmates; 331 FTEs)
May 18 - Northeastern Correctional Center (152 inmates; 70 FTEs)
May 19 - Boston Pre-Release Center (72 inmates; 58 FTEs)
By May 20 – MASAC (32 patients)
May 20 and 21 - Souza Baranowski Correctional Center- (690 inmates; 525 FTEs)
May 21 - MCI-Shirley Minimum (253 inmates; 80 FTEs)
May 27 and 28 - MCI-Cedar Junction (537 inmates; 422 FTEs)
May 28 - Pondville Correction Center (121 inmates; 51 FTEs)
May 29-31 - MCI-Norfolk (1254 inmates; 405 FTEs)

See Mobile Testing Schedule, attached hereto as Exhibit C. With the completion of the above testing, all DOC inmates/patients and FTEs will have been offered COVID-19 testing.

As of May 11, 2020 the DOC had 2073 tests in its possession. The supplier of the tests has assured the DOC that there is no shortage of tests available to the Department and that tests will be provided as needed. Therefore, the DOC has

[4] At Bridgewater State Hospital, 109 of approximately 226 patients agreed to be tested. Of that number, 2 patients tested positive.
[5] At Old Colony Correctional Center, 592 of approximately 653 inmates agreed to be tested. Of that number, 0 inmates tested positive.

access to a sufficient number of tests to implement its testing plan.

3. What is the DOC Plan to manage what it characterized as "hot spots"?

All new admissions to the DOC, all inmates/patients returning from court or an outside hospital, and potentially any inmate moved within the DOC(subject to a case-by-case review) are quarantined for 14 days before they are medically cleared to enter general population after consultation with an infectious disease nurse. All inmates are clinically monitored during their 14-day quarantine immediately following their intake for signs and symptoms associated with COVID-19. If the inmate does not exhibit symptoms, they are medically cleared from quarantine by the medical vendor.

Depending on the distribution of possible positives, there can be a need for at least 4 cohorts:

1) Inmates refusing tests. Inmates who refuse to be tested are subject to a mandatory 14-day quarantine with like individuals. The inmate will be medically cleared by the medical vendor once the 14-day quarantine period has elapsed if there have been no COVID-19 symptoms.

2) Inmates testing negative without close contact to a known positive. Inmates in this cohort are housed with like inmates.

3) Inmates testing negative with close contact to a known positive. Inmates in this cohort are subject to a mandatory 14-day quarantine.

4) Inmates testing positive. Inmates in this cohort are placed in medical isolation.

Each facility has identified areas for quarantine, depending on the size of the outbreak. Facilities are flexible in their ability to designate quarantine space. Neither the DOC nor any particular "hot spot" facility has run out of quarantine options.

Pursuant to CDC guidelines, the DOC, and in particular "hot spot" facilities, have quarantine options that may include the following:

-Separately, in single cells with solid walls(i.e., not

bars) and solid doors that close fully;

-Separately, in single cells with solid walls but without solid doors;

-As a cohort, in a large, well-ventilated cell with solid walls and a solid door that closes fully;

-As a cohort, in a large, well-ventilated cell with solid walls but without a solid door;

-As a cohort, in single cells without solid walls or solid doors(i.e., cells enclosed entirely with bars), preferably with an empty cell between occupied cells. (Although individuals are in single cells in this scenario, the airflow between cells essentially makes it a cohort arrangement in the context of COVID-19.);

-As a cohort, in multi-person cells without solid walls or solid doors (e.g., cells enclosed entirely with bars), preferably with an empty cell between occupied cells;

-Safely transfer individual(s) to another facility with available medical isolation capacity in one of the above arrangements.

The DOC is especially mindful of inmates testing positive who are at higher risk of severe illness of COVID-19. Per CDC guidelines, whenever possible, these inmates are not cohorted with other infected individuals, and accommodations are made to reduce the risk of transmission of other infectious diseases to the higher-risk individual.

Any inmate at any DOC facility who has tested positive and has exhibited symptoms is re-tested 14 days after symptom onset. If re-testing is negative, the inmate can be cleared from medical isolation, as long as the inmate has been asymptomatic for the last 7 days without medication for symptom management. If re-testing is positive, the inmate will be monitored for another 7 days and re-tested again before being cleared from medical isolation.

Any inmate who is asymptomatic positive after testing can be released from medical isolation after 14 days from the positive test. Any inmate who exhibits symptoms consistent with COVID-19 during the 14-day isolation is managed as a symptomatic positive.

As to clinical care for inmates who have tested positive:

Asymptomatic positives are seen by medical staff at least once per day, during which they undergo a temperature check, an oxygen saturation (O2) check, and symptom checks. They are also seen by medical staff during medication rounds.

Symptomatic positives are seen by medical staff at least twice a day for temperature, O2, and symptom checks. They are offered comfort medication for symptoms as needed. Depending on presentation, a more thorough assessment may be done. They are also seen by medical staff during medication rounds. Nursing staff review all symptomatic positives with the onsite physician, and the patient is seen by the physician if necessary.

Mental Health rounds are conducted in all units three times a week, and daily in quarantine units.

After an inmate/patient has tested positive, the site Infectious Disease Manager, in consultation with the medical vendor, identifies close contacts. Close contacts are placed on quarantine and monitored for symptoms for 14 days. If they remain asymptomatic, they are cleared for general population. If at any time they become symptomatic, they are tested as a patient under investigation.

