

STATE OF MINNESOTA
COUNTY OF CARLTON

DISTRICT COURT
SIXTH JUDICIAL DISTRICT

CASE TYPE: Habeas Corpus

Roger Foster and Kristopher Mehle, on behalf
of themselves and all others similarly situated;
and Adam Dennis Sanborn, on behalf of
himself and all others similarly situated,

Honorable Leslie Beiers
Court File No. 09-CV-20-633

Petitioners,

vs.

Minnesota Department of Corrections; Paul
Schnell, Commissioner; Minnesota
Correctional Facility-Moose Lake; and
William Bolin, Warden,

Respondents.

**RESPONDENTS' MEMORANDUM OF
LAW IN OPPOSITION TO
PETITIONERS' WRITS OF HABEAS
CORPUS AND MANDAMUS AND
APPOINTMENT OF SPECIAL MASTER**

INTRODUCTION

Roger Foster, Kristopher Mehle, and Adam Sanborn (collectively "Petitioners"), individuals committed to the Minnesota Department of Corrections ("DOC"), petition the Court for writs of habeas corpus and mandamus. Petitioners allege the DOC has failed to take reasonable measures to protect them from COVID-19 infection during their incarceration. Petitioners seek, among other things, their release from the Minnesota Correctional Facility ("MCF")-Moose Lake and an order requiring the DOC to take further unspecified action to protect them during this unprecedented global crisis. Because the DOC has taken significant action to respond to the COVID-19 emergency, Petitioners' allegations are not supported by the record, and Petitioners can cite no legal authority supporting the extraordinary relief they seek, Petitioners' claims should be dismissed.

FACTS

I. BACKGROUND ON MCF-MOOSE LAKE

MCF-Moose Lake is a medium security facility that as of June 3, 2020 housed 982 adult offenders. (Declaration of Crystal Hansen (“Hansen Decl.”) ¶ 3.) MCF-Moose Lake houses offenders serving sentences for a variety of commitment offenses. (*Id.* ¶ 3, Ex. 1) As of June 3, the top five categories of commitment offenses for offenders housed at MCF-Moose Lake were: (1) drug related offenses (approximately 25%); (2) criminal sexual conduct (approximately 21%); (3) weapons related offenses (approximately 10%); (4) burglary (approximately 8%); and (5) homicide (approximately 7%). (*Id.*) The average length of sentence for offenders housed at MCF-Moose Lake, excluding life sentences, is currently 87 months. (*Id.*)

MCF-Moose Lake has the operational capacity to house 1,023 offenders with a total capacity of 1,075.¹ (*Id.* ¶ 3.) MCF-Moose Lake’s 982 offenders are housed in eight living units. (*Id.*) Unlike some other DOC facilities, MCF-Moose Lake houses offenders in a variety of cell types, with most offenders housed in congregate living settings. (Declaration of Dr. James Amsterdam (“Amsterdam Decl.”) ¶ 8.) MCF-Moose Lake’s eight living units consist of 128 single-cells, 162 double-cells, 85 three-man cells, 30 four-man cells, 10 six-man cells, and 17 eight-man cells. (Hansen Decl. ¶ 3.)

MCF-Moose Lake also has a segregation unit, known as Unit 4, which has capacity to house 52 offenders. (*Id.*) Prior to the COVID-19 pandemic, Unit 4 housed offenders in segregation for disciplinary and administrative reasons, and also served as temporary housing for new offender intakes at the facility. (*Id.*) Unit 4 houses offenders in single-cells with solid doors and walls. (*Id.*) Each cell in Unit 4 has its own toilet and sink. (*Id.*)

¹ Operational capacity refers to the number of beds available at MCF-Moose Lake excluding the 52 beds within its segregation unit. (Hansen Decl. ¶ 3.)

MCF-Moose Lake also has two other independent buildings with the capability to house offenders: the gymnasium and Building 84. (*Id.* ¶¶ 5, 7.) MCF-Moose Lake’s gymnasium is in a building apart from its living units and the gymnasium is normally used for indoor recreational activity. (*Id.* ¶ 7.) Building 84 is a separate building at MCF-Moose Lake that is normally used to conduct chemical dependency and sex offender treatment programming. (*Id.* ¶ 5.)

II. HEALTH SERVICES AT MCF-MOOSE LAKE

At all DOC facilities, health care is provided to offenders through Health Services. (Declaration of James Olson (“Olson Decl.”) ¶ 2.) Each DOC facility has its own Health Services overseen by a Director of Clinical Operations (“DCO”) (*Id.*) DCOs manage the administration and operation of Health Services, but the quality of offender medical care is overseen by a physician, the DOC’s Medical Director. (*Id.*; Amsterdam Decl. ¶ 1.) At MCF-Moose Lake, Health Services consists of 13 nursing staff, one Registered Nurse supervisor, one part-time dentist, and one part-time dental hygienist. (Olson Decl. ¶ 2.) At MCF-Moose Lake, like at other DOC facilities, nursing staff conduct medication pass and sick call among their many job duties. (*Id.*) Medication pass is the distribution of prescribed medication to offenders, which at MCF-Moose Lake is typically conducted on a set schedule four times a day. (*Id.*) Sick call allows offenders to sign up to see nursing staff for a condition that does not require emergency care and is typically conducted on a set schedule following medication pass. (*Id.*)

Offenders with urgent and emergent conditions that are unable to be treated by Health Services staff are transported to regional hospital emergency rooms. (*Id.* ¶ 9.) MCF-Moose Lake generally utilizes regional hospitals in Carlton County, but they also utilize hospitals in the broader region if necessary for urgent or emergent care. (Amsterdam Decl. ¶ 19.)

III. DOC IMPLEMENTATION OF COVID-19 GUIDANCE FROM THE CENTERS FOR DISEASE CONTROL AND PREVENTION AND THE MINNESOTA DEPARTMENT OF HEALTH

Material aspects of this novel coronavirus remain unknown and guidance regarding COVID-19 has evolved as more information has become available to the scientific and medical communities. (*Id.* ¶ 2.) For this reason, the U.S. Centers for Disease Control and Prevention (“CDC”) recommends that stakeholders monitor the CDC’s website to receive the most current information. (*Id.* ¶ 7, Ex. 4.) Even before Governor Tim Walz declared a peacetime emergency related to the COVID-19 pandemic on March 13, the DOC began taking preventative and preparative measures. (*Id.* ¶ 3.) This included implementing interim guidance that was first issued by the Minnesota Department of Health (“MDH”) to correctional facilities on March 10. (*Id.* ¶ 4, Ex. 2.) Based in part on this guidance, the DOC’s Medical Director developed COVID-19 screening, testing, and infection control protocols to be utilized at all DOC facilities beginning on March 13. (*Id.* ¶ 5, Ex. 3.) These protocols required, among other things, enhanced hygienic measures, screenings of all offenders presenting COVID-19 symptoms, screenings of all new offender intakes, the wearing of personal protective equipment by Health Services staff, the isolation of symptomatic offenders, and the quarantine of cellmates of symptomatic offenders. (*Id.* ¶ 5.)

On March 16, MDH appointed a member of MDH’s staff as an epidemiologist liaison to exclusively provide guidance to the DOC in implementing MDH and CDC guidelines in correctional facilities. (*Id.* ¶ 6.) The MDH liaison has been in nearly daily contact with the DOC’s Medical Director to address the DOC’s questions regarding the implementation of MDH and CDC guidance at each of the DOC’s unique facilities. (*Id.*) Since she was assigned to the DOC, the liaison has reviewed and provided input into each version of the DOC’s protocol

regarding COVID-19 screening, testing and infection control—which is currently in its eighteenth version. (*Id.* ¶ 15.)

On March 23, the CDC issued its *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*. (*Id.* ¶ 7, Ex. 4.) This was the first CDC COVID-19 guidance document specific to correctional and detention facilities. (*Id.* ¶ 7) Throughout the COVID-19 pandemic, the DOC has worked with MDH’s liaison to implement this guidance at its facilities and has sought direction from MDH to the extent that implementation of the CDC guidelines was not possible due to the circumstances of any particular DOC facility. (*Id.*) The CDC guidance explicitly provides:

This guidance will not necessarily address every possible custodial setting and may not use legal terminology specific to individual agencies’ authorities or processes. **The guidance may need to be adapted based on individual facilities’ physical space, staffing, population, operations, and other resources and conditions.** Facilities should contact CDC or their state local, territorial, and/or tribal public health department if they need assistance in applying these principles or addressing topics that are not specifically covered in this guidance.

