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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

LANCE AARON WILSON; MAURICE SMITH; EDGAR VASQUEZ, individually and on behalf of all others similarly situated,

Plaintiff-Petitioners,

v.

FELICIA L. PONCE, in her capacity as Warden of Terminal Island; and MICHAEL CARVAJAL, in his capacity as Director of the Bureau of Prisons,

Defendant-Respondents.

No. CV 20-4451-MWF-MRW

RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

Hearing Date: July 27, 2020
Hearing Time: 10:00 a.m.
Ctrm: 5A

Honorable Michael W. Fitzgerald
United States District Judge

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I. INTRODUCTION

In opposition to Respondents' motion to dismiss, Petitioners state that the Court has ruled that it does not have jurisdiction over their habeas claim. *See* Dkt. No. 56 ("Opp.") at 8:9-21 ("The Court already has denied Petitioners' habeas claim and certified it for 'immediate' appeal.") (capitalization normalized). Respondents therefore respectfully request that the Court dismiss Petitioners' habeas claim for the reasons stated in its June 10, 2020, Order with prejudice and without leave to amend.[1] *See* Dkt. No. 41 ("Order").

Petitioners' second claim challenging prison conditions, for which they seek injunctive relief, should also be dismissed. Petitioners acknowledge that the BOP has taken actions at FCI Terminal Island in response to the COVID-19 pandemic, including attempting to segregate inmates, providing masks and hand sanitizer to inmates, testing every inmate, and considering home confinement for eligible inmates. *See* Opp. at 12:24-13:28; *see also* Dkt. No. 55 ("MTD") at 3:9-4:17 (outlining Petitioners' allegations regarding the BOP's "emergency measures" at FCI Terminal Island in response to COVID-19). Petitioners disagree with the extent and timing of the BOP's actions, but these disagreements cannot rise to the level of an Eighth Amendment violation.

Indeed, one of the district court cases on which Petitioners primarily rely, *Cameron v. Bouchard*, was reversed by the Sixth Circuit Court of Appeals four days ago, *Cameron v. Bouchard*, –F.3d–, 2020 WL 3867493 (6th Cir. Jul. 9, 2020). *Cameron*

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[1] Petitioners maintain that while they "accept" the Court's determination, they "do not agree with it," and will "pursue an appeal at the appropriate time." Opp. at 9:2-4. Since the issuance of the Court's Order, another district court has ruled that "the weight of authority within and outside this circuit [the Fourth Circuit] suggests that, as a general matter, petitioners cannot challenge their conditions of confinement in a habeas corpus proceeding." *Hallinan v. Scarantino*, 2020 WL 3105094, at *11 (E.D.N.C. Jun. 11, 2020) (collecting cases). Given Petitioners' purported acceptance of the Court's ruling, it is appropriate for Respondents to move to dismiss this claim because the operative Complaint still contains a claim for which the Court found it lacks jurisdiction to decide. Therefore, Petitioners' contention that the motion to dismiss is somehow improper is without merit. *See* Opp. at 6:11-14. The Court, moreover, permitted Respondents to file a motion to dismiss in its June 22, 2020, minute order. *See* Dkt. No. 48.

followed the holding in *Wilson v. Williams*, the other district court case on which Petitioners relied until it was reversed, concluding: "Fatal to Plaintiffs' claim was the fact that the BOP 'responded reasonably' to the risks presented by COVID-19." *Id.* at *6 (quoting *Wilson v. Williams*, –F.3d–, 2020 WL 3056217, at *7 (6th Cir. Jun. 9, 2020) ("*Williams*")). The same is true here. The BOP responded reasonably to the risks presented by COVID-19 at FCI Terminal Island, and Petitioners' Eighth Amendment claim similarly fails.

