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IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

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| FLORIAN CRAINIC, et al., | ) | |
| Petitioners-Plaintiffs, | ) | |
| v. | ) | 20-CV-2138 |
| CHAD KOLITWENZEW, et al., | ) | |
| Respondents-Defendants. | ) | |

**ORDER**

**SUE E. MYERSCOUGH, U.S. DISTRICT JUDGE.**

Petitioners, five immigrant detainees, seek immediate release from civil immigration detention pending the resolution of their removal proceedings or their deportation. Petitioners assert that the conditions of confinement put them at an objectively unreasonable risk of contracting COVID-19 and suffering serious harm in light of their underlying medical conditions.

For the reasons below, Petitioners' requests for additional discovery and requests for release are both denied.

**Petitioners' Motion for Additional Expedited Discovery**

The United States (the "Government") and JCDC Corrections Chief Kolitwenzew have worked diligently and cooperatively with Petitioners and have already produced substantial discovery to Petitioners on an expedited basis, including all consenting ICE detainees' immigration history, criminal history, JCDC medical records, JCDC policies, and video footage. JCDC additionally arranged for Petitioners' counsel to interview each detainee by phone, which, along with the documents provided, enabled counsel to expeditiously determine which detainees should be a part of this action.

Petitioners now seek sick call requests and responses regarding detainees who are not Petitioners, an inspection by their expert, Dr. Venters (in person or by video), and more video footage. Petitioners assert this information is relevant to whether JCDC is implementing adequate measures to prevent the entry and spread of COVID-19. The Government objects, arguing undue burden, irrelevancy and in excess of the limited scope of habeas discovery.

The Court has the discretion to allow discovery on a habeas claim for good cause. Rule 6(a) of the Rules Governing Habeas

Corpus Cases. The Court is not persuaded, however, that good cause exists for further discovery, primarily because significant discovery has already been produced and the evidentiary record is well developed. Petitioners have already submitted their own declarations and expert testimony regarding how the procedures fall short or have not been followed. More evidence on that score is unnecessary and would cause an undue burden on JCDC and the Government. Petitioners' request for additional discovery is denied.

**Amended Petition for Release**

Petitioners seek immediate release pursuant to 28 U.S.C. § 1441, contending that their continuing detention puts them at a high risk of serious illness or death. The Court has already concluded that Petitioners' claims are properly raised in a habeas corpus petition and that Petitioners have standing to bring those claims.

A conditions of confinement claim based on due process is analyzed under the objective inquiry standard announced in Kingsley v. Hendrickson, 576 U.S. 389 (2015). Hardeman v. Curran, 933 F.3d 816 (7th Cir. 2019). While Hardeman addressed a conditions-of-confinement claim for pretrial detainees under the

Fourteenth Amendment, the same standards apply to federal civil immigration detainees bringing claims under the Fifth Amendment. *See, e.g.*, Belbachir v.Cty. of McHenry, 726 F.3d 975, 979 (7th Cir. 2013) (applying same standards to civil immigration detainee as to state pretrial detainee).

To prevail on a conditions of confinement claim, Petitioner must prove: "(1) the conditions in question are or were objectively serious (or if the claim is for inadequate medical care, his medical condition is or was objectively serious); (2) the defendant acted purposefully, knowingly, or recklessly with respect to the consequences of his actions; and (3) the defendant's actions were objectively unreasonable—that is, "not rationally related to a legitimate governmental objective or … excessive in relation to that purpose." Hardeman, 933 F.3d at 827 (Sykes, J., concurring) (*quoting* Kingsley, 135 S. Ct. at 2473–74). The third requirement is rooted in the Supreme Court's decision in Bell v. Wolfish, 441 U.S. 520 (1979), where the Supreme Court instructed that, in determining whether "particular restrictions and conditions accompanying pretrial detention amount to punishment," courts "must decide whether the disability is imposed for the purpose of

punishment or whether it is but an incident of some other legitimate governmental purpose." Id. at 538. Kingsley clarified that "[i]n the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not 'rationally related to a legitimate nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.' " Kingsley, 135 S. Ct. at 2473 (*quoting* Bell, 441 U.S. at 561, 99 S.Ct. 1861).

With regard to the first requirement, the Court continues to find that the conditions involved are objectively serious. *See also*, Mays v. Dart, No. 20 C 2134, 2020 WL 1987007, at *23 (N.D. Ill. Apr. 27, 2020) (finding that there is "no question that the plaintiffs' claims involve conditions that are sufficiently serious to invoke the Fourteenth Amendment"). The dangers of the COVID-19 pandemic are well known to the parties and the general public and have been covered insignificant detail in previous orders by this Court and others. *See generally*, Ochoa, v. Kolitwenzew, No. 20-CV-2135, 2020 WL 2850706 (C.D. Ill. June 2, 2020); Favi v. Kolitwenzew, No. 20-CV2087, 2020 WL 2114566 (C.D. Ill. May 4, 2020); Ruderman v. Kolitwenzew, No. 20-CV-2082, 2020 WL 2449758 (C.D. Ill. May 12,

2020). As of this writing, the COVID-19 virus has infected nearly four million people and claimed over 140,000 deaths in the United States alone.