(*Id.* ¶ 7, Ex. 4 at 1 (emphasis in original).) For this reason, the DOC’s Medical Director has consistently worked with the MDH liaison to adapt this guidance to all DOC facilities. (*Id.* ¶ 7.)

At the direction of Commissioner Schnell, these guidelines – as adapted by the DOC’s Medical Director with the approval of MDH’s consulting epidemiologist liaison – are enforced at all DOC facilities, including MCF-Moose Lake, and have been throughout the COVID-19 pandemic. (Declaration of Commissioner Paul Schnell (“Schnell Decl.”) ¶ 9.)

IV. THE DOC’S COVID-19 PREVENTATIVE AND PREPARATIVE EFFORTS AT MCF-MOOSE LAKE.

On March 29, MCF-Moose Lake became the first DOC facility to have a known case of COVID-19 infection. (Amsterdam Decl. ¶ 8.) Prior to identifying COVID-19 at the facility, however, the DOC took numerous preventative measures at MCF-Moose Lake. (Declaration of

Kristin Rish (“Rish Decl.”) ¶ 3; Declaration of William Bolin (“Bolin Decl.”) ¶ 2.) These measures were taken at the direction of Commissioner Schnell and were consistent with available CDC and MDH guidance being implemented at every DOC facility. (Schnell Decl. ¶¶ 3, 9.)

A. Measures to Promote and Enforce Offender Hygiene

As early as March 6, Commissioner Schnell sent a memorandum to all offenders warning about the dangers of COVID-19 and the importance of offender hygiene. (*Id.* ¶ 3, Ex. 1.) This included reinforcing basic CDC guidance such as encouraging offenders to frequently and thoroughly wash their hands, engage in proper coughing and sneezing etiquette, and regularly clean their cells. (*Id.*) To further encourage hand washing, on March 11 the DOC began distributing extra bars of soap. (Rish Decl. ¶ 3, Ex. 1.) On March 16, the DOC also began inventorying its critical supplies such as personal protective equipment and cleaning supplies. (*Id.* ¶ 5.) On March 18, at the direction of Commissioner Schnell, the DOC distributed additional handwashing and hand sanitizing stations at all DOC facilities. (Schnell Decl. ¶ 5, Ex. 4.) At MCF-Moose Lake, these stations were placed at the main entrance of the facility, at all unit entrances, in unit hallways, and at various other locations that would encourage frequent and convenient offender use. (Rish Decl. ¶ 6.)

At MCF-Moose Lake the DOC employed additional unit swampers (offenders employed to clean the facility) to clean and disinfect unit bathrooms and common areas. (Hansen Decl. ¶¶ 8, 13.) Offenders themselves were also expected to disinfect unit bathrooms following their use and were provided cleaning supplies. (*Id.* ¶ 8.) There has been general compliance with these personal hygiene measures at MCF-Moose Lake as observed by correctional staff. (*Id.* ¶ 13.) All of these preventative hygienic measures were consistent with CDC guidance. (*See*

Amsterdam Decl. ¶ 7, Ex. 4 at 7 (regarding inventorying critical supplies), 10 (regarding providing extra soap and handwashing and hand sanitizing stations), and 18 (regarding cleaning procedures).)

B. Encouraging Offender Reporting of COVID-19 Symptoms

In his March 6 memorandum, Commissioner Schnell also encouraged all offenders to contact Health Services if they had any concerns about their health. (Schnell Decl. ¶ 3, Ex. 1.) Beginning on March 11, to further encourage offenders to report symptoms to Health Services, the DOC waived all medical co-pays. (Rish Decl. ¶ 3, Ex. 1.) This measure was consistent with subsequent CDC guidance. (*See* Amsterdam Decl. ¶ 7, Ex. 4 at 9.) In another effort to encourage offender reporting, Commissioner Schnell also informed all offenders on March 26 that if they reported COVID-19 symptoms they would not lose their work assignment or pay. (Schnell Decl. ¶ 7, Ex. 6.)

C. Measures to Promote and Enforce Offender Social Distancing

On March 11, the DOC began postponing all events that involve persons coming into DOC facilities. (Rish Decl. ¶ 3.) On March 23, a memorandum was distributed to all offenders at MCF-Moose Lake reiterating the importance of social distancing and encouraging offenders to distance themselves at least six-feet apart. (Bolin Decl. ¶ 2, Ex. 1.) In a memorandum to all DOC offenders on March 26, Commissioner Schnell reinforced the importance of social distancing. (Schnell Decl. ¶ 7, Ex. 6.) Social distancing measures at MCF-Moose Lake have been strictly enforced by correctional staff who have seen general compliance from offenders and few instances of formal discipline related to lack of compliance. (Hansen Decl. ¶ 12.) Enforcement of these social distancing policies is consistent with CDC guidance. (*See* Amsterdam Decl. ¶ 7, Ex. 4 at 11.)

D. Suspension of All In-Person Visitation

On March 11, the DOC suspended in-person visitation at all of its facilities, including MCF-Moose Lake. (Rish Decl. ¶ 3.) This suspension was more restrictive than the eventual guidance on visitation that would later be issued by the CDC. (Amsterdam Decl. ¶ 7, Ex. 4 at 13-14.) Also consistent with CDC guidance, the DOC took measures to ensure offenders could remain connected with their family members and friends to maintain offender mental health during the crisis. (Schnell Decl. ¶ 5, Ex. 4.) These measures included providing free phone calls to offenders each week and free video visits. (*Id.*)

E. Activation of the DOC's Incident Management Team

On March 15, Commissioner Schnell activated the Incident Management Team ("IMT"). (Schnell Decl. ¶ 4.) The activation of IMT put in place an emergency command structure to assist the DOC in its preparation and prevention efforts to combat COVID-19. (*Id.*) At MCF-Moose Lake, the Incident Commander is Associate Warden of Operations ("AWO") Kristin Rish.² (Rish Decl. ¶ 2.) As Incident Commander at MCF-Moose Lake, it is AWO Rish's responsibility, among other duties, to communicate the direction and guidance being issued by the DOC's Medical Director to facility staff to ensure its proper implementation. (*Id.*) Putting this emergency planning system in place was consistent with CDC guidance on operational preparedness for correctional facilities. (Amsterdam Decl. ¶ 7, Ex. 4 at 5-6.)

F. COVID-19 Facility Entrance Screenings

On March 16, the DOC implemented a mandatory screening process for all staff and contractors entering any DOC facility, including MCF-Moose Lake. (Rish Decl. ¶ 4.) This

² AWO Rish shares this responsibility on a rotating weekly schedule with Captain Chad Parker. (Rish Decl. ¶ 2.)

included the completion of a COVID-19 screening form and temperature screening prior to entry. (*Id.* ¶ 4, Exs. 2-4.) DOC also screened all packages and mail entering the facility. (*Id.* ¶ 4, Ex. 5.) These measures are consistent with the later-issued CDC guidance on these issues. (Amsterdam Decl. ¶ 7, Ex. 7 at 26.)

G. Moratorium on New Intakes

On March 27, MCF-Moose Lake stopped accepting any new offender intakes. (Rish Decl. ¶ 7.) This means that MCF-Moose Lake no longer has any new offenders being housed at or transferred to the facility, and has facilitated the reduction of its offender population. (*Id.*; Schnell Decl. ¶ 11(h).)

