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**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
AT URBANA**

FLORIAN CRAINIC, MUMIN FATAI OWOLABI, MARIO ARNALDO GONZALEZ TORRES, ORLANDO RAFAEL CHINCHILLA-RIVAS, YACUB SOBHI IBRAHIM

Petitioners,

v.

CHAD KOLITWENZEW, in his Capacity as Chief of Corrections, the Jerome Combs Detention Center, et al.,

Respondents,

UNITED STATES OF AMERICA,

Interested Party.

CIVIL ACTION NO. 20-cv-2138

UNITED STATES' RESPONSE IN OPPOSITION TO THE AMENDED PETITIONS FOR WRITS OF HABEAS CORPUS

Now comes the United States, as an Interested Party, by and through John C. Milhiser, United States Attorney, and Kimberly A. Klein and Joshua I. Grant, Assistant United States Attorneys, and in opposition to Petitioners' Amended Petitions for Writ of Habeas Corpus (Doc. 69), now state as follows:

INTRODUCTION

In this case, a group of seven civil detainees seek release from the Jerome Combs Detention Center (JCDC). Their criminal histories include animal torture and

armed violence after using a hammer to bludgeon multiple dogs and threatening a woman with a machete, domestic violence, assault and battery, weapons charges, a gang affiliation, fraud, burglary, and resisting arrest. And yet they claim they are no danger to the community. Their immigration histories often include final or near final orders of removal to their countries of origin. And yet they claim they are not flight risks. They have been convicted of crimes involving dishonesty and fraud, and even in the case now before the Court, have at times submitted clear misrepresentations that are readily refuted by their own medical records or criminal history documentation. And yet they claim they can be trusted to obey the law and the Court's directions if released.

The above examples are not isolated incidents. Instead, they represent a pattern. Petitioners have demonstrated criminal histories, patterns of dishonesty, and records of violence. They represent clear dangers to communities or flight risks if released. Their civil detentions are eminently reasonable and in no way violate the Constitution such that the Court must intervene. And while Petitioners argue otherwise, they often submit incomplete, misleading, or untrue information. The Court should not countenance Petitioners' transparent attempts to misrepresent their criminal, immigration, and medical histories, as well as the conditions of the JCDC, in order to secure a reprieve from their crimes.

Petitioners seek release due to the COVID-19 worldwide pandemic. As the

government has acknowledged, the pandemic poses serious challenges to the health and safety of our communities. Those challenges are particularly present and unique inside correctional facilities, where law enforcement is charged with balancing the need to detain individuals who have broken the law and may pose dangers to the community or flight risks if released, with the responsibility reasonably to limit the potential spread of the virus and provide living and working conditions that protect the detainees, staff, and community.

At the JCDC, this balance has been achieved: the population of Immigration and Customs Enforcement (ICE) detainees held at the JCDC has been reduced to 20% capacity (down to 31 from 155 in March), and the JCDC has implemented robust measures to address the pandemic, including providing and requiring the wearing of facemasks, implementing mandatory social distancing policies, reassigning detainees to different cells to spread out the remaining population, and developing screening, testing, and mitigation procedures. To date, these measures have been successful, as there have been no confirmed cases of COVID-19 inside the facility.

Despite these measures, Petitioner Florian Crainic brought this action on May 21, 2020, and pursued it on an "emergency" basis. He claimed his health conditions were serious and not being adequately treated. He claimed that the JCDC is unsanitary, unsafe, and overcrowded. And he claimed that the JCDC had not taken

several key pandemic response measures, such as implementing social distancing or screening policies. Based on these allegations, he argued that the Constitution and due process required his and potentially "dozens" of other ICE detainees' immediate release.

Of course, the record has shown otherwise. It was Petitioner himself who didn't take his diabetes seriously and elected to stop testing his own blood sugar during the pendency of the TRO proceedings. Further, the JCDC has in fact reduced its population by 80% so that detainees can be spread out into either single cells or larger cells with only one cellmate. The JCDC implemented mandatory social distancing policies and has enforced them. The JCDC has also screened and when necessary, quarantined or tested, both detainees and staff. These measures track and at times exceed public health guidance from experts like the Centers for Disease Control and Prevention (CDC). In other words, the JCDC's response to the pandemic has been considerate, robust, and above all, reasonable. The measures, as this Court found in its recent TRO decision, have "significantly reduced" the risk of contracting COVID-19 inside the facility, "making the conditions, while still serious, less so." Doc. 52 at 28-29.

The JCDC's significant response measures must also be considered along with the circumstances of each individual detainee, including a detainee's criminal history and immigration status. For Petitioner Crainic, this meant weighing the

JCDC's response measures together with his criminal history, which involved a crime of dishonesty both in the United States and Romania, and immigration history, which included a near-final order of removal, as well as evidence suggesting that he fled Romania to avoid his criminal prosecution there. The Court, in its decision denying Petitioner Crainic's motion for a temporary restraining order, found that when the JCDC's response to the pandemic was considered with Petitioner's controlled health conditions and lack of compliance, as well as the risk of flight created by his immigration status and criminal history, Petitioner was unlikely to prove that his conditions of confinement violate the Constitution. Doc. 52 at 38.

Following the Court's TRO decision, the parties engaged in expedited and exhaustive discovery regarding Petitioner Crainic's motion to certify a class action from the remaining ICE population at the JCDC. The parties focused discovery on identifying detainees who met Petitioner's class definition as detainees who were over the age of 50 or possessed certain medical conditions. After concluding this discovery and learning that there were 10 or fewer qualifying detainees rather than the "dozens" claimed to exist, the parties reached an agreement where Petitioner withdrew his motion for class certification and filed an amended complaint joining the remaining additional detainees. The parties agreed to address the merits of the remaining claims on an expedited basis without TRO litigation.

Those remaining individual claims—petitions for writs of habeas corpus and

alleged violations of the 5th Amendment—are now before the Court. The petitions seek the immediate release of seven detainees (Petitioners). Like Petitioner Crainic's claims before them, these petitioners claim they have serious health conditions and the conditions at the JCDC are so inadequate, that they should be immediately released despite their criminal histories and immigration statuses.

The Court should deny the petitions. They are premised on a view of the JCDC's conditions that largely ignores, disregards, and distorts the JCDC's significant response to the pandemic, a response that can only be described as objectively reasonable and thus far, undeniably effective, as there have been no cases of COVID-19 inside the facility. Petitioner Crainic originally complained in this lawsuit about a lack of social distancing and facemask policies. But now that the JCDC has implemented such policies, Petitioners admit that most detainees and staff follow the policies but complain that enforcement and compliance are inconsistent. This is not a surprise in a correctional institution. Perfection is not required—only reasonable measures to prevent the spread of the virus. That is exactly what has occurred here.