All DOC facilities have instituted fresh air programs to allow for all inmates/patients, whatever their COVID-19 status, time outdoors. In the case of the Massachusetts Treatment Center and MCI-Framingham, inmates are afforded outdoor time of one hour, twice a week. At MCI-Shirley Medium, inmates are afforded outdoor time once every four days. The number of persons released at any one time is restricted to allow for social distancing, and inmates/patients are required to wear their masks. Inmates from one housing unit do not recreate with inmates from any other housing unit. Inmates recreate only with similarly situated cohorts. This outdoor time is in addition to the time when inmates in cell-type housing units are allowed out of their cells to shower, make telephone calls, and recreate, typically one hour a day.

4. What is the percentage of DOC inmates who are 50-59 years old? What is the percentage of DOC inmates who are 60 or older?

Percentage of inmates who are 50-59 years old as of May 11, 2020:

18% (1,308 out of 7,343 inmates)

Percentage of inmates who are 60 or older as of May 11, 2020:

13% (957 out of 7,343 inmates)

Finally, Commissioner Mici brings to the Court's attention the ruling of the U.S. District Court in Grinis v. Spaulding, 2020 WL 2300313(D.Mass. May 8, 2020)(O'Toole, J.). Exhibit D, attached. The Court denied plaintiffs' motion for injunctive relief brought by inmates at Federal Medical Center(FMC) Devens, seeking release because of COVID-19. The Court addressed the elements of deliberate indifference, and determined that the inmates were unlikely to win on the merits, and that the Federal Bureau of Prisons(BOP) and the facility "have made significant changes in operations in response to COVID-19. The respondents' papers outline the steps taken by them at both the national and institutional levels. The measures taken at FMC Devens have included: providing inmate and staff education; conducting inmate and staff screening; putting into place testing, quarantine, and isolation procedures in accordance with BOP policy and CDC guidelines; ordering enhanced cleaning and medical supplies; and taking a number of other preventative measures to include: (a) educating inmates and staff regarding the virus and the BOP's response, and on measures that they should take to stay healthy; (b) establishing quarantine and isolation units that are physically separated from the housing units; (c) providing separate examination rooms and testing for symptomatic inmates; (d) enhancing screening of staff and visitors to FMC Devens; (e) reducing and/or prohibiting prisoner movement; (f) distributing personal protective equipment and sanitizer to staff and inmates, and requiring that masks be worn in FMC Devens; (f) separating inmates by housing unit and floor to shelter in place with the fewest number of inmates; (g) modifying activities and services to provide them in the housing unit, with the fewest number of inmates; and (h) developing extensive cleaning and disinfecting procedures at FMC Devens.

The Court also noted that two of the plaintiffs were serving lengthy sentences and would not qualify for alternative options such as home release or medical parole.

Sincerely,

/s/ Stephen G. Dietrick
Stephen G. Dietrick
Deputy General Counsel

Admissions and Releases to the Massachusetts Department of Corrections, February – March, Years 2018 – 2020 by Type

	Criminal		Civil		Awaiting Trial	
	Admissions	Releases	Admissions	Releases	Admissions	Releases
18-Feb	199	216	208	193	172	185
18-Mar	239	272	232	239	193	192
18-Apr	187	182	258	226	181	193
19-Feb	198	215	127	149	178	160
19-Mar	230	209	186	150	175	178
19-Apr	195	244	197	131	196	207
20-Feb	161	180	225	169	51	57
20-Mar	87	129	139	246	32	41
20-Apr	15	305	72	197	9	24

2003 WL 25530367 (Mass.Super.) (Trial Order)
Superior Court of Massachusetts.

William HAVERTY and others[1],
v.
Michael T MALONEY, Commissioner of Correction, and another[2].

No. 95-3634-F.
February 7, 2003.

Findings of Fact, Rulings of Law and Order for Judgment

Patrick J. King, Justice of the Superior Court.

*1 SUFFOLK, ss.

Introduction

This is a class action, seeking declaratory and injunctive relief, or behalf of inmates in the custody of the Massachusetts Department of Correction arising out of an April 3, 1995 lock down at MCI-Cedar Junction.[3] The plaintiffs contend that their due process and equal protection rights under the Fourteenth Amendment to the United States Constitution as well as their rights under the Massachusetts Equal Rights Act, G.L. c. 93, § 102, have been violated[4] All of the claims except for the claims under State Law were previously submitted on summary judgment to the court (Grabau, J.) Summary judgment was granted in favor of the plaintiffs on their due process claim and denied as to their equal protection claim. As to the due process claim, the court ruled that the East Wing units constituted segregation units which required the defendants to comply with the procedural requirements contained in the Department Segregation Unit Regulations, 103 CMR 421.00 et seq. It was undisputed that inmates assigned to the East Wing were denied the procedural safeguards required by said regulations. Final judgment then entered, pursuant to Mass. R. Civ. P. 54(b), in favor of the plaintiffs on their due process claim. After appeal, that judgment was affirmed in substantial part by the Supreme Judicial Court on October 10, 2002. *Haverty v. Commissioner of Correction,* 437 Mass. 737, 740, 776 N.E.2d 973 (2002).

During the pendency of the appeal, the equal protection and equal rights act claims were tried. These claims are based on the allegation that DOC classifies Hispanic prisoners to the Plymouth block of the East Wing at MCI-Cedar Junction on the basis of race or ethnicity. Based upon the stipulations of the parties and the credible evidence introduced during the jury-waived trial, the court now makes the following findings of fact, rulings of law and order for judgment.

Findings of Fact

Parties

The plaintiffs, William Haverty, David Cosme, Robert Grady, Mark Gentile and Israel Luna, are all inmates confined at MCI-Cedar Junction.

The defendant Michael T. Maloney has been the Commissioner of the Department of Correction. (DOC) of the Commonwealth of Massachusetts since 1997. When this action was commenced in 1995, Larry DuBois was the Commissioner of Correction.