Petitioners, in fact, do not address that in order to obtain injunctive relief, they must demonstrate that "prison authorities' ***current*** attitudes and conduct" meet the "high legal standard" of deliberate indifference, and will continue to do so in the future. *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004) (emphasis added); *Farmer v. Brennan*, 511 U.S. 825, 845 (1994). Petitioners' own allegations, and those facts of which the Court may take judicial notice, demonstrate that the BOP has taken reasonable measures. The reasonableness of these measures is reflected in the fact that while the number of COVID-19 cases within the United States and Los Angeles County continues to skyrocket, the number of positive cases within FCI Terminal Island has been decreasing, as have the number of inmates housed at FCI Terminal Island.

Finally, Petitioners admit that they have not exhausted administrative remedies, and their reliance on the Court's June 10, 2020 Order relieving them of this statutory obligation, is misplaced.[2] *See* Opp. at 8:26-28, n. 3. Petitioners' failure to exhaust their conditions-of-confinement claim under the PLRA is another reason why their Complaint should be dismissed.

For these reasons, and those stated in prior filings, Respondents respectfully request that the Court grant this motion.

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[2] The Court's June 10, 2020, Order only pertained to Petitioners' habeas claim: "Although the TRO Application appeared to suggest that Petitioners are seeking immediate relief on both of their claims, they have since clarified that they are requesting 'only the first of the two—the process-based remedy for enlargement' be considered through their TRO Application. (TRO Reply at 17). Therefore, the Court only examines Petitioners' first claim in this Order." Order at 14.

II. ARGUMENT

A. Petitioners' Eighth Amendment Conditions-of-Confinement Claim Should Be Dismissed

1. Petitioners Cannot Demonstrate that They Are Subject to an Unreasonable Risk of Harm

The Court described the COVID-19 pandemic as "an ongoing, once-in-a-century crisis." Order at 2. In the face of this extraordinary crisis, the Court acknowledged that the BOP's efforts at FCI Terminal Island were "laudable." *Id.* at 20. As Respondents have previously argued, and as the vast majority of federal courts have found, including the Fifth, Sixth and Eleventh Circuits, such efforts cannot rise to an Eighth Amendment violation even where the harm imposed by COVID-19 was "ultimately not averted." *Williams*, 2020 WL 3056217, at *8 (quoting *Farmer*, 511 U.S. at 844); *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020); *Swain v. Junior*, –F.3d–, 2020 WL 3167628, at *7 (11th Cir. Jun. 15, 2020); *Cameron*, 2020 WL 3056217, at *6 (rejecting plaintiffs' attempts to distinguish *Williams* because their "argument at most shows that defendants' response was imperfect") (quoting *Williams*, 2020 WL 3056217, at *10 ("Here, even if the BOP's response has been inadequate, it has not disregarded a known risk or failed to take any steps to address the risk, ... such that its response falls below the constitutional minimum set by the Eighth Amendment.")).

Respondents respectfully submit that to find otherwise would disregard the realities of the ravages COVID-19 has inflicted worldwide, within the United States, and Los Angeles County. For example, the Court noted that "[a]s of June 7, 2020, there have been 1.9 million confirmed cases and 109,901 deaths from COVID in the United States alone." Order at 2. Two weeks later, on June 25, 2020, when Respondents filed their supplemental brief, another half million Americans had been infected (up to 2,416,727 confirmed cases) and another 12,649 Americans had died (122,550 deaths), including 89,490 persons infected and 3,205 deaths in Los Angeles County. *See* Dkt. No. 50 (June 25, 2020 Supp. Brief at 4:12-16). In the approximately three weeks since then, these