V. THE DOC'S MITIGATION EFFORTS AT MCF-MOOSE LAKE

The DOC considered MCF-Moose Lake to be particularly susceptible to COVID-19 infection because, unlike other DOC facilities, it houses many offenders in congregate living settings. (Amsterdam Decl. ¶ 8.) This makes COVID-19 prevention and mitigation measures particularly challenging and is the reason that the DOC consulted the guidelines MDH developed for all congregate living settings. (*Id.* ¶¶ 8, 12, Ex.7.) As soon as the DOC became aware of a positive COVID-19 test result at MCF-Moose Lake on March 29, it immediately began implementing the isolation and quarantine procedures developed by the DOC's Medical Director in collaboration with MDH's epidemiologist liaison. (Bolin Decl. ¶ 3.) The positive offender was immediately brought to isolation and the offender's entire unit was placed on lock-up status. (Rish Decl. ¶ 8.) This meant that no offender was permitted to leave their cell except to use the bathrooms, which were regularly cleaned and disinfected by unit swamper. (*Id.*) Though COVID-19 continued to spread at the facility, the DOC's mitigation efforts curbed the spread to

manageable levels that have been within MCF-Moose Lake's capacity to control. (Amsterdam Decl. ¶ 24; Olson Decl. ¶ 24.)

A. Implementation of Modified Unit Movement

As part of its continued social distancing efforts, MCF-Moose Lake significantly restricted the ability of offenders to move throughout the facility. (Hansen Decl. ¶ 9.) This included ending any comingling of offenders from different living units during recreation and meal times. (*Id.*, Ex. 5.) Offenders' recreation time was restricted to their specific living unit and all offenders began receiving meals within their specific living unit. (*Id.*; Rish Decl. ¶ 13(d).)

B. Isolation

Any offender who is determined by MCF-Moose Lake Health Services staff to have any symptoms of COVID-19 is immediately isolated. (Rish Decl. ¶ 13(d); Hansen Decl. ¶ 4; Olson Decl. ¶ 6; Amsterdam Decl. ¶ 9.) During the COVID-19 pandemic there have been no exceptions to this rule. (Olson Decl. ¶ 6.) Offenders placed on isolation status are housed in MCF-Moose Lake's segregation unit, also known as Unit 4, where they are placed in cells with solid doors and walls. (*Id.* ¶ 7.) According to CDC guidance, these are the ideal conditions for offender isolation. (Amsterdam Decl. ¶ 9, Ex. 4 at 16.)

Each isolation cell has its own toilet and sink and offenders in isolation are evaluated and receive health care within their cells. (Olson Decl. ¶ 7.) Health Services clears all offenders before they are permitted to leave isolation. (Amsterdam Decl. ¶ 18; Olson Decl. ¶ 13.) Currently to be cleared to leave isolation, offenders must go three consecutive days while afebrile (i.e. fever free) without medication in addition to ten days with no progressive symptoms. (Olson Decl. ¶ 8.) Additionally, if offenders on isolation status test positive for

COVID-19 they must complete 14 days since the onset of their symptoms in a step-down environment, described in more detail below. (*Id.*)

MCF-Moose Lake has had sufficient capacity to house offenders on isolation status in its segregation unit throughout the COVID-19 pandemic. (Olson Decl. ¶ 10; Hansen Decl. ¶ 4; Rish Decl. ¶ 13(g); Amsterdam Decl. ¶ 18.) For this reason, at no point during the pandemic has MCF-Moose Lake had to house an offender on isolation status in another unit, or in a cohort. (Olson Decl. ¶ 10.)

As of June 3, 79 offenders at MCF-Moose Lake have fully recovered from COVID-19 and have been cleared from isolation status by Health Services to return to their living unit. (Olson Decl. ¶ 11, Amsterdam Decl. ¶ 24.) As of June 3, there is only one offender remaining on isolation status in MCF-Moose Lake's segregation unit. (Olson Decl. ¶ 11, Amsterdam Decl., ¶ 24.) Even though MCF-Moose Lake has almost eliminated offenders on isolation status, it nevertheless continues to make preparations to ensure it does not reach capacity in the event of an unanticipated surge of COVID-19 infection. (Amsterdam Decl. ¶ 20; Rish Decl. ¶ 13(g).)

C. Step-down

MCF-Moose Lake created a step-down procedure that permits offenders previously in isolation, but who have had a positive COVID-19 test, to be quarantined and monitored in a separate space before returning to their living unit. (Amsterdam Decl. ¶ 18.) At MCF-Moose Lake, offenders in step-down status pursuant to this procedure are housed in the gymnasium. (Hansen Decl. ¶ 7.) Offenders in step-down status must be asymptomatic and cleared by Health Services to leave isolation. (Amsterdam Decl. ¶ 18.) As explained above, this means that Health Services has determined that the offender has gone three days without a fever without medication, and has gone ten days with no progressive symptoms. (Olson Decl. ¶ 8.) Offenders

determined by Health Services to meet these criteria must complete an additional 14 days since the onset of their symptoms in step-down. (*Id.*)

Offenders in step-down status are monitored by Health Services staff and any offender exhibiting symptoms while in step-down is immediately returned to isolation. (*Id.* ¶ 12.) Before an offender can return to their living unit from step-down status they must be evaluated and cleared by Health Services staff. (*Id.* ¶ 13.)

As of June 3, there is only one offender in step-down status at MCF-Moose Lake. (Olson Decl. ¶ 14; Amsterdam Decl. ¶ 24.)

D. Quarantine

The DOC's Medical Director developed a procedure for quarantining offenders at MCF-Moose Lake consistent with CDC guidelines and in collaboration with MDH's consulting epidemiologist liaison. (Amsterdam Decl. ¶ 9.) During the pandemic, any offenders who have been cellmates of an offender placed on isolation status are immediately placed in quarantine. (Olson Decl. ¶ 15.) The period of quarantine is currently 14 days. (Amsterdam Decl. ¶ 15, Ex. 10.) Offenders on quarantine status are confined to their cell as a cohort and are expected to practice social distancing within the cell to the extent they are able. (Hansen Decl. ¶ 9.)

Offenders on quarantine status must seek permission from security staff to utilize unit bathrooms, and security staff ensure the unit is clear to permit social distancing to occur during bathroom use. (*Id.* ¶ 8.) Offenders are expected to clean and disinfect the bathroom following their use with cleaning supplies made available to them at the facility and extra swabbers have been employed to regularly clean and disinfect unit bathrooms. (*Id.*) Offenders on quarantine status also have their own scheduled yard time apart from their living unit and are not permitted to commingle outside of their cellmate cohort. (*Id.* ¶ 9.) These requirements are strictly

enforced by security staff who have seen general compliance during the pandemic. (*Id.* ¶¶ 9, 12.)

Given the restrictions offenders face when placed in quarantine, the DOC has put a number of measures in place to encourage offender reports of COVID-19 symptoms. (Hansen Decl. ¶ 11.) Those measures include allowing offenders to keep their work assignments while on isolation or quarantine status and permitting them to use devices for electronic communication and music known as “Jpay” tablets. (*Id.*)

Offenders in quarantine are closely monitored by Health Services staff. (Olson Decl. ¶ 17.) Quarantined offenders are regularly screened for COVID-19 symptoms and additionally screened upon any report of symptoms. (*Id.*) Any offender determined by Health Services staff to be exhibiting any COVID-19 symptoms is immediately placed on isolation and the 14 day quarantine period is restarted for the other cellmates. (*Id.*)

As of June 3, there are no offenders on quarantine status because they have had a cellmate placed on isolation status. (Olson Decl. ¶ 18.) Currently, there are 16 offenders on quarantine status, but all 16 offenders are on quarantine status because they will be leaving MCF-Moose Lake. (*Id.*) This precautionary quarantine prior to leaving a facility with COVID-19 infections is consistent with CDC guidance. (*Id.*) Because MCF-Moose Lake has been so successful in its mitigation efforts, all 16 offenders on quarantine status are being temporarily housed in the facility’s individual segregation cells until they complete their quarantine and can leave the facility. (*Id.*)

E. Personal Protective Equipment and Barrier Masks

Throughout the COVID-19 pandemic, Health Services staff assessing and screening patients have been required to don personal protective equipment (“PPE”) when assessing

offenders for COVID-19. (Amsterdam Decl. ¶ 5, Ex. 3.) PPE includes an N-95 mask, gloves, eye protection in the form of goggles or facemask, gown, and shoe covers. (*Id.*; Olson Decl. ¶ 4.)