Indeed, Petitioners scrutinize every minute detail of prison life and claim that even if the JCDC did everything it said it is doing, it is not enough. This argument is premised upon a faulty factual assumption: there is simply nothing the JCDC can or could do—no measures exhaustive enough—for the prison to reasonably respond

to the pandemic. And the following legal argument Petitioners have made is premised upon another mistaken view of the law: there is nothing the JCDC could do in response to the pandemic to make Petitioners' continued detention legal. But that standard does not exist in the law. It does not exist in CDC guidance. And it does not provide a reason for the Court to disturb their current lawful detention.

Moreover, Petitioners minimize the other individual factors that are key to determining whether the government's continued detention is reasonable: criminal and immigration histories. Notably, ICE has helped reduce the JCDC's population by identifying and releasing detainees after considering their personal conditions, the safety of communities in relation to crimes committed, and flight risk. More than 100 detainees most appropriate for a reprieve from their crimes during the pandemic have already been released. The remaining ICE detainees are individuals who either have no serious underlying health conditions or conditions that are well-controlled, have criminal histories such that release may pose a danger to the community, or have immigration statuses such as final orders of deportation where even a temporary release may create a serious risk of flight.

In fact, in a transparent attempt to secure their release, Petitioners have provided the Court with misleading and incomplete information about their criminal and immigration histories. For example, Petitioner Rositas-Martinez claims he poses no threat to the community. In reality, Petitioner Rositas-Martinez was convicted for

torturing multiple dogs with a hammer and domestic violence against his "then-wife". Petitioner Chinchilla minimizes his criminal history by indicating that he has only one conviction for a non-violent misdemeanor, when he actually has a significant juvenile criminal history and also has pending weapons charges that occurred while on probation from his conviction. Petitioner Ibrahim casually refers to being incarcerated once at Western Illinois Correctional Center but omits any reference to a long list of arrests and/or convictions for offenses like domestic battery, assault, intimidation, and theft.

With respect to the JCDC, Petitioners have similarly provided misleading or incomplete information. For example, Petitioners complain that conditions are "filthy" in part because to clean their cells they must share a single mop bucket that contains dirty water and hair. Of course, what Petitioners fail to mention is that when they are provided with a bucket and disinfectant each morning to clean their cells, all they need to do to receive a clean bucket of water is ask the assigned pod worker or on-duty officer and they will receive fresh water and cleaning supplies. In another example, Petitioners admit that the JCDC requires social distancing but complain that it is not always enforced, such as when detainees watch television. Of course, Petitioners fail to mention that the JCDC day rooms have multiple TVs, so if someone is too close, a detainee can simply move to another TV or return to their cell. Petitioners' allegations not only reflect a pattern of providing the Court

incomplete information regarding the JCDC, but also an unwillingness to accept that they have a responsibility to follow the JCDC's rules and to avail themselves of their ability to socially distance and follow the protective measures the facility has put into place.

With respect to claimed medical conditions, Petitioners again provide incomplete or misleading information. For example, Petitioner Fatai-Owolabi declares, under penalty of perjury, that "[s]ince being in detention, I have lost around 30 pounds." Doc. 56 at ¶ 13. However, his medical records reflect that he has actually gained 13 pounds during his time at the JCDC. Petitioner Chinchilla claims to have untreated asthma, but never complained to medical staff about asthma until after this lawsuit began, was given a peak flow test that showed his lungs to be in good condition, his oxygen saturation sits at 97-99%, and a chest x-ray revealed clear lungs. In another attempted deception, Petitioner Misaknov declared under oath that he "never received" an inhaler, even though he knew that doctors proscribed him an inhaler and he could walk to the officer desk to use it at any time; he never has, yet still claims to the Court that JCDC has failed to treat his condition. Such distortions and misleading statements that are easily refuted by documentary evidence are emblematic of the flawed factual foundations of Petitioners' claims.

Accordingly, given the JCDC's significant pandemic response measures and objectively reasonable conditions of confinement, as well as the various health

conditions, conviction histories, and immigration statuses, the petitions now before the Court are simply not the kind where the Constitution mandates Court intervention. They should be denied.

BACKGROUND

The JCDC has responded to the pandemic by changing the daily lives of its detainees, correctional officers, and medical staff. These changes touch on every aspect of daily life for detainees and staff. They range from population reductions, medical screening measures, quarantine procedures, the provision of multiple face masks, increased cleaning and sanitation, and mitigation plans. Many of these measures have been in place since the beginning of the pandemic and others have been implemented over time. These measures are accurately summarized in Chief of Corrections Chad Kolitwenzew's prior declaration and testimony in this case, as well as the Court's TRO Order. See Doc. 29 at 6-13; Doc. 29-1; Doc. 52 at 7-8. They will not be repeated, but key points and updates are summarized here.

The JCDC's changes begin with a drastic drop in the ICE population: only 20% of the population remains from when the pandemic began. Ex. 1, Kolitwenzew Declaration, ¶ 2. With fewer detainees, the JCDC has been able to enact more change: detainees have been reassigned and spread out so that they now live in either single cells or an eight by ten foot cell with one cellmate. Ex. 1, ¶ 3; Doc. 29-1, ¶¶ 24-25; Doc. 53 at 22. Of the remaining detainees, 19 of the 33 have their own cells.

Ex. 1, ¶ 3. Social distancing is now mandatory. *Id.* Detainees have been provided a total of four facemasks and must wear one except when eating or showering. Ex. 1, ¶ 6.

These changes are in addition to the many other measures that have restricted and altered daily life at the facility. For instance, anyone entering the facility is temperature checked and required to wear a mask. Doc. 29-1, ¶ 49. While no new ICE detainees are being admitted, non-ICE detainees entering the JCDC (who do not come into contact with the ICE population) are both screened and evaluated by medical staff. Doc. 29-1, ¶¶ 34, 49-51. Temperatures and vitals are taken, COVID-19 symptoms such as respiratory distress are assessed, and travel and exposure history are evaluated. Doc. 29-1, ¶¶ 49-51. All new non-ICE detainees are placed in a separate pod and remain there until cleared by medical staff and, depending on the results of evaluations, detainees may be isolated or quarantined. Doc. 29-1, ¶¶ 49-51.

For the existing ICE population, it has not been business as usual: JCDC medical staff wear masks and visit the housing unit regularly to check detainees for virus symptoms and administer temperature checks. Doc. 29-1, ¶ 47; Ex. 2, Haggard Declaration, ¶ 42. Correctional staff also visit the housing unit every 25 minutes and check for symptoms. Doc. 29-1, ¶ 47. Medical staff are available 24 hours a day. Doc. 29-1, ¶ 9; Doc. 51-1, ¶ 15. JCDC pod workers also conduct a disinfection

routine three times per day where tables and door handles are cleaned; showers and toilets are cleaned once per day with showers being deep cleaned once per week. Ex. 1 at ¶ 13. JCDC staff have educated detainees regarding how to lower their risk of exposure to COVID-19 and the facility displays posters in English and Spanish reminding detainees to practice proper hygiene and socially distance. Doc. 29-1, ¶¶ 39-42.