numbers continue to climb. Currently, there are 3,353,348 Americans infected, and 135,524 deaths, including 136,129 infected and 3,822 deaths in Los Angeles County.[3] In other words, in the approximately one month since the Court's June 10, 2020 Order, the rate of infection of Americans infected by the coronavirus has nearly doubled, infecting nearly an additional 1.5 million Americans, and another 25,623 Americans have died. In contrast, the numbers of positive cases at FCI Terminal Island have decreased, which currently report six inmate and four staff cases of COVID-19.[4] These statistics show that the BOP has not been deliberately indifferent to the inmates' needs at FCI Terminal Island, and that the BOP has not denied Petitioners "the minimal civilized measure of life's necessities" in addressing the harm COVID-19 presents in its prisons, including at FCI Terminal Island. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). Petitioners cannot show that they are incarcerated under conditions posing a substantial risk of harm as the ravages from COVID-19 exposes everyone—prisoner and non-prisoner alike. *See Farmer*, 511 U.S. at 837; *id.* at 844 ("A prison official's duty under the Eighth Amendment is to ensure reasonable safety."); *see also Hallinan*, 2020 WL 3105094, at *6 (no Eighth Amendment violation even though the facility "reported 19 inmate deaths and 664 active inmate and staff infections at FCC-Butner").

Petitioners also fault the BOP for not decreasing the population of FCI Terminal Island, contending that only 46 inmates had been considered for home confinement at the time of the filing of their Complaint, and only five inmates had been released. *See*

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[3] *Coronavirus Resource Center: COVID-19 Dashboard*, John Hopkins Univ. & Med., https://coronavirus.jhu.edu/map.html (last accessed July 13, 2020); http://publichealth.lacounty.gov/media/coronavirus/data/index.htm (last updated July 12, 2020). These statistics belie Petitioners' argument that "[w]hile society has chosen to implement protective rules to prevent the spread of COVID-19, prisoners are forced to live in conditions that dramatically increase not only their risk of contracting a COVID-19 infections, but also their risk of dying from a COVID-19 infection." *See* Opp. at 12:5-8. These "protective rules" have not slowed, let alone prevented, the spread of the coronavirus, as the rates of infection and deaths continue to soar nationwide and in Los Angeles County.

[4] https://www.bop.gov/coronavirus/ (last accessed July 13, 2020).

Opp. at 13:20-25 & n. 5; Compl. ¶ 71; Dkt. No. 10 at 34. Indeed, the Court noted that as of May 15, 2020, 1,042 inmates were housed at FCI Terminal Island. Order at 3. Since then, 83 inmates have been released, and the current population at FCI Terminal Island is 959 inmates.[5] These statistics demonstrate that even without the Court's intervention, the BOP is taking its obligation to combat COVID-19 by all means necessary, including reducing its prison population. What Petitioners really want is to control how the BOP makes its decisions. *See* Opp. at n. 5. Petitioners, however, do not address Respondents' argument that the BOP's decisions whether to transfer an inmate to a different facility or to home confinement falls within its unreviewable authority to designate an inmate's place of imprisonment. *See* MTD at 8:1-9:11; Dkt. No. 50 (Supp. Brief at 12:1-14:6); *Hallinan*, 2020 WL 3105094, at *16 ("the fact that respondents have not 'maximized' use of home confinement and other release provisions to reduce the FCC-Butner population does not establish an Eighth Amendment violation").

For these reasons, Respondents respectfully submit that Petitioners cannot satisfy the objective component of an Eighth Amendment violation. Indeed, the only case which found otherwise cited by Petitioners was the district court in *Martinez-Brooks v. Easter*, 2020 WL 2405350 (D. Conn. May 12, 2020). *See* Opp. at 14:16-19.[6] Respondents respectfully submit that this Court should reject *Martinez-Brooks* and find that compliance with CDC recommendations, including "access to soap, tissues, gloves, masks, regular cleaning, signage and education, quarantine of new prisoners, and social distancing during transport" satisfies the objective component of the Eighth Amendment. *Valentine*, 956 F.3d at 801-02; *Chunn v. Edge*, 2020 WL 3055669, at *1 (E.D.N.Y. Jun.

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[5] https://www.bop.gov/locations/institutions/trm/ (last accessed July 13, 2020).