COVID-19 is particularly dangerous due to how easily it spreads, including through asymptomatic individuals, and the severity of the resulting illness. While some may experience mild symptoms, it is now well known that COVID-19 can lead to serious illness or death in anyone.

Current science warns that certain medical conditions put an individual at a higher risk, including hypertension, obesity, asthma, and diabetes. The risk is elevated even if these conditions are well-controlled, though the risk is less as compared to uncontrolled conditions. The risk also increases across the board as age increases. Living in a congregate setting like a detention center unavoidably increases the risk of contracting COVID-19 as compared to the relative isolation achievable at home.[1]

[1]The situation at the Cook County Jail and at other jails and ICE detention centers across the country has shown just how rapidly this virus can spread in a jail-like setting. As of July 23, 2020, the Federal Bureau of Prisons' website reports that 4,247 inmates have active infections and 98 have died. ICE's website on July 23, 2020 reported a total of 3,736 detainees who have tested positive for COVID-19 (926 currently positive), with three deaths. In the Pulaski County Detention Center in Ullin, Illinois, 51 ICE detainees have tested positive over time, with 6 currently under isolation or monitoring.

Quantifying these risks more exactly does not appear possible at present. No can predict who will suffer serious illness or death and who will not. The risk, though, is clearly objectively serious, satisfying the first requirement.

The Court reaches a different conclusion with regard to the second requirement—whether the continued detention of Petitioners is objectively unreasonable. To make this determination, the Court considers the safeguards now in place at JCDC and an individualized consideration of each Petitioner's particular medical vulnerability, immigration history, and the Government's interest in continued detention of that Petitioner.

The Court begins with JCDC's safeguards now in place. The most dramatic improvement in JCDC since the pandemic began has been the reduction of the ICE detainee population by more than 80%. There were 155 male ICE detainees on March 19, 2020, reduced now to 26. The pods used to hold 48 detainees and now hold fewer than 15. Over 120 detainees have left JCDC in the past three months, and no new ICE detainees have entered since April 3, 2020.

This reduction has enabled detainees to either be placed in single cells, or, at most, placed two to an eight-foot by ten-foot cell, with bunk beds on opposite walls. Four of the Petitioners—Florian Crainic, Mario Arnaldo Gonzales Torres, Juan Manuel Rositas Martinez, and Orlanda Rafael Chinchilla Rivas—have their own cells. The ICE detainees are housed separately from other detainees at JCDC, though JCDC staff do come into contact with all the detainees and with others outside of their jobs. ICE detainees are also transported outside of JCDC at times, so the "bubble" is not closed.

The population reduction has also enabled ICE detainees to stay at least six feet from each other, one of the primary ways to reduce the risk of exposure. Some of the detainees (including some of Petitioners, according to the pictures) do not practice social distancing even though that distancing is now mandatory in JCDC, but that does not change the fact that there is enough space now to socially distance even if some do not. Similarly, every detainee has been provided masks and wearing them is mandatory, though, again, that direction is not followed by all the ICE detainees. These improvements have made JCDC significantly safer than when the

pandemic began. *Compare with* Herrera-Herrera v. Kolitwenzew, 20-cv-2120 (5/19/20 order, C.D. Ill.)(masks had not yet been provided to detainees, social distancing more difficult).

Petitioners maintain that more can and should be done to enforce compliance with JCDC's distancing and mask rules. The sides dispute how often the detainees are reminded or instructed to distance and wear masks. Chief Kolitwenzew points out that punishment or physical force to compel compliance are neither wise nor allowable options.

The Court need not wade into this dispute. Perhaps more can be done to compel compliance, but, again, Petitioners have masks to wear, have the ability to social distance, and understand the importance of doing both. *Compare with* Ochoa v. Kolitwenzew, 20-cv-2135 (6/2/20 order, C.D. Ill.)(finding that ICE detainee lacked the mental ability to understand the pandemic or how to protect himself).

Petitioners also dispute whether the cleaning occurs as frequently or effectively as stated by Chief Kolitwenzew. Petitioners maintain that the y do not have hand sanitizer as Chief Kolitwenzew asserts, do not have paper towels, and often do not have a clean

bucket of water for mopping. Chief Kolitwenzew points out that detainees need only ask for a clean bucket of water and that hand sanitizer, soap, and cleaning products are available and accessible.