On the rare occasion where detainees have exhibited even potential symptoms of concern, they are evaluated, treated, and quarantined by medical staff. For example, in April 2020, a group of detainees presented with cold symptoms such as runny noses or coughing. Doc. 29-10, ¶ 7. They were evaluated and none had elevated temperatures or other CDC indicated symptoms. *Id.* Still, the detainees were quarantined for 14 days while they were treated. *Id.* They recovered without issue. *Id.*

Implementation of the JCDC's sweeping and invasive changes to daily life has not been perfect or without issue. For example, since Chief Kolitwenzew's May 28, 2020 testimony, detainees occasionally disregard social distancing rules and stand too close together while in line for meals. Ex. 1, ¶¶ 5-6. Detainees' time in line for meals is limited—about 2-3 minutes at most—and they generally wear facemasks. Ex. 1, ¶ 8. Further, JCDC staff have directed detainees to follow social distancing rules and counseled them that it is their responsibility to follow the rules

to protect themselves and others. Ex. 1, ¶ 6. Detainees have a responsibility to follow the rules and options to do so: they can stand farther away at the back of meal lines, eat meals in their cells, and get up and walk to another television if other detainees are too close in the dayroom. Ex. 1, ¶¶ 7-9, 17. Staff do not physically restrain detainees who break the rules nor place them in segregation, as this would create other safety, health, and liability issues Ex. 1, ¶ 9. But staff have verbally ordered detainees to follow the rules, occasionally sent detainees to the back of a line, and counseled detainees regarding their obligations. *Id* at ¶¶ 7-9. Detainees have a responsibility to the follow the rules. They usually do: overall, most detainees have complied with the JCDC's social distancing, facemask, and general COVID-19 prevention policies. Ex. 1, ¶ 9; Doc. 53 at 15, 20-21.

In addition to continuing to implement these policies, the JCDC has recently blocked off meal room seats with taped "X" marks to ensure that detainees who choose to eat in the meal room instead of their cells must sit at least six feet or more apart. Ex. 1, ¶ 10. Indeed, the JCDC's meal rooms are now largely empty during meal times due to the low populations and the fact that the detainees can always choose to eat meals in their cells. *Id*. Detainees who choose to eat meals in the meal room generally follow social distancing rules and the tape marks; they sit at least but often more than six feet apart. *Id*. In addition to taping off seats in the meal room, because phone banks have two phones affixed close together to each side of a

vertical pole, JCDC staff have also used tape to block one side of each a phone bank and required detainees to only use one side of a phone bank at a time in order to maintain distance. Ex. 1, ¶ 11.

With respect to sanitation, the JCDC recently installed new antibacterial soap dispensers in showers and day-room bathrooms, which eliminates the need for the use of bars of soap, although detainees may still request them if desired. Ex. 1, ¶ 5. Showers are cleaned daily and deep cleaned once per week. Ex. 1, ¶ 16.

Overall, the JCDC has developed a comprehensive set of precautionary measures to limit the risk of COVID-19 that include social distancing and facemask rules, detainee population reduction and spreading out, testing capability, medical screening, quarantine, and mitigation plans. Ex. 1 at ¶ 20; Ex. 53 at 27-28. Moreover, it remains true that to date, no detainee or JCDC staff member has tested positive for COVID-19. Ex. 1, ¶ 21.

ARGUMENT

I. The Law

A. Petitions for Writs of Habeas Corpus

A petition for a writ of habeas corpus is appropriate to challenge the fact or duration of confinement. *See Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *Hill v. Werlinger*, 695 F.3d 644, 645 (7th Cir. 2012). In fact, a "quantum change in the level of custody" must be addressed by habeas corpus, while a quest for "a different

program or location or environment" must be raised in a civil rights claim. *Glaus v. Anderson*, 408 F.3d 382, 388 (7th Cir.2005) (internal quotation omitted); *see Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir. 1979). Here, Petitioners blur the line between the two by claiming that the conditions of their confinement violate their Fifth Amendment rights, but seek the remedy of outright release from custody. Accordingly, the Court has previously determined that they may seek habeas corpus relief.

In order to prevail on a habeas corpus claim, a petitioner must demonstrate that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2241. Petitioners contend that being held in custody at the JCDC during the COVID-19 pandemic violates their Fifth Amendment rights. In other words, Petitioners allege that the mere fact of their continued confinement violates the Fifth Amendment. This is an extraordinarily broad constitutional claim that must fail because the conditions at the JCDC do not amount to punishment of the detainee, particularly in light of the facility's preventative measures against the spread of COVID-19.

B. Fifth Amendment

A claim challenging the conditions of confinement based on due process is analyzed under the objective inquiry standard. *Kingsley v. Hendrickson*, 576 U.S. 389 (2015); *Hardeman v. Curran*, 933 F.3d 816 (7th Cir. 2019). To prevail on this

claim, Petitioners 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."

Id. at 827, *quoting Kingsley*, 135 S. Ct. at 2473–74. Objective reasonableness turns on the "facts and circumstances of each particular case." *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

The constitutionality of pre-trial detention conditions under the Fifth Amendment requires an evaluation of whether those conditions amount to punishment of the detainee or are incident to a legitimate governmental purpose. *Bell v. Wolfish*, 441 U.S. 520, 535-38 (1979). A condition amounts to punishment if a plaintiff can show that through express intent, the condition is not "reasonably related to a legitimate governmental objective." *Id.* at 539. Petitioners do not present allegations or evidence to show the Government has an "express intent" to punish them by detaining them in a manner that would result in them suffering death or serious injury from COVID-19.

Where express intent cannot be shown, courts must then ascertain whether the conditions serve a legitimate purpose and whether the conditions are rationally related to that legitimate purpose. *Id.* at 538, 561; *Kingsley*, 135 S. Ct. at 2473. The

Supreme Court has held that ensuring a detainee's presence at hearings and "the effective management of the detention facility once the individual is confined" are legitimate governmental interests. *Id.* at 540. The Government also has a "legitimate . . . interest[]in reducing the flight risk posed by prisoners facing removal." *Builes v. Warden Moshannon Valley Corr. Ctr.*, 712 F. App'x 132, 134 (3d Cir. 2017). Moreover, the Supreme Court has specifically warned that "such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Bell*, 441 U.S. at 540 n.23.