Peter Pepe is the Superintendent of MCI-Cedar Junction. When this action was filed, Ronald T. Duval was the Superintendent at MCI-Cedar Junction. He held that post between July 1991 and November 1999.

MCI-Cedar Junction - 1970 - April 1995

*2 Between the 1970's and 1995 MCI-Cedar Junction was the Commonwealth's only maximum security facility. The prison was divided into two sections, the East Wing and the West Wing. During the first half of the 1970s, the population at Cedar Junction was approximately 500 inmates. This was a period of extreme turmoil when the prison officials were not able to control the inmates. During this period, there were 25 murders at MCI-Cedar Junction. Over time DOC was able to regain control of the prison and eliminate most of the violence.

Since the mid-1970's, all inmates classified to MCI-Cedar Junction are initially housed in the East Wing of the prison. The East Wing contains eight housing units, each with 45 one man cells, and a ninth Modular Unit which has the capacity. to house 58 men. Thus, the East Wing has a maximum capacity of 418 men The cells in the East Wing have grill type doors and an observation area above the cells where correctional officers can observe the inmates without being detected. There is also a disciplinary segregation unit in the East Wing.[5] After a period of positive behavioral adjustment and a willingness to work, inmates are allowed to progress to the West Wing of the institution. The West Wing provides less restrictive confinement and is comprised of three housing units, each containing 72 one man cells and a disciplinary segregation unit. The cells in the West Wing have solid doors with windows.

INCREASE IN GANG RELATED VIOLENCE

In the early 1990s, the Commonwealth's prisons experienced a growth in the number of volatile and frequently gang-affiliated incidents involving younger inmates. Over time, these violent inmates were transferred to MCI-Cedar Junction. These inmates often engaged in gang related fights. Beginning in late 1992, MCI-Cedar Junction received an influx of Hispanic gang members.[6] The three major Hispanic gangs were La Famalia, NETA and the Latin Kings.

The African-American gangs tended to be from particular neighborhoods in the major cities in Massachusetts. The Hispanic gangs, on the other hand, included members from the entire East Coast as well as other areas. The Hispanic gangs were much more organized than the African-American gangs, often having a chain of command.

Upon the arrival of the Hispanic gangs, fights often broke out between members of the Hispanic gangs and the African-American gangs. For example, on July 4, 1992, a Hispanic inmate was attacked by African-American inmates. The correctional officers in the tower at MCI-Cedar Junction had to fire into the recreational yard to break up the disturbance. Despite various sanctions imposed on the aggressors in these altercations, including court prosecutions, loss of statutory good time and reclassification to the Departmental Segregation Unit, the incidents became more frequent between 1992 and 1994.

The disturbances even took place in the inmates' dining room. During one fight in the dining room an inmate was stabbed On July 13, 1993 there was another major incident on the basketball court when African-American inmates attacked Hispanic inmates Three Hispanic inmates were seriously injured and spent several months hospitalized. Once again, correctional officers in the tower had to fire their weapons to restore order.

Until 1995, Superintendent Duval had a policy of making himself available to inmates on a one to one basis after lunch.[7] On one occasion a group of eight Hispanic inmates approached him after lunch and told him that they wanted to speak to him. He refused telling them that he would only speak to them one at a time. The following week he was approached by 10 to 12

Hispanic inmates. This was after specifically telling them that they could not approach him during the lunch hour except on a one to one basis. As a result of that incident, he ruled that the action constituted an unauthorized group demonstration and took disciplinary action against the inmates involved.

THREE PHASE PROGRAM

*3 To address these problems, Superintendent Duval consulted with other DOC officials and in 1995 devised a three phase program at MCI-Cedar Junction to keep the inmates in small groups with the hope that this would reduce the level of violence. Under this three phase program, inmates were assigned to housing units which ranged in restrictiveness based upon the inmate's behavior. Despite these changes, the number of fights continued to increase during the three phase program,

On April 3, 1995 there was a disturbance in Bristol 4 in the East Wing. A correctional officer was stabbed and brutally beaten after being attacked by 10-12 inmates. The attackers included Hispanics, African-Americans and some whites. As a result of this incident, Superintendent Duval came to the conclusion that he could not control the institution and provide safety to the inmates and correctional officers with the three phase system and instituted a lock down where all the inmates were locked in their cells 24 hours a day. That lock down continued to August 1995. In the meantime, on June 30, 1995, this action was filed.

SECURITY THREAT GROUPS

Prison gangs referred to by DOC as Security Threat Groups ("STG") (a name similar to that used by many other state correction departments and the Federal Bureau of Prisons) pose a serious threat to the safety of DOC employees and other inmates. STG's perpetrate criminal activity behind prison walls through violence and intimidation of both staff and fellow inmates. The behavior and activities of STG members, either alone or in concert, pose a substantial threat to the orderly operation of DOC correctional institutions. Operating through force, intimidation, secrecy, extreme loyalty to fellow gang members, STG's potential for destructive activity is well recognized nationwide by correction's officials.

The increase in gang related violence necessitated the need for DOC to develop a policy to effectively manage and deter gang violence within DOC facilities and to prevent future or continued gang involvement by new inmates. This resulted in major operational changes to MCI-Cedar Junction culminating in the present operational parameters within the East Wing of the prison. Superintendent Ronald Duval exercised his professional-judgment and employed reasonable measures for the sole purpose of avoiding institutional disruption and violence, to manage the prison, to reduce violence by prison gangs to staff and other inmates and to control the population with the resources available. These resources necessarily included the architectural design of the prison.

On April 19, 1995, Commissioner DuBois issued the following letter to all inmates:
The Department of Correction is experiencing an increased number of disruptive and violent incidents at secure institutions involving organized inmate groups which represent a threat to the security and safety of the institution, staff and other inmates. Membership in security threat groups will not be tolerated in the Department of Correction.