[6] The other cases cited by Petitioners did not involve convicted prisoners. *See Fraihat v. U.S. Immigration and Customs Enforcement*, 2020 WL 1932570, at *1 (C.D. Cal. Apr. 20, 2020) (involving immigration detainees); *Basank v. Decker*, 2020 WL 1481503, at *1 (S.D.N.Y. Mar. 26, 2020) (same). The Eighth Amendment does not apply to immigration detainees. *See Cameron*, 2020 WL 3867393, at *4 ("For prisoners incarcerated following a conviction, the government's obligation arises out of the Eighth Amendment's prohibition on cruel and unusual punishment.") (citation omitted).

9, 2020) ("Rather than being indifferent to the virus, MDC officials have recognized COVID-19 as a serious threat and responded aggressively."); *Grinis v. Spaulding*, 2020 WL 2300313, at *3 (D. Mass. May 8, 2020) ("Both the BOP and FMC Devens have made significant changes in operations in response to COVID-19.").

2. Petitioners Cannot Satisfy the Subjective Test for Deliberate Indifference

Petitioners' Eighth Amendment claim also fails because they cannot satisfy the subjective prong of the Eighth Amendment, as numerous courts have found within the COVID-19 prison context. *See Cameron*, 2020 WL 3867393, at *6-8; *Swain*, 2020 WL 3167628, at *6; *Williams*, 2020 WL 3056217, at *7-9; *Valentine*, 956 F.3d at 801; *Marlowe v. LeBlanc*, 2020 WL 2043425 (5th Cir. Apr. 27, 2020); *Hallinan*, 2020 WL 3105094, at *14-16; *Chunn*, 2020 WL 3055669, at *26; *Grinis*, 2020 WL 2300313, at *3; *Money v. Pritzker*, 2020 WL 1820660, at *18 (N.D. Ill. Apr. 10, 2020); *Wragg v. Ortiz*, 2020 WL 2745247, at *21 (D.N.J. May 27, 2020); *Nellson v. Barnhart*, 2020 WL 1890670, at *6 (D. Col. Apr. 6, 2020); *Baez v. Moniz*, 2020 WL 2527865, at *7-9 (D. Mass. May 18, 2020); *Plata v. Newsom*, 2020 WL 1908776, at *3-9 (N.D. Cal. Apr. 17, 2020).

In contrast to these authorities, Petitioners solely rely on the now reversed *Cameron* district court case. Opp. at 16:13-24. With *Cameron*'s reversal, Petitioners cannot cite to a single authority where the Eighth Amendment subjective component has been met within the COVID-19 prison context.[7] In reversing the district court, *Cameron* found that there was no Eighth Amendment violation where the "BOP's actions to control the virus" included:

> [I]mplement[ing] measures to screen inmates for the virus; isolat[ing] and quarantin[ing] inmates who may have contracted the virus; limit[ing]

[7] Petitioners also cite to *Hernandez v. County of Monterey*, 110 F. Supp. 3d 929, 943 (N.D. Cal. 2015) for the generic principle that "known noncompliance with generally accepted guidelines for inmate health strongly indicates deliberate indifference." Opp. at 16:16-18. *Hernandez* is inapposite since it focused on providing accommodations to inmates with disabilities. *See* 110 F. Supp. at 936-37.

> inmates' movement from their residential areas and otherwise limit[ing] group gatherings; conduct[ing] testing in accordance with CDC guidance; limit[ing] staff and visitors and subject[ing] them to enhanced screening; clean[ing] common areas and giv[ing] inmates disinfectant to clean their cells; provid[ing] inmates continuous access to sinks, water, and soap; educat[ing] staff and inmates about ways to avoid contracting and transmitting the virus; and provid[ing] masks to inmates and various other personal protective equipment to staff.

2020 WL 3867393, at *6. The BOP has been doing the same here, and Petitioners cannot plead otherwise. *See* MTD at 3:9-4:17 (summarizing allegations in Complaint regarding FCI Terminal Island's efforts to respond to COVID-19).