II. The JCDC's Conditions Are Objectively Reasonable

To prevail on his claim, Petitioners must show not just that there is a risk of harm, but that the precautions the JCDC is taking to protect them from that harm are "objectively unreasonable." *See Kingsley*, 135 S. Ct. at 2473. Importantly, the JCDC's actions are not subject to a bare negligence standard, much less a strict liability standard. *See Steading v. Thompson*, 941 F.2d 498, 499 (7th Cir. 1991). Rather, Petitioner "must prove . . . something akin to reckless disregard." *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (*en banc*); *Miranda v. Cty. Of Lake*, 900 F.3d 335, 353 (7th Cir. 2018).

To establish that a risk of harm presented by conditions of confinement violates the Constitution, a pretrial detainee must prove that (1) the defendant made an "intentional decision with respect to the" challenged conditions; (2) the challenged conditions put the detainee at a "substantial risk of suffering serious harm"; (3) the defendant did not take "reasonable available measures to abate that risk"; and (4) by failing to take the reasonable available measures, the defendant "caused the [detainee's] injuries. *Castro*, 833 F.3d at 1071. "[O]bjective reasonableness turns on the 'facts and circumstances of each particular case.'" *Kingsley*, 135 S. Ct. at 2473 (quoting *Graham v. Connor*, 480 U.S. 386, 396 (1989)). Furthermore, "[c]ourts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." *Bell*, 441 U.S. at 539.

In this case, the JCDC has responded to the pandemic by implementing measures that have touched on and changed every aspect of life inside the prison. Those measures have been described in detail in the government's prior response brief, as well as Chief Kolitwenzew's testimony and declarations. See Doc. 29-1, Kolitwenzew First Declaration; Ex. 1, Kolitwenzew Declaration; Doc. 53, May 28, 2020, Transcript. The JCDC's key response measures that are relevant to the

question of whether its response has been reckless or reasonable are summarized below by category:

Voluntary Population Reductions

- At the beginning of the pandemic, 155 ICE detainees resided in the JCDC. Ex. 1 at ¶ 2.
- The JCDC decided to reduce its ICE population by not accepting new ICE detainees and working with ICE to voluntarily release appropriate detainees. Doc. 53 at 11, 22.
- The JCDC has now reduced its ICE population by 80%, as only 31 ICE detainees, or 20%, of the original population remains. Ex. 1 at ¶ 2; Doc. 21-1 at ¶¶ 5, 34, 49.

Housing Changes

- Because of the prison's population reduction, the JCDC has reassigned detainees to spread the population out. Doc. 21-1 at ¶ 24; Ex. 1, ¶ 3.
- Of the remaining 31 ICE detainees, 19 now have their own cells with no cellmate whatsoever. Ex. 1, ¶ 3. This includes Petitioners Rositas-Martinez and Chinchilla. *Id.*
- All other detainees no longer share bunk beds but instead reside in 8x10 foot cells where they may stay more than 6 feet aware from their single cellmate at all times. DOC 21-1 at ¶ 24; Ex. 1 at ¶ 4.

Social Distancing Polices

- The JCDC requires all detainees to socially distance by staying at least 6 feet apart. Staff have educated detainees regarding their responsibility to socially distance and remind them of it when in line for meals or medications. Ex. 1 at ¶¶ 6-8; Doc. 21-1 at ¶¶ 24, 26.
- To enforce social distancing, staff at first placed red biohazard bags on meal room seats, then more recently, affixed more permanent X marks

using tape, to the top of most meal room seats to block them off so that detainees who choose to eat in the meal room must sit at least six feet apart. Ex. 1 at ¶ 10; Doc. 21-1 at ¶ 27.

- The meal rooms are largely empty during meals now due to population reductions and detainees who choose to eat there instead of in their cells typically follow the markings and sit at least six feet apart, although it is often more than six feet. Ex. 1 at ¶¶ 7, 10.

- All group gatherings, classes, group counseling sessions, and religious events have been cancelled. Doc. 21-1 at ¶ 28.

Personal Protective Equipment

- Detainees have been provided with four facemasks: the two medical/surgical facemasks and two cloth facemasks; the cloth masks are laundered regularly. Detainees may ask for a replacement medical facemask at any time. Ex. 1 at ¶ 6; Doc. 21-1 at ¶ 30; Doc. 53 at 12-14.

- Detainees are required to wear facemasks at all times except when showering or eating. Ex. 1 at ¶ 6. While some detainees occasionally forget or resist the rule, most generally comply and wear facemasks at all times. Ex. 1 at ¶¶ 6-8.

Screening, Testing, and Isolation Procedures

- No new ICE detainees have entered the JCDC for more than three months and the JCDC is not accepting new ICE detainees. Doc. 29-1 at ¶ 34; Doc. 53 at 11.

- If for some reason there were a new detainee, upon arrival they would be subject to screening and mandatory quarantine time and can only be released into the detainee pods after receiving medical clearance. Doc. 29-1 at ¶¶ 49-51.

- Any detainee showing signs or symptoms of COVID-19 will be isolated in a negative pressure room for further observation and treatment by the facility's medical staff in accordance with state and local health department guidelines. Doc. 29-1 at ¶¶ 43-45.

- Medical staff come into the pods each day in the morning to take detainees' temperatures and check for other symptoms warranting immediate referral to the onsite medical provider. Doc. 29-1 at ¶ 47; Ex. 2, Haggard Declaration at ¶ 42. JCDC medical staff previously took detainees' temperature twice per day, but after some detainees resisted and refused, and after consultation with the JCDC Medical Director, the JCDC decided to take one temperature check per day. Ex. 2 at ¶ 42. Logs for June 2020 show the JCDC taking detainees' temperatures and that temperatures are normal. Ex. 2 at ¶ 42, Ex. X (temperature logs).

- Correctional staff, all of whom have training for basic medical situations and some of whom are trained first responders, enter the pods every 25 minutes to check for symptoms of illness or infection. Doc. 29-1 at ¶ 47. A detainee who was found to have COVID symptoms or who makes a sick call request would be medically evaluated. If a detainee would be seen immediately if warranted. If a detainee presents with symptoms of COVID-19 they would immediately be quarantined for 14 days or until a negative test returns. The rest of the housing unit would be considered a cohort and quarantined for 14 days. The detainee would be monitored for symptoms and their temperatures would be taken twice a day. If the detainee is positive they would be isolated until two negative tests return. Their vital signs and condition would be monitored. They would be sent to the hospital if the condition worsens with more severe symptoms that warranted a higher level of care. See Ex. 2 at ¶ 43.

- The JCDC now has 300 COVID-19 tests on hand, tests have been conducted when a detainee or staff member has either presented recognized symptoms or possibly been exposed to the virus, and all of these tests have been negative. Doc. 29-1 at ¶¶ 37-38; Ex. at ¶ 21; Ex. 53 at 22.