Effective this date, inmates who are members of security threat groups will not be permitted to transfer below medium security. Additionally, any inmate who is a leader of any of these groups or any inmate involved in a security threat group incident will be subject to transfer to restrictive housing at MCI-Cedar Junction.

In April of 1995, there was an alleged plot at MCI-Concord to take hostages. As a result, 45 inmates were transferred to MCI-Cedar Junction. Many of these inmates were Hispanic. In April 1995, 135 inmates who were members of gangs were assigned to Plymouth units I, II and III in the East Wing. Later a fourth Plymouth unit was opened up for gang members. In May 1995, Superintendent Duval decided to segregate the inmates assigned to the Plymouth units based upon gang

membership.

*4 Inmates at MCI-Shirley in August 1995 rioted causing $2.3 million in damages. The riot began in the dining room after a correction officer was assaulted. As a result of that riot, approximately 40-50 inmates from MCI-Shirley were transferred to MCI-Cedar Junction including Hispanic gang members. The Inner Perimeter Security.(IPS) team reported that they were members of La Famalia and the Latin Kings. Some of these inmates were assigned to the Plymouth units.

ADOPTION OF STG REGULATIONS

On August 28, 1995, the DOC adopted 103 DOC 514, "Security Threat Group Management", a policy designed to identify gang members in an effort to more effectively manage the activities of gangs and to effectuate some degree of control over gangs in DOC facilities. DOC's STG policy is designed and implemented to identify and control the activities of any group or gang that threatens prison safety and security. DOC's STG policy is race-neutral in its design and implementation. The practices and procedures used to implement the STG policy are reasonable and legitimate to ensure safety and security in the Commonwealth's prisons, including the control of prison gangs. Prisoners are identified as gang members based upon the criteria set forth in the STG Validation Worksheet, which does not include race or ethnicity in such determination.

To ensure the security and program needs of each inmate in DOC's custody, each inmate, pursuant to the Department's Classification regulation, 103 CMR 420.08 and 420.09, receives an initial classification hearing and subsequent classification reviews at least every six month. Each inmate is classified on an individual case by case basis. Among the factors considered by the classification board, the Superintendents, and the Commissioner's designee in classifying each inmate are the following: outstanding legal issues; escape history; enemies; co-defendants; educational/vocational background; medical issues; mental health issues; family history/support; substance abuse history; disciplinary history; the inmate's objective point-based score; special skills; DDU placements; administrative chronology; institution adjustment and security concerns, current adjustment and program needs.

Those inmates identified as STG members, who are transferred to MCI-Cedar Junction due to an STG related disciplinary action and/or are a leader, recruiter or enforcer of a STG may be deemed by the prison Superintendent to be a security risk to the institution and, therefore, may be housed in the Plymouth Units at the discretion of the Superintendent. After a period of good behavior and a stated willingness to renounce their gang membership, these inmates may be reclassified and transferred to MCI-Norfolk (a medium security prison) for participation in the STG program known as the Spectrum Program. Membership in a gang alone will not result in classification to MCI-Cedar Junction but will prevent the inmate from being classified to a facility below medium level security.

The East Wing of MCI-Cedar Junction is comprised of 9 housing units which have a capacity to house 418 prisoners. Eight of these housing units have a capacity to house 45 men per unit and are named Bristol 1; Orientation Unit; Essex 1; Suffolk 1; and Plymouth I, II, III and IV. Plymouth I housed inmates with miscellaneous disciplinary problems; Plymouth II housed members of the Latin Kings; Plymouth III housed NETA members; and Plymouth IV housed members of La Familia. The ninth housing unit is named the Modular Unit which has the capacity to house 58 men. DOC utilizes the Plymouth housing units to house inmates it believes meet the criteria of the STG regulations. Approximately 283 inmates are confined to the 5 non-Plymouth East Wing housing units.

*5 The implementation of the STG policy has resulted in a significant reduction in inmate violence at MCI-Cedar Junction.

DISPARATE IMPACT OF STG POLICY

The plaintiffs case relies in large part on the disparate impact of the STG policy on Hispanic inmates. When the April 1995 lock down was implemented, Superintendent Duval put persons who were believed to be STG members in the Plymouth housing units. Initially nearly 90% of the inmates in 4 of the Plymouth units were Hispanic. Over the years that percentage has been reduced but has remained high. The following table shows, for three separate dates in 1996 and 1997, the number

and percentage of Hispanic inmates in DOC custody the number and percentage of Hispanic inmates represented in the East Wing, the number and percentage of Hispanic inmates in the 4 Plymouth housing units, and the percentage of the Hispanic inmates in the Plymouth Block represented of all inmates in the custody of DOC:

Dates	% of Hispanic Inmates in DOC custody	No. and % of Hispanics in East Wing	No. and % of Hispanics in Plymouth Unit	~~f all Hispanic DOC inmates in Plymouth Units~~
6/6/96	20%	158 of 414 (38%)	118 of 133 (89%)	5.9%
2/7/97	22%	164 of 413 (39%)	109 of 137 (80%)	4.9%
6/6/97	22%	161 of 398 (40%)	98 of 124 (79%)	4.4%

There is no dispute that a disproportionate percentage of Hispanic inmates have been classified to the Plymouth units. The plaintiffs argue that in many instances objective based point scores of the Hispanic inmates do not warrant their classification to the Plymouth units. The objective point based score, however, is only one of the tools used to classify inmates. Moreover, the plaintiffs have not presented any credible statistical evidence that the average point base scores of Hispanic prisoners transferred to MCI-Cedar Junction are disproportionately higher than non-Hispanic prisoners.