As of April 1, cotton barrier masks were distributed to all offenders, who were encouraged to wear them. (Rish Decl., ¶¶ 9-10.) As of April 8, all offenders are required to wear their mask while in the presence of staff and other offenders, with limited exceptions. (*Id.*)

As of April 15, all MCF-Moose Lake staff were required to wear an N-95 mask at all times while in the presence of other staff or offenders, and N-95 masks were distributed to all MCF-Moose Lake staff. (*Id.* ¶ 11.) This requirement continued until May 11, when it was relaxed after consultation with MDH and the DOC's Medical Director, and due to the effectiveness of the DOC's mitigation efforts. (Rish Decl., ¶ 11; Bolin Decl. ¶ 8.) At that time, the DOC's Medical Director instituted the requirement that N-95 masks are only required to be worn under the following circumstances: (1) when staff are escorting symptomatic offenders; (2) when staff are conducting special duties such as hospital runs and transports; (3) when staff are making rounds in the isolation unit; (4) when staff are making rounds in the step-down unit; and (5) when Health Services staff have any direct contact with symptomatic offenders. (Bolin Decl. ¶ 8.) All staff are still required to wear a cloth barrier mask at all times when in the presence of other staff and offenders. (*Id.*)

F. COVID-19 Testing

Currently, all offenders at MCF-Moose Lake on isolation status are tested for COVID-19 and, as outlined above, positive offenders must complete 14 days in isolation after their symptom onset on step-down status. (Amsterdam Decl. ¶ 15, Ex. 10.) All offenders on quarantine status

are also tested on day 12 of their quarantine. (*Id.*) These testing procedures were developed with the input, guidance, and approval of MDH's epidemiologist liaison. (*Id.*)

With coordination and guidance from MDH, the DOC recently began mass testing of both offenders and staff. (Schnell Decl. ¶ 13) On May 22, 1,408 offenders at MCF-Stillwater were tested and all 1,408 were negative for COVID-19 infection. (*Id.*) On June 2, 386 staff and 1,102 offenders at MCF-Lino Lakes were tested. (*Id.*) All test results were negative for COVID-19 Infection. (*Id.*) These mass testing efforts will continue at additional facilities in a manner consistent with the guidance and approval for such testing the DOC receives from MDH. (*Id.*)

VI. DOC EFFORTS TO REDUCE ITS PRISON POPULATION FOR THE HEALTH AND WELL-BEING OF OFFENDERS

It is important to remember that Minnesota's prison population generally consists of individuals sentenced by Minnesota courts to serve felony sentences in the Commissioner's custody. While the Commissioner is responsible for administering sentences, the Commissioner does not decide who is committed to his custody or what their prison sentence will be. That is the responsibility of Minnesota courts. But once an offender is committed to the Commissioner's custody, the Commissioner has authority over the conditions both in and out of prison. As the Court is well aware, most felony sentences in Minnesota include a minimum term of imprisonment, equal to two-thirds of the sentence, and a maximum supervised-release term, equal to one-third of the sentence. Minn. Stat. § 244.101, subd. 1 (2018). The term of imprisonment must be served before a person may be released on supervised release. *Id.* § 244.05, subds. 1, 1b(a) (2018). Supervised release is a modern version of parole—a period when an offender remains in DOC custody after release from prison, subject to conditions established by the DOC. When an offender is released from prison before expiration of his

sentence, the Commissioner has broad discretion to impose conditions of release and to sanction violations of those conditions. *Id.* §§ 241.01, subd. 3a(b), 244.05, subds. 2-3. The Legislature authorized the Commissioner to impose conditions of release upon offenders placed on supervision and to sanction violations of conditions of release, which may include revoking and reimprisoning an offender. *Id.* § 244.05, subd. 3. The conditions of release are based on the DOC’s assessment of the need for public safety. Minn. R. 2940.1900 (2019).

Absent statutory authority, the Commissioner cannot release offenders early—before their supervised-release date—and disregard the court orders committing individuals to his custody. Minnesota law allows for certain types of early release programs, but the grant of authority came with limitations. The early release programs include work release, release for certain nonviolent controlled substance offenders, the challenge incarceration program, and conditional medical release. *See* Minn. Stat. §§ 244.05, subd. 8 (conditional medical release), 244.17-.173 (challenge incarceration), 244.0513 (nonviolent controlled substance offenders), 241.26 and 244.065 (work release) (2018). The Commissioner has expanded both work release and conditional medical release in response to COVID-19. The Commissioner has discretion to release offenders on work release “[w]hen consistent with the public interest and the public safety.” *Id.* § 241.26, subd. 1 (2018); *see also id.* § 244.065 (2018). However, the offender must have served “at least one half of the term of imprisonment.” *Id.* § 244.065. Under Minnesota Statutes section 244.05, the Commissioner “may order” an offender to be placed on conditional medical release “if the offender suffers from a grave illness or medical condition and the release poses no threat to the public.” *Id.* § 244.05, subd. 8. The statute directs the Commissioner to consider the offender’s age and medical condition, health care needs, custody classification, and

level of risk, as well as the appropriate level of community supervision, alternative placements, and coverage for health care costs. *Id.*

Both before this action was commenced and since that time, the DOC has taken significant measures aimed at reducing prison population and protecting the health and wellbeing of offenders during the COVID-19 pandemic. (*Id.* ¶ 11(a)-(i).) Those measures include the DOC's COVID-19 Conditional Medical Release program, its COVID-19 Expanded Work Release Program, its COVID-19 management of release offenders, and its COVID-19 Release Violator Sanction Reduction process. (*Id.*) While the exact number of offenders that have been released from prison as a result of these efforts collectively can only be estimated, the DOC's total prison population has been reduced by at least 675 offenders over the last three months and is at its lowest level in over 15 years. (*Id.* ¶ 12.)

A. COVID-19 Conditional Medical Release

On April 16, the DOC began a COVID-19 Conditional Medical Release program for offenders at higher risk of grave harm from COVID-19 by virtue of their medical condition(s). (*Id.* ¶ 11(a).) COVID-19 Conditional Medical Release is an expansion of the DOC's existing medical release program, which was available to eligible offenders suffering from a grave illness or medical condition. (*Id.*) To be eligible for COVID-19 Conditional Medical Release, an offender must meet the following criteria: (1) they must currently have a serious medical condition that puts them at higher risk of severe illness if they were to contract COVID-19; (2) their release must not pose a threat to the public; (3) their health costs in the community must be borne by the offender, veteran's benefits, Medicare, or some other federal or state medical assistance program; and (4) they must have an available and appropriate residence or placement in the community to which they can be released under supervision. (*Id.*, Ex. 11.)

To assist and facilitate offender applications for COVID-19 Conditional Medical Release the DOC solicited and received assistance from all three Twin Cities area law schools and created a guide with instructions on application completion. (*Id.*, Exs. 14-15.) As of June 1, the DOC received 1,523 applications for the program and 84 applicants were approved for early release. (*Id.* ¶ 11(b).) Of those 84 approved applicants, 17 were housed at MCF-Moose Lake.

B. COVID-19 Expanded Work Release Program

On April 14, the DOC began implementing its COVID-19 Expanded Work Release Program. (*Id.* ¶ 11(c).) This program expanded the DOC's existing work release to offenders with the following eligibility criteria: (1) they have served at least one half of their term of imprisonment, (2) they have no more than 3 months remaining to release, (3) they have an assessment score using the Minnesota Screening Tool Assessing Recidivism Risk ("MNSTARR") of medium or low risk, (4) they have an approved program or residence, and (5) they have access to a landline or internet access with a camera-capable device at the release address. (*Id.*, Ex. 16.) DOC caseworkers were instructed to screen offenders on their caseload who may meet the criteria for this program, provide them an application, and encourage them to apply. (*Id.* ¶ 11(c).)

As of June 1, the DOC has identified 166 offenders that are eligible for early release under the program and 61 have been approved. Of the 61 approved applicants, four were housed at MCF-Moose Lake. (*Id.* ¶ 11(d).)

C. COVID-19 Management of Release Violators

Offenders who are under supervision in the community that violate their conditions of release can have their release revoked and be reimprisoned. (*Id.* ¶ 11(f)); *see* Minn. Stat. § 244.05, subd. 3. At the direction of Commissioner Schnell, hearing officers in the Hearings

and Release Unit at the DOC must exercise a more restrictive stance to the processing of warrant requests or revocations in an attempt to limit the number of offenders being reimprisoned to those who present an articulable danger to community safety. (*Id.* ¶ 11(g), Ex. 17 at 2.) While it is difficult to determine the precise population reduction that can be attributed to this direction from the Commissioner, in April and May of this year there were 325 fewer release violators reimprisoned than over the same period last year. (*Id.* ¶ 11(h).)