Finally, Petitioners' attempt to distinguish Respondents' cases fails. For example, Petitioners attempt to distinguish *Valentine* by stating that there, the "prison officials had complied with CDC guidelines, continuously updating their policy and procedures as CDC guidelines changed." Opp. at 17:8-11. The BOP, however, has been doing the same here as outlined in their nationwide plan as well as those implemented at FCI Terminal Island. *See* Dkt. No. 28 (Declaration of Ronell Prioleau). Petitioners cannot legitimately plead that the BOP has not been complying with CDC guidelines. Petitioners also contend that *Chunn* and *Grinis* are distinguishable because of the number of inmates infected. *See id.* at 17:11-15. This factual difference, however, is not determinative because numerous courts have found that whether the harm is averted or not does not make an Eighth Amendment violation. *See* Dkt. MTD at 13:1-24. Finally, as stated above, *Hallinan* found no Eighth Amendment violation even though there had been 19 inmate deaths from COVID-19. 2020 WL 3105094, at *6.

In short, Petitioners cannot show that BOP officials had a "sufficiently culpable state of mind," that they "kn[ew] of and disregard[ed] an excessive risk to inmate health or safety," and acted with "the unnecessary and wanton infliction of pain." *Farmer*, 511 U.S. at 833, 837; *Whitley v. Albers*, 475 U.S. 612, 619 (1986) (citation omitted). Petitioners cannot show that the BOP acted with "obduracy and wantonness," as opposed to "inadvertence or error in good faith, that characterize the conduct prohibited by the

Cruel and Unusual Punishments Clause." *Wilson*, 501 U.S. at 299. Nor can Petitioners show that that the BOP's "current attitudes and conduct" amount to reckless disregard. *See Toguchi*, 391 F.3d at 1060. To the contrary, Petitioners admit that the BOP "[a]ttempted to 'solve' the overcrowding and communal housing issues"; provided masks and hand sanitizer in late April; tested asymptomatic prisoners beginning on April 28; placed symptomatic prisoners in the medical facility's short stay unit; and considered home confinement for some inmates. Opp. at 12:24-13:22; *see also* MTD at 3:9-4:17.[8] Respondents recognize that Petitioners are dissatisfied with these efforts, but dissatisfaction does not rise to an Eighth Amendment violation. Indeed, as explained above, nearly all federal courts have concluded that an Eighth Amendment violation could not lie where prison officials responded reasonably to the COVID-19 crisis with steps substantially similar to what the BOP has done here.

For these reasons, Petitioners' Eighth Amendment claim should be dismissed.

B. Petitioners Have Failed to Satisfy the PLRA's Exhaustion Requirements

Petitioners do not even address Respondents' cases in the COVID-19 context holding that exhaustion under the PLRA is required before inmates may bring suit concerning prison conditions. *See e.g.*, *Valentine*, 956 F.3d at 805 (rejecting inmates' exhaustion arguments and noting that administrative "relief by [the prison] remains possible (and the procedure available), even if [the prison] has not acted as swiftly as Plaintiffs would like"); *Swain*, 2020 WL 3167628, at *1; *Wragg*, 2020 WL 3074026, at *2 (D.N.J. Jun. 10, 2020). Ignoring these cases is fatal to Petitioners' Eight Amendment claim.

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[8] Respondents dispute Petitioners' characterizations of the BOP's efforts, but note that even Petitioners admit that the BOP had taken numerous actions to combat the COVID-19 crisis at FCI Terminal Island. Petitioners also contend that Respondents' assertion that they exhaust administrative remedies before filing suit as required by Congressional mandate and codified in the PLRA somehow "confirms their deliberate indifference." *See* Opp. at 16:24-27. This contention is perplexing because a legal argument made by counsel cannot have any bearing on the BOP officials' "sufficiently culpable state of mind." *Farmer*, 511 U.S. at 833.