The housing units in the East Wing of MCI-Cedar Junction, including the Plymouth units, are, for all practical purposes, segregation units. Inmates in the West Wing are not segregated. No evidence was presented as to the racial composition of the inmates in the West Wing. Although the plaintiff's equal protection and equal rights claim are based on the STG policy which relates to the 4 Plymouth block units, the difference between the conditions in the 4 Plymouth block units and the other five East Wing units are minor. The Plymouth unit inmates have slightly less out of cell time because the Plymouth inmates are let out for exercise in smaller groups in order to reduce the number of fights. Appendix A to this decision shows the privileges afforded inmates in the Plymouth and non-Plymouth housing units of the East Wing at Cedar Junction.

The plaintiffs' case also relies on anecdotal evidence from five inmates of conduct indicating racial animus by certain DOC employees. For example, Alexander Peqroza, who is Hispanic, claimed that he was treated differently than an African-American prisoner during a shake down for weapons. The correctional officers made a mess of his personal belongings while searching his cell, but were very gentle when searching the cell of Garth Brown, who is African-American. On another occasion, a correctional officer referred to him as Jose. When he asked the correction officer to use his true name, the correctional officer allegedly responded that you are all "Joses".

***6** None of the plaintiffs' five anecdotal witnesses could identify by name any of the persons who allegedly acted in a discriminatory manner towards them even though correctional officers wore name tags. The incidents testified to by these 5 witnesses, even if found credible and considered with all the other evidence, would be insufficient to prove the existence of a pattern of racial or ethnic bias against Hispanic inmates. It is noteworthy that the classification history of three of these anecdotal witnesses demonstrates clearly that they were not targeted on account of their race or ethnicity by DOC's STG policy. In fact, the court did not find much of the anecdotal witnesses' testimony credible.

Mr. Pagan, one of the plaintiffs' anecdotal witnesses, was determined to be a member of NETA. In August of 1995, he was returned to MCI-Cedar Junction from MCI-Norfolk because of a drug positive random urine test. He initially went to the orientation unit at MCI- Cedar Junction the initial stop for all newly arrived inmates. On October 5, 1995, he was assigned to

Bristol 1 in the East Wing. A few weeks later, he was assigned to Bristol 2 in the West Wing. On December 22, 1995, he was returned back to Bristol 1 in the East Wing because of another dirty urine. Later he was returned back down to Bristol 2, and a few months later on May 23, 1996, he was transferred to Old Colony. Despite the fact that he is Hispanic, had been identified as a member of NETA, and had disciplinary problems, he was not sent back to the Plymouth units.

Another one of plaintiff's witnesses, Mr. Pedrosa, violate his probation and was returned to MCI-Concord where, on June 20, 1999, he was involved in a fight in the recreation yard. It was determined that it was an STG related incident. In January 2000, the classification board recommended that Mr. Pedrosa be assigned to Old Colony Correction Center but the superintendent decided to assign him to Bristol 1 in the East Wing at MCI-Cedar Junction because of the incident in the recreation yard.

Prior to being placed on probation, Mr. Pedrosa had previously been labeled as a gang member and spent time in Plymouth units in 1996. Nonetheless, he was not returned to the Plymouth block. Instead, he was sent to Bristol 1. In July 2000, the classification board recommended that he be sent to Old Colony Correction Center but the Superintendent modified that to SBCC because of a "need for more positive adjustment." Mr. Pedrosa was not returned to the Plymouth units.

As for Mr. Morales, another one of the plaintiffs' witnesses, he assaulted another prisoner while at MCI-Gardner on February 2, 1995. The disciplinary report states that an investigation determined that the incident was STG related. It also had been determined that he was a member of the La Familia. On August 30, 1995, he was transferred to the Plymouth block at MCI-Cedar. He attended the Spectrum Program for STG members. On February 20, 1996, less than 6 months after arriving at MCI-Cedar Junction, he was transferred to Old Colony for Phase 2 of his Spectrum Program. He successfully completed Phase 2 and, on June 30, 1996, he was then classified to MCI-Norfolk. While at MCI-Norfolk, he threatened two officers on two separate occasions. As a result, he was reclassified to MCI-Cedar Junction on October 10, 1996. He was not assigned, however, to the Plymouth units because the disciplinary problems were not gang related; rather he was sent to Essex 1, then to Essex 2, and less than 6 months later, on March 14, 1996, he was reclassified and sent to MCI-Gardner. This evidence demonstrates that DOC's policy with regard to the assignment of inmates to the Plymouth units in the East Wing at MCI-Cedar Junction is based upon behavior and not race or ethnicity.

*7 The plaintiffs' case also relies on expert evidence critical of the STG and classification practices of DOC. The plaintiffs' expert witness, Mr. William Dallman, has worked in the correction industry for 37 years. He retired in June 1994 as a warden and has been working as a consultant since then.

Mr. Dallman opined that putting gang members together was a bad practice because it created solidarity among the gang members. Nonetheless, he agreed that because DOC had only one maximum security facility in 1995, putting all of the gang members in one facility was a judgment call on the part of the DOC which he could not contest.

Although Mr. Dallman opined that the 20 percent rate of overrides of classification board recommendations by the Commissioner in Massachusetts is on the high side, he agreed that quite often there are good reasons for the Commissioner to override a classification board's recommendation. He also acknowledged that the record shows cases where the Commissioner would have been justified in placing Hispanic inmates in maximum security but where he did not do that. For example, inmate Corrillo, who is Hispanic, murdered a correctional officer. Although the Commissioner would have been justified, according to Mr. Dallman, in assigning Mr. Corrello to MCI-Cedar Junction, he went along with the classification board's recommendation that Mr. Corrillo remain at MCI-Norfolk. Mr. Dallman agreed that ultimately where an inmate is assigned is a judgment call to be made by the Commissioner.