VII. FACTUAL BACKGROUND OF PETITIONERS

A. Petitioner Roger Foster

Petitioner Foster was committed to the DOC on April 25, 2019 for a period of 30 months. (*See* Warrant of Commitment attached as Ex. 1 to the DOC’s Habeas Return.) He is currently housed in Unit 8 of MCF-Moose Lake and his sentence is set to expire on August 8, 2021, with a scheduled supervised release date of October 8, 2020. (Declaration of Terry Byrne (“Byrne Decl.”) ¶ 5, Ex. 3.) Petitioner Foster has never been placed on isolation, step-down, or quarantine status during the COVID-19 pandemic. (Hansen Decl. ¶ 10.) Additionally, as of June 3, none of Petitioner Foster’s cellmates since March 29 (the date of the first positive COVID-19 infection at the facility) have been determined by Health Services staff to be exhibiting COVID-19 symptoms, or have been found to be positive for COVID-19. (Olson Decl. ¶ 23.)

B. Petitioner Adam Sanborn

Petitioner Sanborn was committed to the DOC on June 25, 2019 for a period of 65 months. (*See* Warrant of Commitment attached as Ex. 3 to the DOC’s Habeas Return.) He is currently housed in Unit 54 of MCF-Moose Lake and his sentence is set to expire on August 17, 2027, with a scheduled supervised release date of August 17, 2022. (Byrne Decl. ¶ 5, Ex. 4.)

Petitioner Sanborn has never been placed on isolation, step-down, or quarantine status during the COVID-19 pandemic. (Hansen Decl. ¶ 10.) Additionally, as of June 3, none of Petitioner Sanborn's cellmates since March 29 have been determined by Health Services staff to be exhibiting COVID-19 symptoms, or have been found to be positive for COVID-19. (Olson Decl. ¶ 23.)

C. Petitioner Kristopher Mehle

Petitioner Mehle was committed to the DOC on January 28, 2019 for a period of 36 months. (*See* Warrant of Commitment attached as Ex. 2 to the DOC's Habeas Return.) On May 14, 2020 he began work release at the Bethel Work Release Center. (Byrne Decl. ¶ 3.) On that same day, he escaped from the facility through a fire door and was terminated from his work release program at Bethel. (*Id.* ¶ 3, Ex. 1.) He is currently a fugitive and a warrant was issued for his arrest. (*Id.* ¶ 3.) If Petitioner Mehle is apprehended during the COVID-19 pandemic, he will not be returned to MCF-Moose Lake. (*Id.* ¶ 4; Rish Decl. ¶ 7.)

While Petitioner Mehle was at MCF-Moose Lake, he was never placed on isolation, step-down, or quarantine status during the COVID-19 pandemic. (Hansen Decl. ¶ 10.) Additionally, from March 29, 2020 to May 14, 2020, none of Petitioner Mehle's cellmates were determined by Health Services staff to be exhibiting COVID-19 symptoms or to have been found to be positive for COVID-19. (Olson Decl. ¶ 23.)

ARGUMENT

To date, the DOC has done what at the start of this lawsuit appeared to be an insurmountable task: as of June 3, there is only a single offender on isolation status in the entire facility. (Olson Decl. ¶ 11, Amsterdam Decl., ¶ 24.) Equally impressive, as of June 3, 79 offenders have fully recovered from COVID-19 and have been cleared by Health Services to return to their living units. (Olson Decl. ¶ 11, Amsterdam Decl. ¶ 24.) The DOC is therefore

uniquely positioned in this case to demonstrate that the exhaustive efforts outlined above are not only reasonable, but they were completely effective in mitigating the spread of this unprecedented disease. On this record, Petitioners cannot prevail. The Court should deny the petition without a hearing.

I. PETITIONERS ARE NOT ENTITLED TO HABEAS RELIEF.

A writ of habeas corpus is a civil remedy available to obtain relief from unlawful imprisonment or restraint. Minn. Stat. § 589.01 (2018); *Rud v. Fabian*, 743 N.W.2d 295, 297 (Minn. Ct. App. 2007). Habeas corpus is an appropriate procedure to use if the petitioner may be entitled to immediate release or if the petitioner challenges decisions that affect the length of his confinement. *See Kelsey v. State ex rel. McManus*, 244 N.W.2d 53, 54 (Minn. 1976); *State v. Schnagl*, 859 N.W.2d 297, 302-03 (Minn. 2015); *State ex rel. Huseby v. Roy*, 903 N.W.2d 633, 635 (Minn. Ct. App. 2017). The writ may be used to bring claims concerning fundamental constitutional rights, significant restraints on liberty, conditions of confinement alleged to constitute cruel and unusual punishment, and confinement that allegedly violates applicable laws. *State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 26-27 (Minn. Ct. App. 2006); *State ex rel. Ford v. Schnell*, 933 N.W.2d 393, 404-05 (Minn. 2019). But habeas corpus remains a limited remedy that does not apply to every DOC action or decision—just to those alleged to illegally imprison or restrain someone. *See* Minn. Stat. §§ 589.01, 589.04(d), (f) (2018).

The habeas petitioner bears the burden of proving the illegality of his detention. *Breeding v. Swenson*, 60 N.W.2d 4, 7 (Minn. 1953). Though a district court may hold an evidentiary hearing, a hearing is not necessary if a petitioner fails to allege sufficient facts to establish a prima facie case for relief, or if the petition does not show a factual dispute. *Case v. Pung*, 413 N.W.2d 261, 263 (Minn. Ct. App. 1987); *Seifert v. Erickson*, 420 N.W.2d 917, 920

(Minn. Ct. App. 1988). In addition, a petitioner is not entitled to an evidentiary hearing where it is clear as a matter of law from the pleadings that he is not entitled to relief. *See Morse v. State*, 311 N.W.2d 855, 856 (Minn. 1981).

A. Petitioners Are Not Entitled To Habeas Relief Based On Their Claim Of Cruel And Unusual Conditions Of Confinement.

Minnesota courts have held that “habeas corpus is available under certain circumstances to test a claim of a prisoner that the conditions of his confinement constitute cruel and unusual punishment.” *Kelsey v. State*, 283 N.W.2d 892, 895 (Minn. 1979); *see also Guth*, 716 N.W.2d at 26-27. However, this does not establish broad authority to hear all constitutional claims in habeas proceedings, because petitioners must still comply with the requirements of the habeas statute, Minn. Stat. § 589.01. Indeed, Minnesota courts have made clear that bringing a conditions of confinement claim in a habeas proceeding requires affirmatively showing a need for judicial intervention. *See State ex rel. Crosby v. Wood*, 265 N.W.2d 638, 639 (Minn. 1978) (“[H]abeas corpus is available as a remedy in cases of mistreatment only if it appears that the mistreatment will be continued or repeated if relief is not afforded.”). In *State ex rel. Cole v. Tahash*, the court explained:

We are satisfied that one confined in a state institution is entitled to a hearing upon a petition for a writ of habeas corpus if his petition is supported by a prima facie showing of a course of cruel and unusual treatment occurring at a time and place and under circumstances giving rise to the inference that the treatment will continue or be repeated in the absence of judicial intervention. The minimal requisites of such a showing should include a verified statement detailing: (a) The facts respecting the treatment claimed to be cruel and unusual; (b) the time and place of such treatment; and (c) the identity of the person or persons considered responsible for it.