- The JCDC's medical department has a mitigation plan and procedure for the evaluation, quarantine, and treatment of detainees who display symptoms or test positive for COVID-19. Doc. 53 at 27-28; Doc. 29-2 (CDC Quick Reference for Law Enforcement); Doc. 29-3; Doc. 29-4. Medical staff are always available to treat or secure immediate treatment for detainees as needed. Ex. 2 at ¶ 44. The JCDC also has the ability to, depending on a detainee's needs or condition, flex medical staff's hours to

have someone stay through the night or detainees can be immediately sent to local hospitals for a higher level of care if needed. Ex. 2 at ¶ 44.

- Enhanced health screening procedures have been implemented to prevent JCDC staff from bringing COVID-19 into the facility. This includes directions to stay home if staff has any of the identified symptoms, self-reporting, and temperature checks upon entering the JCDC. If staff come into contact with any high-risk individuals outside of the jail or exhibit abnormal symptoms, they are not allowed to return to work until they have taken a COVID-19 test and received a doctor's note. Doc. 29-1 at ¶ 38; Doc. 53 at 24-25.

Education

- Handouts that request maintaining six feet apart for social distancing, provide information about COVID-19 and good hygiene practices, have been provided to the detainees in both English and Spanish and posted throughout the common areas of the pods. Doc. 29-1 at ¶¶ 40-42.

Sanitization and Hygiene

- The JCDC recently purchased new antibacterial soap and installed dispensers for it in every bathroom and the showers. Ex. 1 at ¶ 5. Detainees may still request their own individual bar of soap at any time. *Id*. Hand sanitizer and other cleaning supplies also remain available to the detainees at any time through request to a guard. Ex. 1 at ¶ 12; Doc. 29-1 at ¶ 59.

- The JCDC conducts a daily disinfection routine three times a day where door handles and tables are cleaned three times per day. Ex. 1 at ¶ 13. Paid pod workers clean after each meal. *Id.* Showers and toilets are cleaned every day and deep-cleaned one per week. Ex. at ¶¶ 13, 16.

- Detainees are provided with a mop bucket and disinfectant to clean their cells each morning. If the mop bucket water is dirty, a detainee may ask a pod worker or on-duty officer for a clean bucket of water and will receive one. Ex. 1 at ¶ 14.

These exhaustive and sweeping measures have fundamentally altered life inside the prison, from entry, to eating, to cleaning, to standing in line. JCDC staff have considered every aspect of life inside and outside the prison and implemented precautions designed to prevent the spread of COVID-19. These are the hallmarks of a reasonable response.

Petitioners, in their amended petition, claim that "JCDC conditions have not improved in the weeks since this Court ordered the release" of another detainee on June 2, 2020, or other detainees in April and May 2020. Doc. 69 at ¶¶ 5-6. The government recognizes that at those times, based on different records and individual circumstances, the Court found release to be appropriate. However, Petitioners' incredible assertion that "JCDC conditions have not improved" simply ignores reality and the record. To wit, since the release of other detainees in April and May 2020, the JCDC has made the following major improvements:

- More than 120 ICE detainees have left the building and the population has been reduced to a paltry 20% of where it began.
- Changed cell assignments to allow social distancing in cells.
- Stopped accepting any new ICE detainees to the facility.
- Distributed four facemasks to each detainee—two medical grade masks and two cloth masks.
- Implemented mandatory social distancing, placed stickers on the floor for guidance, and taped off meal room chairs, phones, and dayroom seats.

- Purchased 300 COVID-19 testing kits ready for use if necessary.

These are not trivial measures—they are vast improvements that have spread detainees out, kept them away from each other, and further allowed the facility to prevent the spread of the virus.

Petitioners even claim that nothing has improved during the pendency of this lawsuit. Doc. 69 at ¶ 8. This galling assertion again ignores the fact that most of the above improvements have occurred in the past two months. In fact, based in part on those improvements, this Court recently found that the JCDC has "significantly reduced" the risk of contracting COVID-19 inside the facility, "making the conditions, while still serious, less so." Doc. 52 at 28-29. Further, another Court in this district similarly found that the "JCDC has implemented measures to reduce the risk of COVID-19 spreading in JCDC, including significant population reduction" and the JCDC's measures, considered along with the individual's circumstances, warranted denial of the petitioner's request for release. See *Leyva v Kolitwenzew*, No. 20-cv-2124, Doc 9 at p.11 (June 29, 2020).

Further, since the Court's TRO decision, the JCDC has continued to make improvements, including the following:

- Another 10 ICE detainees have left the building and the population has been reduced from 41 at the time of the TRO hearing to 31. Doc. 52 at p 8 (41 detainees); Ex. 1 at ¶ 2 (31 detainees).

- Of the remaining 31 detainees, 19 now have their own cells with no cellmate. Ex. 1 at ¶ 3.

- New antibacterial soap and dispensers have been purchased and installed in all showers and bathrooms. Ex. 1 at ¶ 5.

- Tape marks blocking off meal room and day room seats to require social distancing have been installed. Ex. 1 at ¶ 10. One side of each phone bank has also been blocked off. Ex. 1 at ¶ 11.

What this shows is that the JCDC is not idly standing by. It is not disregarding its pandemic responsibilities. Instead, the JCDC is continuing to revise, refine, and improve its protections. Ex. 1 at ¶ 20. That is exactly what it should do. It is what a reasonable response to an evolving pandemic is. And it is precisely what the law requires.

Petitioners argue that conditions at the JCDC are inadequate because while they acknowledge that most guards and staff wear facemasks and gloves and socially distance, Petitioners nevertheless broadly claim that enforcement is lacking and sanitation is "bad." However, Petitioners' declarations provide conflicting information and largely avoid acknowledging that they have any ability to self-help. For example:

- Petitioners admit that they have been told to wear masks at all times and to stay six feet apart, as well as that stickers have been put on the floor to promote social distancing, seats have been marked off at the tables in the dayroom, and flyers/posters in English and Spanish have been posted around the dayroom. Doc. 60 at ¶¶ 26-30; DOC 61 at ¶¶ 39, 49-50, 53. However, Petitioners also allege generally that some detainees do not wear their masks at all times, or observe the distancing rules in the dayroom or when in line for meals despite the warnings and reminders, yet Petitioners also indicate that it is possible for them to socially distance in their cells and minimize contact in the common areas. Doc. 56 at ¶¶ 31-32; Doc. 57

at ¶ 23; Doc. 58 at ¶¶ 23, 40; Doc. 59 at ¶ 24; Doc. 60 at ¶ 31; Doc. 61 at ¶¶ 36, 54.