There is no evidence that Hispanic prisoners are being confined in the Plymouth units for a disproportionately longer period of time than those prisoners assigned to the other East Wing housing units or that inmates who renounce their gang affiliation are not allowed to earn their way to a lower security facility through the Spectrum Program.

The Court found credible the testimony that the decision to classify inmates to the Plymouth units was based on the criteria set forth in the STG regulations and that the decision to house Hispanic gang members together was based on legitimate security concerns and not based on the race or ethnic background of the inmates. Although at times 90% of the inmates in the Plymouth units were Hispanic, those inmates represented fewer than 6 percent of all the Hispanic inmates in DOC custody.

Race and ethnicity were not factors in the labeling of STG members. Likewise, race and ethnicity were not factors used by DOC in the classification or transfer of inmates to the Plymouth Housing units.

There is no credible evidence that the Commissioner of Correction or his subordinates selected, designed or implemented the STG policy to discriminate against Hispanic inmates.

There is no credible evidence that the Commissioner of Correction or his subordinates acted with a discriminatory purpose in classifying and transferring Hispanic inmates to the Plymouth housing units in the East Wing at MCI-Cedar Junction.

RULINGS OF LAW

The Equal Protection Claim brought by the plaintiffs requires a showing that they are members of a distinct class and being purposefully discriminated against. See *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256, 272, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). "[E]ven if a neutral law has a disproportionate adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Id.*

***8** The plaintiffs are members of a distinct class for purposes of an Equal Protection Clause, analysis. The STG policy has had a disparate impact on Hispanic inmates in that the percentage of Hispanic inmates in the Plymouth units is grossly disproportionate to the percentage of Hispanic inmates in the custody of DOC. This evidence is sufficient to meet the plaintiff's burden of proof and to place the burden on DOC to prove the lack of a discriminatory motive.

DOC has met its burden of proof. DOC's legitimate interest in institutional security warranted the adoption of a policy to control gang activity. Prison officials must be afforded a measure of deference in such matters. See *Jones v. North Carolina Prisoner's Labor Union, Inc.,* 433 U.S. 119, 132-133, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1997).

DOC's STG policy is neutral on its face. The factors taken into consideration by DOC in its STG policy are equally applicable to all inmates. During a relevant time period for which figures are available, the Hispanic population in the Plymouth units was approximately 90% as opposed to the Hispanic population in the DOC system of 21%. DOC, however, has rebutted the inference of discrimination by credible evidence that the adoption of the STG regulations and its decision to house Hispanic gang members together in the Plymouth housing units were based on a valid penological objective, namely, to address the significant security threat posed by Hispanic gangs. Where to house inmates is the responsibility of prison officials subject, of course, to compliance with any applicable regulations, none of which apply to this equal protection analysis. See *Meachum v. Fan,* 427 U.S. 215, 225, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976).

The consequence of classification to the Plymouth housing units has dire consequences for the inmates involved. The conditions of confinement in those units are quite harsh. This court's decision does not in an way endorse the adequacy of the procedures for the classification of inmates to the Plymouth housing units. As the Supreme Judicial Court has made clear, the procedures followed violated DOC's own DSU regulations. Nonetheless, DOC's STG policies and practices do not violate plaintiffs' Equal Protection Clause rights. For the same reasons, the plaintiffs have not established that their rights under the Equal Rights Act, G.L. c. 93, § 102, have been violated.

Based upon all of the evidence, the court rules that the plaintiffs have failed to establish that the STG policy has been used to discriminate against Hispanic inmates. For this reason, judgment will enter in favor of the defendants on plaintiffs' Equal Protection Clause and Equal Rights Act claims.

ORDER FOR JUDGMENT

Accordingly, it is hereby ordered that:

Judgment shall enter in favor of the defendants with regard to plaintiffs' Equal Protection Clause and Equal Rights Act claims.

<<signature>>

Patrick J. King

Justice of the Superior Court

DATED: February 7, 2003

Footnotes

[1] David Cosme, Robert Grady, Mark Gentile and Israel Luna.
FN2. Peter Pepe, Superintendent, MCI-Cedar Junction. When this action was commenced, Larry DuBois was the Commissioner of Correction and Ronald T. Duval was the Superintendent of MCI-Cedar Junction. They have since been replaced by the current named defendants.

[3] On November 15, 1995, the court (Lopez, J.) certified a class defined as "all prisoners who are now confined or may at some point be confined in any housing unit other than the Department Disciplinary Unit" at MCI-Cedar Junction. For purposes of the equal protection claims presently before the court, the class consists of Hispanic inmates who have been or will in the future be assigned to the Plymouth housing units at MCI-Cedar Junction.

[4] Additional claims in the Complaint were voluntary dismissed [text illegible]

[5] The plaintiffs raise no issue in this case concerning the inmates assigned to the East Wing disciplinary segregation unit.

[6] There was a fifty percent increase in the number of Hispanic inmates in DOC custody between 1990 and 2000.

[7] Between 1995 and 1999 the Department of Correction's inmate population was approximately 10,000 inmates each year in 1995 Caucasians made up approximately 49 percent percent of the population, African-Americans 30 percent and Hispanics 20 percent.