129 N.W.2d 903, 907-908 (Minn. 1964).

Although it is clear that a habeas petitioner carries a heavy burden, the contours of when conditions of confinement alleged to be cruel and unusual actually warrant habeas relief is not

well-defined. Indeed, it does not appear there are any Minnesota appellate cases granting habeas relief, including release from incarceration, based on allegedly unlawful conditions of confinement. Rather, habeas petitioners have been unsuccessful on appeal when they brought habeas petitions related to medical care and difficulty with other offenders. *See State ex rel. Kopetka v. Young*, 163 N.W.2d 49 (Minn. 1968) (per curiam) (affirming denial of habeas petition seeking release to convalesce from respiratory infection before undergoing surgery for a hernia or tumor, and declining to assume DOC would not provide needed medical care); *Kelsey v. State ex rel. Erickson*, 320 N.W.2d 438, 439 (Minn. 1982) (although habeas would be appropriate if petitioner established present and continuing mistreatment amounting to cruel and unusual punishment, record showed petitioner was receiving adequate medical treatment); *Kelsey v. State ex rel. Erickson*, 349 N.W.2d 613 (Minn. Ct. App. 1984) (determining problem of poor relationship between petitioner and other inmates did not rise to level of cruelty permitting relief); *Beck v. Crist*, No. CX-00-477, 2000 WL 995006, at *2 (Minn. Ct. App. July 18, 2000) (unpublished) (affirming denial of habeas corpus petition challenging alleged failure to treat Legionnaire's disease where district court found petitioner had adequate access to medical care).

Here, Petitioners do not meet their high burden to obtain habeas relief. While Minnesota courts have not squarely defined what cruel and unusual punishment means in the context of a petition for habeas corpus, the United States Supreme Court has stated that, “[a]fter incarceration, only the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment.” *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Cruel and unusual punishment involves “more than ordinary lack of due care,” it is “obduracy and wantonness, not inadvertence or error.” *Id.* Prison officials have a duty to ensure reasonable safety for prisoners, and in considering this duty, due regard must be taken for prison officials “unenviable task” of

maintaining safe and humane conditions in a prison. *Farmer v. Brennan*, 511 U.S. 825, 844 (1994) (citations omitted). To be cruel and unusual, a prison official must have a sufficiently culpable state of mind. *Id.* at 834. Thus, establishing cruel and unusual punishment in the context of conditions of confinement requires a showing that prison officials acted with deliberate indifference to a substantial risk of serious harm to an offender. *Id.* at 828. Deliberate indifference is more than negligence – it is the equivalent of recklessly disregarding a risk. *Id.* at 836. A prison official must “know[] that inmates face a substantial risk of serious harm and disregard[] that harm by failing to take reasonable measures to abate it.” *Id.* at 835, 847. Prison officials are not deliberately indifferent “if they responded reasonably to the risk, even if the harm ultimately was not averted.” *Id.* at 844.

The DOC has responded reasonably to COVID-19 at MCF-Moose Lake. Throughout the pandemic, the DOC’s Medical Director has consulted with an assigned MDH epidemiologist liaison, who in turn reviews and approves protocols to ensure compliance with CDC and MDH compliance. More specifically, prior to a known case of COVID-19 occurring in a DOC facility, MCF-Moose Lake took actions that included: suspending in-person visitation; issuing memoranda to offenders highlighting the importance of handwashing; distributing extra soap; installing additional handwashing and hand sanitizing stations; employing extra swamper to clean and disinfect common areas; encouraging offenders to self-report symptoms and guaranteeing their work assignments; postponing events where outsiders would be entering the facility; encouraging and enforcing social distancing; activating an Incident Management Team to assist with preparation and prevention efforts; screening all staff and contractors entering the facility, and screening mail and packages; and placing a moratorium on accepting new intakes.

After COVID-19 was detected at MCF-Moose Lake, officials took the following additional actions: restricting offender mobility, which included ending comingling of offenders from different living units; directing that staff work within their assigned unit and not work across units; isolating any offender showing symptoms; implementing a step-down procedure for asymptomatic offenders recovering from COVID-19 to be monitored and quarantined before returning to a living unit; quarantining offenders who had been cellmates with offenders placed in isolation; continuing to encourage self-reporting; distributing masks to offenders and requiring that masks be worn while in the presence of others; distributing N-95 masks to staff and requiring they be worn while in the presence of others; and requiring testing of offenders in isolation. In addition to the actions taken at MCF-Moose Lake, the DOC has also taken measures to reduce prison populations through work release and conditional medical release.

And while the issue of COVID-19 in correctional institutions is novel, courts in other jurisdictions have found that conditions of confinement do not rise to the level of cruel and unusual punishment where prison officials, like the Commissioner and Warden, have taken reasonable actions to prevent the spread of the virus. For instance, the Montana Supreme Court held that prison officials were not deliberately indifferent to the health and safety of offenders amid the COVID-19 pandemic where officials implemented measures such as screening everyone arriving at a prison, restricting in-person visitations and off-site appointments, and working with the Board of Pardons and Parole to consider early release of eligible offenders. *Disability Rights Montana v. Montana Judicial Districts 1-22*, OP 20, 0189, 2020 WL 1867123, a*3-4 (Mont. Apr. 14, 2020). Likewise, a federal court in California held that California's Department of Corrections and Rehabilitation was not deliberately indifferent to the risk that COVID-19 poses, noting that the Department implemented measures to increase social

distancing, such as restricting movement, eliminating mixing of inmates from different housing units, and placing six foot markers in common areas. *Plata v. Newsom*, Case No. 01-cv-01351, 2020 WL 1908776, at *5 (N.D. Cal. Apr. 17, 2020). And recently, the Massachusetts Supreme Court held that the Massachusetts Department of Corrections was not deliberately indifferent to the risk posed to inmates by COVID-19 because the Department had implemented several measures to combat the virus, such as canceling in-person visits, screening of individuals prior to entering a facility, isolating symptomatic inmates and those who have tested positive, mandating that staff wear masks, increased testing, and increased cleaning.³ *Foster v. Comm'r of Corr.*, SJC-12935, 2020 WL 2844516, at *15-17 (Mass. June 2, 2020).

It should be noted that no Petitioner in this case has been exposed to an individual known or believed to be infected with COVID-19. No Petitioner has been in isolation, step-down, or quarantine during the pandemic. Further, as of June 3, 2020, only one offender at MCF-Moose Lake was in isolation and 79 had fully recovered. While isolated incidents of protocols not being followed may occur, as they no doubt would in any setting, such incidents cannot be grounds for the habeas relief Petitioners seek. The record demonstrates that the response at MCF-Moose Lake has been reasonable under the circumstances; the DOC's response has not been cruel and unusual as a matter of law.

B. Petitioners Are Not Entitled To Habeas Relief Based On Any Other Constitutional Or Statutory Provisions.

³ See also *Valentine v. Collier*, 956 F.3d 797, 802-803 (5th Cir. 2020) (noting that “mere disagreement” with prison officials’ response to COVID-19 does not establish deliberate indifference and warrant injunctive relief); *Swain v. Junior*, 958 F.3d 1081, 1089 (11th Cir. 2020) (reversing injunction and noting that evidence indicated that prison officials were not deliberately indifferent because they adopted safety measures such as screening, quarantining, enhanced cleaning).

Petitioners, without much in the way of substantive analysis, also rely on other constitutional and statutory provisions to support their claim for habeas relief. Petitioners cite, unavailingly, the Minnesota Constitution's due process clause as a basis for habeas relief. The right to substantive due process guaranteed by the Minnesota Constitution is identical to that guaranteed by the United States Constitution. *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988). The United States Supreme Court has held that if a claim is covered by a specific constitutional provision, the claim must be analyzed under that provision's standards and not substantive due process. *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998). Because Petitioners' allegations are covered by the Minnesota Constitution's prohibition against cruel or unusual punishment, due process is not a proper vehicle to seek the relief they request. Even if their claim could be analyzed under the due process clause, however, it would clearly fall short for the reasons set forth above.⁴

Petitioners' reliance on statutes and administrative rules related to correctional facilities is similarly misplaced. In considering what would constitute unlawful conditions of confinement in the context of habeas relief, Minnesota courts have held that conditions of confinement that are cruel and unusual punishment may be a basis for habeas relief. *See Kelsey*, 283 N.W.2d at 895; *Cole*, 129 N.W.2d at 907-908. Petitioners have not established that conditions of confinement that run afoul of a statute, but are not cruel and unusual, entitle them to habeas relief or otherwise render their incarceration unlawful or illegal.

⁴ Petitioners also refer to Minn. Const. Art. 1, § 1, which sets forth the object of state government. It confers no rights aside from the right of the people to "alter, modify or reform government," and Petitioners fail to explain how it is applicable to their allegations. *See* Minn. Const. Art. 1, § 1. As with all of their alleged bases for habeas relief, Petitioners make the merely conclusory allegation that the DOC's failure to protect offenders from COVID-19 violates this provision.