As with the distancing and the masks, the Court finds that Petitioners' ability to keep themselves and their surroundings clean appears to be adequately, though not completely, within their control.

Chief Kolitwenzew has taken other measures to prevent the entry and spread of COVID-19, including blocking off seats, removing telephones, cancelling group activities, requiring doctor clearance for any staff who have a high-risk contact, isolating any detainee showing symptoms, and securing extra nurses to cover if necessary.

As for testing, JCDC has purchased about 300 COVID-19 tests. Tests are conducted if a resident or staff member presents with symptoms or possible exposure. The tests run thus far have all come back negative. However, the Court's notes from the evidentiary hearings reflect that only 20 tests have been conducted. (The Court has not checked the transcript on this to confirm that the Court's notes are correct.)

Nonetheless, there is room for improvement in JCDC's response. For example, the minimal amount of testing gives scant confidence that no one in JCDC is COVID-positive, spreading the virus asymptomatically. To conclude that an outbreak is unlikely to occur at some point seems naïve. Once an outbreak occurs, it may be difficult to control given the asymptomatic spread.

Dr. Venters identified shortcomings such as the lack of a unified, "living" (i.e., frequently updated) written response plan in one document, easily accessible to all staff. The Court can see how this would go far in stemming the spread if an outbreak occurs. Dr. Venters' points about testing new detainees, isolating new detainees for 14 days instead of 5-14 days, and asymptomatic testing are also well taken.

But whether the failure to implement Dr. Venters' recommendations is objectively unreasonable is not the question. If that failure is objectively unreasonable, the remedy would be injunctive relief directing that those recommendations be implemented, not the release of the detainees. The same conclusion is reached for Dr. Venters' opinions on how the chronic medical conditions of Petitioners could be handled better.

The question in this case is whether the Petitioner's continued detention is objectively unreasonable. The current conditions do not alone make Petitioners' detention objectively unreasonable. There must be something more, such as an objectively confirmed medical vulnerability and a lack of legitimate government interest in continued detention. *See* Favi v. Kolitwenzew, 20-cv-2087 (5/4/2020 Order, C.D. Ill)(medical conditions and lack of showing of flight risk or danger to public). Each Petitioner must be considered separately to make that determination.

**Mumin Fatai Owolabi**

Mr. Fatai Owolabi is from Nigeria and has been detained for nearly one year and eight months. He has no criminal record. His removal order became final in March 2020, over 90 days ago.

Mr. Fatai Owolabi's removal appeared indefinitely delayed until recently. The first attempts to fly Mr. Owolabi back to Nigeria fell through because of Nigeria's international flight ban. However, Mr. Owolabi is now scheduled to fly to Nigeria in mid-August, either by commercial flight if available or by a private charter plane. His removal therefore appears substantially likely and soon. Zadvydas v. Davis, 533 U.S. 678 (2001)(post-removal order detention allowed

if significant likelihood of removal in reasonably foreseeable future—six months presumptively reasonable). This Court has no jurisdiction to review a removal order. 8 U.S.C. § 1252(g).

Further, the Government has legitimate flight concerns. Mr. Owolabi signed a detailed, sworn statement effectively admitting his marriage to a U.S. citizen is a sham. Mr. Owolabi disavowed the statement at the hearing in this case, testifying that he was "entirely confused" and "not in a normal state of mind." That may be true, but the admission still gives the Government reason to question the truth of Mr. Owolabi's promise to appear for removal when ordered by ICE, if he were to be released pending his removal.

As for his medical conditions, Mr. Fatai Owolabi is 47 years old and has type 2 diabetes and hypertension. There is much dispute over the severity of those conditions and whether JCDC's management of those conditions is adequate. The question, though, is whether the existence of those conditions puts Mr. Owolabi at such a risk of severe illness that he must be released just a few weeks shy of his deportation. Mr. Owolabi has not made that showing. He has been in JCDC for about four months now without becoming ill, and he is able to social distance, wear a mask,

and wash his hands frequently. His risk of catching COVID-19 now is less than the risk when he first arrived at JCDC in March, when social distancing was more difficult and masks were not available. Additionally, he is able to further reduce the risk by doing what he can to control his diabetes and hypertension through diet and monitoring his blood sugars.

Mr. Fatai Owolabi claims in his declaration that he has lost 30 pounds since his detention, has numbness/tingling in hands and legs several times a week, has blurry vision every day, headaches every morning, has a heart that races occasionally, and, until recently, sharp pains in chest. However, the JCDC medical records do not show any such complaints. Those records show that he had no complaints at his check-up in June 2020 and that his diabetic foot exam was normal. Mr. Fatai Owolabi disputes whether those records are true and accurate, but, regardless, Mr. Owolabi has not shown that these symptoms are evidence of an underlying condition which puts him at a higher risk of serious illness from COVID-19. Mr. Fatai Owolabi's continued detention until his deportation in mid-August is constitutional.