- Petitioner Chinchilla says that the eating area of the dayroom is only mopped and swept on Mondays, but other Petitioners admit that this is done on a daily basis. Doc. 57 at ¶ 28; Doc. 58 at ¶¶ 26, 32; Doc. 61 at ¶ 60. Other Petitioners admit that pod workers clean the common areas, wipe down the tables in the dayroom with disinfectant after every meal, and clean the phones. Doc. 57 at ¶ 27; Doc. 58 at ¶ 30; Doc. 61 at ¶ 56-57.

- Several Petitioners deny that they have been given access to hand sanitizer. Doc. 57 at ¶ 37; Doc. 60 at ¶ 34; Doc. 61 at ¶¶ 48, 69. However, this is at best misleading. While detainees may not be able to keep it in their cells due to its alcohol content, the record demonstrates that hand sanitizer is kept at the guard's station and is available to detainees upon request. Ex. 1 at ¶ 12. Petitioner Rositas-Martinez admits that he has seen hand sanitizer at the guard station, and most Petitioners admit to being able to wash their hands with soap and water frequently. Doc. 56 at ¶ 34; Doc. 57 at ¶ 36; Doc. 59 at ¶ 30; Doc. 60 at ¶ 33; Doc. 61 at ¶¶ 67-68.

- While several Petitioners claim that they have only filthy mop water and little disinfectant to clean their cells each day, other Petitioners admit that they are given cleaning supplies every day that they use to clean their cells and Petitioner Gonzalez-Torres also cleans his cell with soap and hot water. Doc. 56 at ¶ 35; Doc. 57 at ¶ 24-25; Doc. 58 at ¶ 34; Doc. 56 at ¶ 35; Doc. 59 at ¶ 34; Doc. 60 at ¶ 37; Doc. 61 at ¶¶ 62-63. Nevertheless, Petitioners omit the fact that they can request clean water or more disinfectant at any time by simply asking a pod worker or guard. Ex. 1 at ¶ 14.

Respectfully, Petitioners have to accept some responsibility for implementing the safety mechanisms they have been provided. They can ask for a new bucket of water or more cleaner, ask the guard for a squirt of hand sanitizer, or move to another part of the large dayroom to watch one of the other TVs, and, if some detainees are crowding in line, they can wait at the back of the line until the others have passed

through as suggested by Petitioner Rositas-Martinez. Doc. 71 at ¶¶ 54-55, Ex. at ¶¶ 8, 17. With population reduced to 20% capacity, this should take little effort to accomplish.

Petitioners also loosely analogize this case to others around the country where courts have granted preliminary to relief to detainees due to conditions of confinement during the pandemic. However, the facts and realities of this case are not analogous to other well publicized cases seeking relief for groups of detainees in ICE custody during the COVID-19 pandemic. Those cases are largely about the ability to social distance.

For instance, in *Rivas*, the petitioners alleged that the only effective means of preventing the spread of COVID-19 is social distancing, but that the conditions in their detention facilities made that impossible. *Zepeda Rivas v. Jennings,* No. 20-CV-02731-VC, 2020 WL 2059848 (N.D. Cal. Apr. 29, 2020). The detainee populations in that case were at 70% capacity with 355 detainees in one facility and 168 in the other and were actually increasing as new detainees continued to arrive at both facilities and be released into the population without any quarantine period. *Id.* The TRO and request for relief in *Rivas* was based on the argument that at 70% capacity, the detainee population in the two detention centers was so high that social distancing was impossible, depriving detainees of their best defense against COVID-19 and therefore exposing them to an unreasonable risk of harm or death. Release

was not requested as an outright remedy, but only as a mechanism for reducing the population to a level that would allow proper social distancing and alleviate the unreasonable risk of harm to the detainees. And it was on that basis that the court granted relief. Finding that ICE had failed to take appropriate action to adequately reduce the detainee population to allow social distancing, the court ordered the provisional class and bail review process as a mechanism to deplete the population of the facilities to achieve a level where social distancing would be possible and not as a constitutionally required remedy due to the risk of COVID-19 in and of itself.

The same is true in *Sousa*, where Judge Young found that all detainees in a given facility share an interest in the "release [of] a critical mass of [d]etainees—such that social distancing will be possible and all those held in the facility will not face a constitutionally violative substantial risk of serious harm." *Savino v. Souza*, 20-cv-10617-WGY, 2020 WL 1703844 at *7 (D. Mass. Apr. 8, 2020). Judge Young then issued relief in the form of an order requiring the reduction of the population. *Id*. at *28. The same is also true in other COVID-19 cases where relief was granted based on overcrowding and the inability of detainees to protect themselves by social distancing like *Roman v. Wolf,* 2020 WL 2188408 (C.D.Cal. April 23, 2020), *Thakker v. Doll*, __ F. Supp. 3d __, No. 1:20-cv-480, 2020 WL 2025384, at *4 (M.D. Pa. Apr. 27, 2020), and *Faour Abdullah Fraihat, et al. v. U.S. Immigration and Customs Enf't, et al.*, CV19-1546 JGB (SHKx) (C.D. Cal. April 20, 2020), which

again ordered immediate reduction in the population to allow detainees to social distance and protect themselves against the spread of COVID-19.

Here, the goal that all of these other actions sought to attain, that being the reduction of the detainee population to levels where social distancing can be practiced, has already been met at the JCDC where the ICE detainee population has been reduced not **to** 70% but **by** 80%. The crowding and lack of personal protective equipment and ability to social distance that justified relief in *Rivas* and the other cases previously mentioned (and even by the Court in its prior decisions in Tello, Ruderman, Favi, Ochoa, and Herrera-Herrera) no longer exists at the JCDC. Two of the same kind of surgical masks used by the staff and two additional cloth masks have been provided to each detainee. Seats and telephones have been blocked off in common areas, and detainees have been spread out so that there are no more than two detainees in any cell, which allows for social distancing of at least 6 feet as recommended by Petitioners' experts and the CDC, with many detainees even no longer sharing a cell with any cellmate. Under these circumstances, the environmental factors that the courts found made the risk of COVID-19 constitutionally unreasonable are substantially mitigated.

Although Petitioners continue to allege that the precautionary measures that this Court found to be lacking at the JCDC in other cases remain lacking to this day, in denying Petitioner Crainic's TRO, the Court found otherwise. Now Petitioners'

argument has changed to suggest that even the current substantially improved conditions and exhaustive reforms are not good enough, and they are left requesting release as an outright remedy. None of the other actions allowing relief have proceeded on the premise that it is constitutionally impermissible for anyone with a COVID-19 risk factor to remain detained during the pandemic, but rather only that without the ability to social distance, the conditions of confinement place susceptible detainees at an unreasonable risk of injury or death. Going beyond this to the point now requested by Petitioners would logically require the Court to abandon the well-respected guidance of infectious disease experts and find that there are essentially no conditions under which a detainee with one of the enumerated medical conditions should remain in custody during the COVID-19 pandemic.