End of Document

Mobile Testing Schedule

Sites	Dates	Plan	Inmate Census	Staff FTE's
NCCI 500 Colony Road Gardner, MA 01440	5/13-15	Test inmate/patients only 5/13 Test inmate/patients and staff 5/14 &15	929	328
MCI Concord 965 Elm Street Concord, MA 01742	5/17 -5/18	Test inmate/patients only 5/17, 5/18 rest of inmate/patients and staff testing	587	331
Northeastern Correctional Center Barretts Mill Road West Concord, MA 01742	5/18	Inmate/patients testing with staff testing at Concord	152	70
Boston Pre Release Center 430 Canterbury Street Roslindale, MA 02131	5/19	Staff and inmate/patient testing	72	58
Souza Baranowski Correctional Center Harvard Road Shirley, MA 01464	5/20-5/21	5/20 inmate/patient testing only. 5/21 Rest of inmate/patient testing with staff testing.	690	525
MCI Shirley Minimum Harvard Road Shirley, MA 01464	5/21	5/21 inmate/patient testing, staff welcome to testing at SBCC. Date maybe moved to 5/22 depending cooperation with inmates/patients at SBCC.	253	80
MCI Cedar Junction Route 1A South Walpole, MA 02071	5/27- 5/28	Inmate/patients only on 5/27 and staff testing 5/28 neighboring sites welcomed	537	422
Pondville Correctional Center One Industries Drive Norfolk, MA 02056	5/28	Inmate/patients and staff testing at CJ.	121	51
MCI Norfolk 2 Clark Street Norfolk, MA 02056	5/29-5/31	Inmate/patients only on 5/29 and 5/30. Finish inmates/patients on 5/31 with staff testing. Staff welcome to at testing on 5/28 at CJ.	1254	405

2020 WL 2300313
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

Alexander GRINIS, Michael Gordon, and Angel Soliz, on Behalf of Themselves and Those Similarly Situated, Petitioners,

v.

Stephen SPAULDING, Warden of Federal Medical Center Devens, and Michael Carvajal, Director of the Federal Bureau of Prisons, in Their Official Capacities, Respondents.

CIVIL ACTION NO. 20-10738-GAO

Signed 05/08/2020

Attorneys and Law Firms

William W. Fick, Fick & Marx LLP, Boston, MA, for Petitioner

OPINION AND ORDER

George A. O'Toole, Jr., Senior United States District Judge

***1** The petitioners, Alexander Grinis, Michael Gordon and Angel Soliz, inmates now in custody at Federal Medical Center Devens ("FMC Devens"), bring what they characterize as a class action habeas petition pursuant to 28 U.S.C. § 2241 against respondents Stephen Spaulding, Warden at FMC Devens, and Michael Carvajal, Director of the Bureau of Prisons ("BOP"). The petitioners seek to represent: "(1) a subclass of all persons who, according to applicable CDC guidelines, are at high risk of injury or death from COVID-19, due to their advanced age or medical condition(s) ('Medically Vulnerable Subclass'), and (2) a subclass of all persons who are appropriate candidates for early transfer to home confinement ('Home Confinement Appropriate Subclass')." (Pet. for Writ of Habeas Corpus Under § 28 U.S.C. 2241 & Compl. for Injunctive & Declaratory Relief ¶ 105 (dkt. no. 1).) The petitioners allege that their detention is in violation of the Eighth Amendment to the United States Constitution because of the threat of infection by the virus COVID-19. Pending before this Court is the petitioners' Motion for Immediate Bail Consideration, Temporary Restraining Order, and Preliminary Injunctive Relief (dkt. no. 3).

The petitioners request an order of this Court "releas[ing] sufficient Class Members on bail to ensure effective social distancing at FMC Devens in compliance with CDC guidelines." (Mot. for Immediate Bail Consideration, TRO, & Prelim. Inj. Relief 1 (dkt. no. 3).) They also seek "a temporary restraining order or preliminary injunction ordering Respondents to comply with CDC guidelines and best practices to prevent the spread of COVID-19, including, without limitation, by reducing the prisoner population at FMC Devens sufficiently to permit effective social distancing." (Id. at 2.) The Court heard oral argument from both the petitioners and the respondents.

Separately the petitioners filed a Motion for Class Certification or Representative Habeas Action (dkt. no. 5). The parties have briefed but have not yet been heard in argument on that motion.

A "district court determines whether to issue a preliminary injunction by weighing four factors: '(1) the likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest.' " Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 11 (1st Cir. 2004) (quoting Charlesbank Equity Fund II v. Blinds to Go, Inc., 370 F.3d 151, 162 (1st Cir. 2004)); see also Ross–Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 15 (1st Cir. 1996)). "The sine qua non of this four-part inquiry is likelihood of success on the merits." New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002). "[I]f the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." Id. (citing Weaver v. Henderson, 984 F.2d 11, 12 (1st Cir. 1993)).

***2** The petitioners have not demonstrated that they have a likelihood of prevailing on the merits of their pleaded claims. [1]

1 In addition to asserting a habeas claim, the petitioners also assert claims for declaratory judgment and injunctive relief under the All Writs Act. 28 U.S.C. § 1651.

There is a substantial question whether the relief the petitioners seek is properly sought by means of a habeas petition under § 2241. The petitioners claim they are held

"in custody in violation of the Constitution ... of the United States," 28 U.S.C. § 2241(c)(3), because maintaining them in custody at FMC Devens seriously endangers their health and thus amounts to cruel and unusual punishment in violation of the Eighth Amendment to the Constitution. The respondents argue that the lawfulness of the fact or nature of the petitioners' *custody* is not put in question by the complaint; there is no complaint against the lawfulness of their convictions or the sentences imposed. Rather, the respondents characterize the petitioners' claims as relating to "prison conditions," in particular a species of overcrowding, and that accordingly their remedy should be sought by a civil rights complaint under the doctrine of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1999). [2]

2 There is the further complication that there may be statutory prerequisites to the release relief sought by the petitioners that might be avoided in a habeas action, and thus counsel against proceeding under that rubric. See, e.g., 18 U.S.C. § 3626(a)(3)(A)(i) (prisoner release order may not be issued unless "a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order"). There is also a question of which judicial authority has jurisdiction to issue such an order. A "prisoner release order" may only be ordered by a three-judge court specially constituted. Id. § 3626(a)(3)(B). A "compassionate release" order altering the sentence of a convicted felon apparently may only be entered by the sentencing judge. Id. § 3582(c).