Further, the statutes and rules cited by Petitioners are either inapplicable here or the DOC has not violated them. Petitioners point to requirements that rules be promulgated, and policies and procedures be formulated. *See* Minn. Stat. § 241.021, subd. 1 (2018); Minn. R. 2911.0300, subps. 4, 8 (2019). But Petitioners do not allege that rules have not been promulgated, or that written policies or procedures have not been adopted. They simply disagree with how the DOC has responded to COVID-19. Moreover, it is not evident how a failure to write rules or policies would render an offender's incarceration unlawful.

Petitioners also rely on Minn. Stat. § 241.021, subd. 4, which requires that facilities provide health care to inmates and pay for health care costs. But the DOC provides health care to offenders. Petitioners' real argument appears to be that the health care provided should be different. Petitioners cite Minn. Stat. § 241.021, subd. 5, which states that when a facility does not comply with minimum standards, the Commissioner shall order that deficiencies be remedied. Minn. Stat. § 241.021, subd. 5. It is not apparent how Petitioners believe the DOC violated this provision as there is no allegation that the Commissioner failed to order any alleged deficiencies to be remedied. Further, there is no indication as to what minimum standards the DOC has not complied with, or why a violation of this provision renders Petitioners' incarceration illegal or unlawful.

Petitioners state that the DOC violated Minn. Stat. § 243.57 as well. First, Minn. Stat. § 243.57 is discretionary as it states the offenders *may* be removed to other locations during an epidemic for care or treatment. Minn. Stat. § 243.57. Second, there is no allegation that any Petitioner, at this time, requires care or treatment for COVID-19 symptoms; Petitioners' allegations relate to the DOC's efforts to limit the effects of COVID-19 at MCF-Moose Lake.

Finally, Petitioners cite Minn. R. 2911.0300, subp. 2 (2019), which provides that where facility conditions do not conform to the promulgated minimum standards or when conditions endanger the health and safety of inmates or staff, the facility's use is restricted or the facility may be condemned. The DOC has taken significant steps, as noted above, toward preventing and mitigating the effects of the virus at MCF-Moose Lake. Further, nowhere—including correctional facilities—can be completely free from the dangers of the COVID-19 pandemic. Under Petitioners' logic, correctional facilities would need to be emptied to comply with this rule.⁵

Given the unique challenges that COVID-19 presents to correctional settings, the Commissioner's utilization of the limited authority he has to release some offenders prior to the completion of their court-imposed terms of imprisonment, and the array of tools the DOC has implemented to prevent the effects of COVID-19 at MCF-Moose Lake, Petitioners are not entitled to habeas relief as a matter of law and the Court should dismiss their petition in this regard without a hearing.

II. PETITIONERS FAILED TO SATISFY THE LEGAL STANDARDS FOR ISSUANCE OF A WRIT OF MANDAMUS.

Mandamus is neither a legal claim nor a source of a legal claim. Rather it is an extraordinary, equitable remedy. *Sinell v. Town of Sharon*, 289 N.W. 44, 45 (Minn. 1939); *Duncan v. Roy*, 830 N.W.2d 48, 51 (Minn. Ct. App. 2013). Establishing the basis for mandamus is the petitioner's burden. *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 178-79 (Minn. 2006); *In re Krogstad*, 941 N.W.2d 750, 754 (Minn. Ct. App. 2020). Before a

⁵ It is worth noting that the rules in chapter 2911 cited by Petitioners apply only to county and private correctional facilities. See Minn. R. 2911.0200, subp. 35 (defining "facility" as a "county, multiple county, or private corrections facility of a Class I to Class VI type").

writ of mandamus may issue, the petitioner must prove: (1) the failure to perform an official duty clearly imposed by law; (2) that petitioner is specifically injured by a public wrong due to this failure; and (3) there is no other adequate remedy at law. *Walther v. Lundberg*, 654 N.W.2d 694, 697 (Minn. Ct. App. 2002).

“Mandamus is an extraordinary legal remedy that courts issue only when the petitioner shows that there is a clear and present official duty to perform a certain act.” *Breza v. City of Minnetrista*, 706 N.W.2d 512, 518 (Minn. Ct. App. 2005), *aff’d*, 725 N.W.2d 106 (Minn. 2006). A writ of mandamus may issue only to compel an official “to perform duties with respect to which [he or she] plainly [has] no discretion as to the precise manner of performance and where only one course of action is open.” *State v. Davis*, 592 N.W.2d 457, 459 (Minn. 1999) (quoting *State ex rel. Gresham v. Delaney*, 6 N.W.2d 97, 98 (Minn. 1942)).

Here, the DOC does not contest that it has an obligation to provide medical care to individuals committed to its custody. *See Estelle v. Gamble*, 429 U.S. 97 (1976). Petitioners do not allege the DOC failed to provide medical care, nor do they allege that the DOC failed to provide *any* COVID-19 mitigation response. At issue in this case is the *sufficiency* of the DOC’s response. Mandamus cannot remedy an alleged insufficient response to a novel disease during a global pandemic.

Mandamus may issue against a public official only to compel a ministerial duty; it cannot be used to control the discretion of a public official. *Duncan*, 830 N.W.2d at 51-52 (holding that decisions of the Commissioner of Corrections regarding imposition of release conditions and revocation of release were discretionary and thus mandamus was not available). Mandamus likewise cannot be used to challenge an error in the exercise of a public official’s discretion. *Mendota Golf*, 708 N.W.2d at 177-79; *see also Duncan*, 830 N.W.2d at 51 (relying on *Mendota*

Golf in holding that mandamus cannot be utilized to dictate how the Commissioner of Corrections exercises his discretion). The manner of the DOC's response to COVID-19 at MCF-Moose Lake is within the discretion of the Commissioner of Corrections, and to the extent that response is allegedly inadequate, mandamus is not an appropriate vehicle to challenge his exercise of discretion. Mandamus is solely intended to compel an official duty to perform a specific, ministerial act that the official is failing to perform. *See Duncan*, 830 N.W.2d at 52; *Breza*, 706 N.W.2d at 518.

Here, the Legislature gave the Commissioner broad authority over state prisons that house individuals committed to the Commissioner's custody. His powers and duties include determining the place of confinement for individuals committed to DOC facilities and to prescribe reasonable conditions and rules for their conduct within DOC facilities, to administer and maintain all state correctional facilities, to organize the DOC as the Commissioner deems necessary to carry out the DOC's functions, and to delegate responsibilities to employees. Minn. Stat. § 241.01, subd. 3a(b), (d), (g), (h) (2018). The Legislature directed the Commissioner to coordinate the DOC's activities with other governmental agencies where appropriate, among other activities. *Id.*, subd. 3b(3). The Commissioner also has authority to place offenders on administrative segregation status for reasons related to serious threats to others or to promote the security or orderly running of the prison. *Id.* § 243.521, subd. 1 (2018).

In the civil rights context, the Supreme Court has recognized that "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin v. Conner*, 515 U.S. 472, 482 (1995) (citations omitted). The same principle should apply here given the Legislature's grant of broad authority to the Commissioner and the extraordinary difficulty of running a state prison, particularly during a pandemic. This

flexibility and grant of discretion is important in areas as dynamic as running multiple prisons statewide, overseeing a large number of statewide staff, and supervising offenders in the community to protect the public and promote rehabilitation in ordinary times and particularly during a pandemic.

Notably, although Petitioners' case focuses on alleged conditions of confinement in a Minnesota prison, this is not a civil rights action and Petitioners chose not to seek relief pursuant to 42 U.S.C. § 1983. Because Petitioners cannot satisfy their burden of establishing that there is no adequate remedy at law, they cannot maintain a cognizable mandamus claim. *See Mendota Golf*, 708 N.W.2d. at 171; Minn. Stat. § 586.02.

Minnesota Statute section 586.12 provides that material issues of fact in mandamus proceeding shall be tried before a jury. When no material facts are at issue, however, a writ of mandamus is properly dismissed. *State ex rel. Pillsbury v. Honeywell, Inc.*, 191 N.W.2d 406, 413 (Minn. 1971). For the reasons set forth above, any factual dispute regarding the Commissioner's duly exercised discretion during this pandemic is immaterial, because resolution of those facts would not resolve the legal deficiencies of Petitioners' mandamus claim. Because Petitioners' mandamus claim is not cognizable as alleged, it should be dismissed without an evidentiary hearing or trial.