In *Thakkar v. Doll*, Judge Jones in the Middle District of Pennsylvania initially granted a TRO and ordered release from three different facilities based on allegations that the conditions in detention centers would result in a "tinderbox effect" spreading rapidly through the facilities and infecting them once COVID-19 entered the facilities and that this demonstrated irreparable harm. By the time the hearing on preliminary injunction came around approximately a month later, the court noted that the feared outcome had not come to pass in two of the three facilities, largely due to the actions of the staff and officials. *Thakker v. Doll*, __ F. Supp. 3d __, No. 20-cv-480, 2020 WL 2025384, at *4 (M.D. Pa. Apr. 27, 2020). In declining to

convert the TRO into a preliminary injunction with respect to those two facilities, the court found that the facilities had reduced their detainee populations to around 50% and had "quickly and effectively implemented the guidelines published by the CDC such that they have stymied any potential outbreak within their walls." *Id.* at *7-8. As a result, the allegations of likelihood of success and inevitable irreparable harm at these detention centers were deemed to be largely speculative and insufficient to warrant a preliminary injunction. *Id.* at *7-8. After learning that these changes had taken place, the court determined that the risk to the detainees no longer outweighed ICE's legitimate interest in detention, reversed the TRO, denied a preliminary injunction, and ordered the released detainees back into detention. *Id.* at *12. The only exception to the order that released detainees return to the facilities was with respect to two detainees who had contracted COVID-19 or developed COVID-like symptoms after being released pursuant to the TRO. *Thakker v. Doll*, Case No. 20-CV-480, ECF 92 (M.D.Pa. April 28, 2020).

Recent precedent in the Ninth Circuit, where *Rivas, Fraihat,* and *Roman* originated, suggests caution in granting the relief requested by Petitioners on the record in this case. The Ninth Circuit recently stayed a preliminary injunction issued in another COVID-19 case granting preliminary relief, *Hernandez Roman v. Wolf*, No. 20-55436, 2020 WL 2188048 (9th Cir. May 5, 2020). The only exception to the stay was the requirement that the detention center substantially comply with the

CDC guidelines for correctional and detention facilities to follow in managing COVID-19 that have been discussed extensively in the briefs here. *Id.* at *1. The stay remains in place, and it appears that oral argument may be scheduled in September 2020. *Hernandez Roman v. Wolf,* Case No. 20-55436 Docket Sheet (last viewed on July 3, 2020). The TRO and other relief entered in *Rivas* was also recently appealed to the Ninth Circuit. *Zepeda Rivas v. Jennings,* No. 20-16276 (9th Cir., June 30, 2020). Additionally, in a decision dated May 22, 2020, the Ninth Circuit held that a risk of contracting COVID-19 does not satisfy the standard for purposes of awarding extraordinary relief in the context of a § 2255 motion. *United States v. Dade*, __ F.3d __, No. 19-35172, 2020 WL 2570354, *2-3 (9th Cir. May 22, 2020). Moreover, the Court of Appeals recognized that while COVID-19 presents a "special circumstance" that "might warrant a change in the conditions of his confinement (including transfer to another facility) if those risks are not being adequately addressed," that was not the case there, and is not the case here at this time. While the United States acknowledges that *Dade* was in the context of a § 2255 motion rather than a § 2241 petition, the decision does give some indication of where Appellate Courts might weigh in in these cases.

Thus, the facts, law, and expert guidance all show that conditions at the JCDC, which include an 80% population reduction, social distancing measures, provision of four facemasks, and other screening and testing measures, are objectively

reasonable, are not reckless in any fashion, and therefore, Petitioners' lawful detention does not violate the Constitution.

III. The Individual Petitions Are Without Merit

The objectively reasonable conditions of Petitioners' confinement, while a reason alone that Petitioners' habeas claims should be denied, should also be considered with their criminal and immigration histories. These histories show that Petitioners are not appropriate candidates for release because they often present dangers to the community or clear fight risks.

A. Florian Crainic

1. Criminal History

On November 13, 2019, Mr. Crainic was convicted of conspiracy to commit bank fraud in violation of 18 U.S.C. § 1349 in the United States District Court, District of New Jersey, Case No. 2:l7-CR-00289-ES-1. Doc. 29-11, ¶ 12. Petitioner was sentenced to time served and two years of supervised release. *Id.* According to conviction records obtained by ICE, Mr. Crainic and his coconspirators sought to enrich themselves by withdrawing money from automated teller machines ("ATMs") using counterfeit ATM cards encoded with bank customer's account information after previously obtaining the bank customers' account information by using "skimming" devices installed on the ATMs. *Id.* at ¶ 13. Approximately $50,519.00 of loss was directly attributable to Petitioner. *Id.*

On June 4, 2020, ICE made the United States aware that Mr. Crainic is the subject of an active Diffusion Notice from Interpol that requests his arrest and extradition back to Romania in connection with his 2002 conviction for Complicity to Fraud. DOC 45-46. Based on the timing, it would appear that Mr. Crainic fled to the United States as discussed below to avoid his criminal prosecution for fraud in Romania.

Mr. Crainic's history of fleeing his fraud conviction in Romania and then committing fraud again while in the United States shows that his release would present a danger to the community and he is unlikely to follow the conditions of a release.

2. Immigration History

A citizen of Romania, Crainic first encountered ICE officers on March 15, 2010, at the residence of an individual who had violated the terms and conditions of her visa. Doc. 29-11 at ¶¶ 5-6. Petitioner admitted that he had illegally entered the United States on or about May 2000 after he paid $5,000.00 to be smuggled into the United States via a shipping container. *Id.* Immigration officials charged Petitioner with removability under 8 U.S.C. § 1182(a)(6)(A)(i), for entering the United States without being admitted or paroled. Doc. 29-11 at ¶¶ 7-8.

On March 18, 2010, Crainic posted a $5,000.00 bond and was released from ICE custody. *Id.* at ¶ 9. He appeared before an Immigration Judge on or about April

14, 2011, and conceded his inadmissibility to the United States as charged but sought relief from removal. *Id.* at ¶ 10. The Immigration Court scheduled a hearing on Petitioner's applications for relief for October 21, 2013, but was continued twice, before setting the final hearing date to December 7, 2020 for adjudication of Petitioner's applications for relief. *Id.* at ¶¶ 10-11.

While awaiting the completion of his immigration case, Petitioner received his federal conviction for conspiracy to commit bank fraud, which constituted a crime involving moral turpitude ("CIMT") under the Immigration and Nationality Act. *See* 8 U.S.C. § 1182(a)(2). Doc. 29-11 at ¶ 12. On January 31, 2020, ICE cancelled Crainic's bond, arrested, and detained him, as the conviction constituted a change of circumstance to allow re-arrest. *Id.* at ¶¶ 14-15. On March 23, 2020, Crainic appeared before an Immigration Judge, who held that Petitioner's conviction for bank fraud was a CIMT and that Petitioner was properly detained under the mandatory custody provisions of § 1226(c)(l). *Id.* at ¶ 16.