It is not necessary to resolve that dispute for now, because the petitioners have a more fundamental problem. They have not demonstrated a likelihood of success on their underlying theory of liability: that by failing to release a significant number of inmates as they demand, the respondents have subjected them to cruel and unusual punishment in violation of the Eighth Amendment.

To succeed on such a claim, the petitioners "must satisfy both a subjective and objective inquiry: [Petitioners] must show first, 'that prison officials possessed a sufficiently culpable state of mind, namely one of "deliberate indifference" to an inmate's health or safety,' and second, that the deprivation alleged was 'objectively, sufficiently serious.' " Leavitt v. Corr. Med. Servs., Inc., 645 F.3d 484, 497 (1st Cir. 2011) (quoting Burrell v. Hampshire Cnty., 307 F.3d 1, 8 (1st Cir. 2002)). Prison officials may exhibit "deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). But "deliberate indifference" requires evidence of more than poor judgment or what the law regards as "ordinary negligence." It entails conduct (or an absence of conduct) amounting to "a wanton disregard" of a prisoner's needs, Battista v. Clarke, 645 F.3d 449, 453 (1st Cir. 2011), where a prison official's action amounts to a "recklessness, 'not in the tort law sense but in the appreciably stricter criminal-law sense, requiring actual knowledge of impending harm, easily preventable.' " Watson v. Caton, 984 F.2d 537, 540 (1st Cir. 1993) (quoting DesRosiers v. Moran, 949 F.2d 15, 19 (1st Cir. 1991)).

***3** Both the BOP and FMC Devens have made significant changes in operations in response to COVID-19. The respondents' papers outline the steps taken by them at both the national and institutional levels. The measures taken at FMC Devens have included:

> providing inmate and staff education; conducting inmate and staff screening; putting into place testing, quarantine, and isolation procedures in accordance with BOP policy and CDC guidelines; ordering enhanced cleaning and medical supplies; and taking a number of other preventative measures to include: (a) educating inmates and staff regarding the virus and the BOP's response, and on measures that they should take to stay healthy; (b) establishing quarantine and isolation units that are physically separated from the housing units; (c) providing separate examination rooms and testing for symptomatic inmates; (d) enhancing screening of staff and visitors to FMC Devens; (e) reducing and/or prohibiting prisoner movement; (f) distributing personal protective equipment and sanitizer to staff and inmates, and requiring that masks be worn in FMC Devens; (f) separating inmates by housing unit and floor to shelter in place with the fewest number of inmates; (g) modifying activities and services to provide them in the housing unit, with the fewest number of inmates; and (h) developing

> extensive cleaning and disinfecting procedures at FMC Devens.

(Resp'ts' Omnibus Resp. to Pet. for Writ of Habeas Corpus & Opp'n to Pet'rs' Mot. for Immediate Bail & Injunctive & Declaratory Relief 46–47) (dkt. no. 32).) The government reported at the hearing on the present motion that to that point in time only one inmate at FMC Devens had been diagnosed with the COVID-19 virus, out of a population of approximately one thousand. Data from the BOP website indicates no additional cases identified at FMC Devens since then. BOP: COVID-19 Update, Federal BOP (May 8, 2020, 4:00 PM), http://www.bop.gov/coronavirus/. These affirmative steps may or may not be the best possible response to the threat of COVID-19 within the institution, but they undermine an argument that the respondents have been actionably deliberately indifferent to the health risks of inmates.

The Attorney General has instructed BOP facilities to transfer appropriate qualifying inmates from institutional incarceration to home confinement pursuant to the recently enacted "CARES Act," P.L. 116-136, 134 Stat. 281(Mar. 27, 2020). Indeed, the Court was informed at the hearing on the present motion that FMC Devens was preparing to transfer petitioner Grinis to home confinement in early May, but that he had objected to one of the steps in the process, completion of a fourteen-day quarantine period. It is not clear what his status is now. Unlike petitioner Grinis, however, petitioners Gordon and Soliz are serving lengthy sentences for serious drug offenses. They have not shown that it is likely that they would qualify for transfer from incarceration to home confinement under the current BOP eligibility requirement, and therefore they have not shown that they personally have a likelihood of success in obtaining the relief prayed for in their petition.

Finally, the petitioners' request to be admitted to bail also lacks merit. While a district court may have "inherent power" to release a habeas petitioner pending determination of the merits of the petition, see Woodcock v. Donnelly, 470 F.2d 93, 94 (1st Cir. 1972), a bail decision is a highly particularized one, involving detailed consideration of factors such as the nature and circumstances of the offense of conviction, the history and characteristics of the petitioner, and the nature or seriousness of any danger to the community from the release of the prisoner. See 18 U.S.C. § 3142(g). The petitioners do not address such considerations, instead basing their request for bail on the circumstances of their confinement alone, rather than on the particular factors as applied to each of them. So even if this action is properly characterized as a habeas petition, which is subject to doubt, the basis for making a considered bail decision is lacking.

*4 For the foregoing reasons, the Motion for Immediate Bail Consideration, Temporary Restraining Order, and Preliminary Injunctive Relief (dkt. no. 3) is DENIED.

It is SO ORDERED.

All Citations

--- F.Supp.3d ----, 2020 WL 2300313

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