III. PETITIONER MEHLE'S CLAIMS ARE MOOT.

Courts are designed to consider actual controversies. *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989). Mootness implicates this Court's jurisdiction. *Id.* Generally, a case should be dismissed as moot if "an event occurs that makes a decision on the merits unnecessary or an award of effective relief impossible." *In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). Thus, mootness "implies a comparison between the relief demanded and the

circumstances of the case at the time of decision in order to determine whether there is a live controversy that can be resolved.” *Id.* Here, an event has occurred – namely, Petitioner Mehle’s release and subsequent fugitive status – that has made the relief he seeks impossible for this Court to award.

Petitioner Mehle has been released from MCF-Moose Lake and is currently a fugitive whose whereabouts are unknown. (Byrne Decl. ¶ 3.) If he is found and apprehended, he will not be returned to MCF-Moose Lake during the COVID-19 pandemic. (*Id.* ¶ 4; Rish Decl. ¶ 7.) His habeas corpus claim is moot because it is based on allegations regarding the DOC’s COVID-19 mitigation efforts at MCF-Moose Lake, a facility he has left. Though the Minnesota Supreme Court has held that an offender who is not in custody is entitled to challenge future confinement if that confinement is “imminent and almost inevitable,” *see Ford*, 933 N.W.2d at 403, Petitioner Mehle cannot make such a showing here.

Similarly, Petitioner Mehle’s mandamus claims are premised on allegations regarding conditions of confinement at MCF-Moose Lake. The Court cannot order the DOC to “perform their duty to protect [Petitioner Mehle] from COVID-19” (*see* Index #1, Prayer for Relief (E)) if Petitioner Mehle is not presently in prison at MCF-Moose Lake and is indeed presently a fugitive. All of his claims are moot and should be dismissed.

IV. APPOINTMENT OF A SPECIAL MASTER IS NOT APPROPRIATE.

Petitioners request appointment of a special master, claiming that a special master would relieve the Court of the need to provide this case with “close and continuing attention and oversight,” the need to consider “the advice and expertise of health care professionals,” and the burden of “overseeing discovery and initiating and conducting alternative dispute resolution.”

(Index #8 at 8.)⁶ Petitioners’ assertions do not—especially at this early stage—establish that this case is one that cannot be addressed effectively and timely by the Court. Nor have Petitioners demonstrated that the issues raised in this case are beyond the Court’s expertise or competence. Accordingly, Petitioners’ request for appointment of a special master should be denied.

Under Minnesota Rule of Civil Procedure 53.01 the Court may only appoint a special master to (1) perform duties consented to by the parties;⁷ (2) hold trial proceedings where appointment is warranted by “some exceptional condition” or “the need to perform an accounting or resolve a difficult computation of damages,” or (3) to address pretrial and post-trial matters “that cannot be addressed effectively and timely by an available district judge. Minn. R. Civ. P. 53.01(a). Appointment of a special master is the exception, not the rule. *See Buller v. Minn. Lawyers Mut.*, 648 N.W.2d 704, 709 (Minn. Ct. App. 2002) (noting that because courts “routinely interpret insurance contracts, no exceptional conditions warrant appointment of a referee”). “Normally, the press of court business or a busy docket alone will not justify the appointment of a special master.” Rule 53.01.Appointment, 2 Minn. Prac., Civil Rules Annotated R 53.01 (6th ed.).

As an initial matter, the Minnesota Rules of Civil Procedure do not govern proceedings seeking writs of habeas corpus or writs of mandamus where they are “inconsistent or in conflict” with the statutes governing those writs. *See* Minn. R. Civ. P. 81.01(a); *see also Peterson v. State*,

⁶ Petitioners also assert that appointment of a special master would provide the Court with an “extra pair of hands” that would be helpful in light of the “importance of social distancing.” (Index #8 at 8.) Because the Court has been conducting proceedings in this matter electronically (a practice that any appointed special master would also likely follow), it is unclear how appointment of a special master has any bearing on the ability of the Court or the parties to practice social distancing.

⁷ Because Respondents have not consented to a special master, appointment of one pursuant to Minn. R. Civ. P. 53.01(a)(1) is not authorized.

No. A06-2085, 2007 WL 2600802, at *2 (Minn. Ct. App. Sept. 11, 2007) (noting provisions in Minn. R. Civ. P. 15.01 did not apply to habeas proceedings because habeas statute “sets forth a specific mechanism for making written submissions to the district court”). The statutes governing habeas and mandamus contemplate summary proceedings before judges of the district courts. *See, e.g.*, Minn. Stat. § 586.03 (setting forth procedures for return of a mandamus writ); Minn. Stat. § 589.08 (setting forth procedure for return of a habeas writ). These proceedings are inconsistent with appointment of a special master under Rule 53.01 especially where, as here, such appointment is sought before those statutory proceedings have been conducted. Petitioners’ request for appointment of a special master can be denied on this basis alone.

Even if Rule 53.01 otherwise applies to these special proceedings, none of the conditions warranting appointment of a special master are present here. Petitioners bring habeas and mandamus claims, which are frequently dealt with by district court judges. *See, e.g., Burch v. Comm’r of Corr.*, No. 09-CV-05-882, 2005 WL 5010638 (Carlton Cnty. Dist. Ct. July 21, 2005). And district court judges also routinely handle cases involving expert testimony, including testimony of health care professionals that Petitioners anticipate here. *See, e.g., Meckola v. Rishavy*, No. 69DU-CV-13-317, 2015 WL 6447382 (St. Louis Cnty. Dist. Ct. Feb. 24, 2015) (describing “complex” nature of “medical malpractice case that included the testimony of multiple expert witnesses”). Indeed, Minnesota district court judges have handled exactly the types of claims raised in the Petition, which implicate prison conditions surrounding the COVID-19 pandemic. *See, e.g., Milo v. Schnell*, No. 02-CV-20-1630 (Anoka Cnty. Dist. Ct. May 28, 2020).

Furthermore, the Court has already demonstrated its willingness and ability to address the issues in this case in a timely and effective manner. The Court has held two telephonic

scheduling conferences, issued orders for return, held a hearing on Petitioners' motion seeking expedited discovery, scheduled a hearing for June 23, 2020 on discovery issues and any legal issues regarding Petitioners' request for the issuance of writs of habeas corpus and mandamus, and has set aside time for an evidentiary hearing in August 2020 if necessary.

The cases cited by Petitioners do not compel a different result, because each involved unique circumstances not present here. In *Brickner v. One Land Development Company*, 742 N.W.2d 706 (Minn. Ct. App. 2007), the court appointed a special master for the limited purpose of determining costs and fees in light of the “sheer volume’ of the record . . . the length and complexity of the trial, the number of exhibits, and the request for a sizeable amount of fees and costs.” *Id.* at 712. In contrast, Petitioners seek appointment of a special master here to conduct all of the duties the Court would otherwise perform at a point in the litigation where the size of the record and the length of any trial is unknown. *Burdette v. Raiche*, No. A18-0626, 2018 WL 5780443, at *3 (Minn. Ct. App. Nov. 5, 2018) and *Call v. Call*, No. A19-0074, 2019 WL 4165018, at *3 (Minn. Ct. App. Sept. 3, 2019) are also distinguishable because they both involved appointment of a special master to supervise execution of unique equitable relief. *Burdette* affirmed appointment of a special master to implement and monitor changes in parenting-time supervision and *Call* affirmed appointment of a special master to implement and monitor post-trial equitable relief regarding restructuring of a business. Unlike *Burdette* and *Call*, the Court has not yet determined Petitioners' entitlement to any relief, much less the type of uniquely complex equitable relief that might warrant appointment of a special master.

Because Petitioners have not identified a basis for appointment of a special master under Rule 53.01, their request should be denied.

CONCLUSION

For the reasons set forth herein, Petitioners' writ of habeas corpus and writ of mandamus should be dismissed without further need for an evidentiary hearing and their motion for a special master should be denied.

Dated: June 5, 2020

Respectfully submitted,

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