Petitioners cite *Jones v. Bock*, 549 U.S. 199, 216 (2007) for the proposition that exhaustion is an affirmative defense. Opp. at 19:7-12. *Jones*, however, noted that if grounds for dismissal appears on the face of a complaint, it is still subject to dismissal under Fed. R. Civ. P. 12(b)(6) and that its holding "is not to say that failure to exhaust cannot be a basis for dismissal for failure to state a claim." *Jones*, 549 U.S. at 216. Moreover, an inmate's concession as to nonexhaustion is a valid ground for dismissal so long as no exception to exhaustion applies and a court may even dismiss an action sua sponte for failure to exhaust administrative remedies. *Govind v. Cash*, 2013 WL 5220809 at *7 (C.D. Cal. Sept. 10, 2013) (citing *Bennett v. King*, 293 F.3d 1096, 1098 (9th Cir. 2002) (affirming sua sponte dismissal on nonexhaustion grounds)).

None of the cases Petitioners cite supports the proposition that administrative remedies are not available at FCI Terminal Island. For example, *Sapp v. Kimbrell*, 62 F.3d 813, 826 (9th Cir. 2010), held that the prison's screening of the prisoner's grievance was proper, administrative remedies were available, and the prisoner's suit *was* barred by failure to exhaust under the PLRA. *See* Opp. at 18:8-16. Petitioners also quote Justice Sotomayor's statement made in connection with the Court's denial of an application to stay a preliminary injunction in *Valentine v. Collier*, 140 S. Ct. 1598, 1601 (2020). *See* Opp. at 18:23-19:4. Justice Sotomayor's statement is not a holding and merely states that it is possible that grievance procedures could constitute a dead-end such that exhaustion is not required.

Although Petitioners contend that that they have adequately alleged that administrative remedies are unavailable (*id*. at 19:18-20:6), their allegations do not support this contention. There is four-tiered administrative remedy process available. 28 C.F.R. §§ 542.10-542.19. Petitioners have not alleged that they ever requested an informal resolution related to the administrative remedy process and were denied. *See e.g.*, ECF 1 at Ex. A, B & C. Petitioners rely on the Declaration of Jacque Wilson, which states: "Staff have claimed that they cannot deal with complaints right now because they are too busy with COVID-19. My brother has submitted three medical complaints to his

case manager, but she has not responded." ECF 1, Ex. 1 ¶ 24. Even if this were true, it has no bearing on whether Petitioners have availed themselves of the administrative remedy process. Not only is submitting a medical complaint not a part of the administrative grievance process, but this declaration provides no context for how long Wilson's purported medical complaints allegedly went unanswered.

Similarly, Exhibit B, in which Smith states "they are not even letting us get forms to write the staff up" does not signal an attempt to submit an administrative grievance for Petitioners' requested injunctive relief (*e.g.*, masks, soap, and testing, etc.) as much as it does a desire to seek discipline of prison staff. In Exhibit E, Wilson claims: "We have been kept from a grievance process, our cop-outs are not being answered and the case managers and counselors are no where [*sic*] to be found to address the home confinement opportunity." Petitioners ask the court to infer from this unsworn statement that Wilson actually sought to challenge his conditions of confinement through the administrative remedy program, but drawing such an inference would run counter to the Congressional intent of mandating exhaustion prior to filing suit. Moreover, as Respondents have previously stated, inmates are automatically considered for referral to home confinement, whether inmates specifically request it or not. *See* Dkt. No. 51 (Javernick Decl. ¶¶ 9-23). To suggest that the BOP's automatic consideration of inmates for referral to home confinement means that exhaustion as to prison conditions is unavailable (so as to circumvent PLRA exhaustion requirements) is unavailing. None of the named Petitioners alleges he sought to pursue the formal administrative remedy process and that FCI Terminal Island interfered with that attempt, rendering administrative remedies "effectively unavailable."

Petitioners' admitted failure to satisfy the exhaustion requirement under the PLRA is another reason why their Eighth Amendment claims should be dismissed.

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III. CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Court dismiss Petitioners' Complaint.

Dated: July 13, 2020

Respectfully submitted,

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