**Mario Arnaldo Gonzalez Torres**

Mr. Gonzales Torres is 51 years old, has no criminal history, and has been detained since August 2019. He has hypertension, high cholesterol and triglycerides, and is obese. He has his own cell. The Board of Immigration Appeals has affirmed the denial of his asylum petition, and a final order of removal was entered on April 28, 2020. *See* DHS v. Thuraissigiam, No. 19-1161 (S.Ct., decided June 25, 2020)(statute prohibiting court review of whether petitioner had a credible fear of prosecution did not violate constitutional due process).

According to the Government, efforts are being made to repatriate Mr. Gonzales Torres to Cuba before the end of the summer. According to the parties, Cuba has closed its border until at least August 1, 2020. The Government contends that Mr. Gonzales Torres refuses to sign forms acknowledging that he must assist in the removal process, but Mr. Gonzales Torres maintains that was only because he could not understand the documents, which were written in English. Nevertheless, there is some grounds for concern regarding flight risk given Mr. Gonzales Torres' imminent removal.

Like Mr. Fatai Owolabi, Mr. Gonzales Torres has not shown that his continued detention for a short period of time to effect removal puts him at such a risk of severe illness that he must be released. If the removal does not occur soon or conditions at JCDC worsen, Mr. Gonzales Torres may renew his request.

**Orlando Rafael Chinchilla Rivas**

Mr. Chinchilla Rivas has been detained for four months, since March 2020. His detention has not yet been as prolonged as some of the Petitioners in other cases. *Compare with* Ochoa v. Kolitwenzew, 20-cv-2135 (6/1/20 order p. 26, 11-month detention with no bond hearing); Ruderman v. Kolitwenzew, 20-cv-2082 (5/12/2020 order p. 34, C.D. Ill.)(four-year detention); Favi v. Kolitwenzew, 20-cv-2087 (5/4/20 Order p. 24)(nine month detention with no bond hearing).

Mr. Chinchilla Rivas recently had a weapons charge against him for possessing two Glock handguns with high capacity magazines while on probation for a conviction for resisting law enforcement. That charge has been dismissed, but still speaks to a plausible concern for public safety should he be released. His requests for bond have been denied three times citing that danger.

Mr. Chinchilla Rivas is 19 years old, obese, claims a history of smoking, and claims that he has had asthma since he was a child. However, JCDC medical records show that that, before this lawsuit, he reported not being on any medication for his asthma, not having breathing problems, and did not request an inhaler. His lungs are clear, and his peak flow test shows that no inhaler is needed. Some pictures show Mr. Chinchilla Rivas not social distancing in JCDC, so the Court wonders why he would start social distancing if released. [118, p. 8-14.] He has his own cell.

Considering all the above factors, the Court concludes that Mr. Chinchilla Rivas has not shown at this time that his continued detention is unconstitutional.

**Juan Manuel Rositas Martinez**

Mr. Rositas Martinez has been detained since November 2019. The Government has a strong interest in protecting the public from Mr. Rositas Martinez, given his arrest record and guilty plea to armed violence and animal torture, as detailed by the Government. He has been reviewed for release by ICE and denied because of the risk he poses to the public. He is 54 years old, obese, has hypertension, and claims a history of smoking. He also claims an

irregular heartbeat and persistent cough, but those claims are not supported by the JCDC medical records. He is assigned a single cell.

Considering all the above factors, the Court concludes that Mr. Chinchilla Rivas has not shown at this time that his continued detention is unconstitutional.

**Florian Crainic**

Mr. Crainic's individual request was denied on June 8, 2020. [52.] For the reasons stated in that order, his renewed request for release is denied again.

**Yacub Sobhi Ibrahim**

Mr. Sobhi Ibrahim has been removed to Brazil, mooting his request.

**Conclusion**

The Court has no doubt that the pandemic presents a serious risk to Petitioners' health and lives, but Petitioners have not on this record demonstrated that their continued detention in JCDC violates their due process rights. The sands are ever-shifting, however, and a different conclusion could be warranted if the material facts relied on in this order change.

**It is ordered that Petitioners' Motion for Discovery and Amended Petition for Release are DENIED. [69, 82.] The clerk is directed to close this case and enter judgment.**

**ENTERED: July 24, 2020**

**FOR THE COURT:** ***s/Sue E. Myerscough***
**SUE E. MYERSCOUGH**
**U.S. DISTRICT JUDGE**