On May 15, 2020, the Immigration Judge held a hearing on Petitioner's applications for relief. *Id.* at ¶ 17. The Immigration Judge denied Petitioner's applications and ordered him removed to Romania. *Id.* Petitioner has now filed an appeal with the Board of Immigration Appeals ("BIA"). Ex. 3 at ¶ 23. As such, the removal order is not final, and Petitioner remains detained under § 1226(c)(l).

As this Court found, the "fact that he committed and was convicted of bank

fraud while he was on immigration bond raises substantial doubt as to whether he will not be a danger to the public or follow conditions of bond in the future." Doc. 52 at 37. Mr. Crainic, who has already fled one prosecution only to commit another crime in this country, would also present a flight risk as he has been ordered deported. Mr. Crainic's substantial flight risk and potential danger to the community show that he should not be released under these circumstances.

3. Medical Conditions

The Court is familiar with Mr. Crainic's medical history and the prior arguments regarding that history will not be repeated in full here but summarized. The parties agree that Mr. Crainic has diabetes. However, Mr. Crainic has been provided with medication and there is no indication in the medical record that his diabetes has not been controlled. Doc. 7-4 at 8-9, 16. As this Court found in its TRO order:

> The parties do agree that Petitioner has a diabetes diagnosis. As noted above, however, well-managed diabetes presents a lesser risk of COVID-19 complications than uncontrolled diabetes. And, from the evidence before the Court, it appears that if Petitioner's diabetes is not well-managed, it is because of his own decisions not to check his blood sugar.

Doc. 52 at 9.

As background for this finding, the Court noted that although Mr. Crainic claimed he had not been able to test his blood sugar, he had not explained why he

failed to use the blood sugar tests available to him at the JCDC's officer desk. Doc. 52 at 10. As a result, the Court found that "it appears that if Petitioner's diabetes is not well-managed, it is because of his own decisions not to check his blood sugar" and "that Petitioner can monitor his diabetes and has failed to do so. *Id.* at 10-11.

Notably, Mr. Crainic has not submitted an updated declaration with his amended complaint or even attempted to explain why he stopped checking his blood sugar levels during the pendency of the TRO proceedings. He introduces no new evidence and makes no attempt to offer any explanation for his prior misleading statements. However, the government notes that following this Court's TRO decision, Mr. Crainic resumed testing his blood sugar levels. Ex. 2 at ¶ 40. He has not requested any further treatment related to his diabetes. *Id.*

Mr. Crainic's decision to restart testing his blood sugar levels after he lost his TRO motion solidifies that his refusal to test his levels and at the same time argue that the JCDC had not given him a blood sugar kit was a transparent attempt to provide incomplete and misleading information in order to denigrate the JCDC and secure his release. See Doc. 52 at 32 ("To the extent that Petitioner's diabetes is uncontrolled, the Court finds that this is due to his own willful failure to monitor his health."). This pattern of dishonesty is consistent with his multiple fraud convictions. It should not be tolerated.

Moreover, since Mr. Crainic resumed testing his blood sugar levels, the JCDC

has continued to monitor him and his labs drawn on June 29, 2020, showed an improvement in his blood glucose level from February 10, 2020. Ex. 2 at ¶ 40. His condition is therefore controlled and presents no serious medical condition justifying or requiring release. See Doc. 52 at 27 ("Petitioner's diabetes appears to be mild and capable of being controlled—which would make his risk of serious illness of death from COVID-19 complications significantly lower.").

In addition, inexplicably, Mr. Crainic continues to argue that he has "reduced right-lung capacity . . . ." Doc. 69 at ¶ 123. But he has never submitted any medical evidence to support that claim. Nor has he addressed the already disclosed medical evidence refuting it. Mr. Crainic's medical record shows that the JCDC has twice x-rayed his lungs. Both times, Mr. Crainic's lungs were shown to be normal, "clear," with no evidence of disease, without evidence of fluid or masses, and with 98% oxygen saturation. Doc. 7-4 at 29-30.

In his amended complaint, Mr. Crainic also, for the first time, claims he has hypertension. Doc. 69 at ¶ 163. But he submits no evidence whatsoever to support this claim. Mr. Crainic does not have hypertension and has not been diagnosed with the condition. Ex. 2 at ¶ 40. His recent blood pressure readings are within normal limits and do not require medication: 2/6 – 137/88, 4/11 – 128/88, 4/17 – 128/80, 6/11 – 130/88. *Id.* Mr. Crainic only takes metformin for his diabetes and naproxen as needed for pain. *Id.* There is simply no evidence to support his new claim that he

has hypertension. Further, although he claims to have the condition, Mr. Crainic does not make any other allegations related to the condition or allege that, even if he had the condition, that it has not been controlled.

Mr. Crainic has therefore failed to carry his burden to prove his claim or that he has any serious medical condition that has not been properly treated or requires his release. Moreover, to the extent that Mr. Crainic's conditions pose any risk, he is responsible for those risks, as he refused to test his blood sugar during the pendency of the TRO proceedings and has also resisted wearing a facemask to protect himself and others. See Doc. 52 at 35 (finding that "these actions show that despite Petitioner's claims, he does not believe or does not care that he may be facing a serious risk of illness or death within the facility").

In summary, given Mr. Crainic's mild and controlled conditions, Mr. Crainic's responsibility for not following the JCDC's rules and caring for his own conditions, and his lack of candor before the Court, as well as his criminal convictions for crimes involving dishonesty and immigration records showing that he presents a "significant flight risk and a potential danger to the public," as well as Mr. Crainic's failure to present any new argument or evidence following the Court's prior findings on these issues, the Court should deny his petition.

B. Mumin Fatai-Owolabi

1. Criminal History

Respondent is unaware of any criminal record for Mr. Fatai-Owalbi in the United States.

2. Immigration Status

Mr. Fatai-Owolabi, a native and citizen of Nigeria, was placed into removal proceedings before an Immigration Judge on or about December 6, 2018, and charged as an immigrant who was not in possession of a valid immigrant visa or other permissible entry document pursuant to 8 U.S.C. § 1182(a)(7)(A)(ii). Ex. 3 at ¶¶ 97-98. He was found removable and classified as an arriving alien and therefore, ineligible for bond during the pendency of his immigration case. Ex. 3 at ¶ 11; *See* 8 U.S.C. § 1225(b)(2)(A); 8 C.F.R. § 1003.19(h)(2)(i).

After Mr. Fatai-Owolabi requested continuances from January 2019 through November 2019, the Immigration Judge found that he failed to establish good cause for further continuances and ordered him removed to Nigeria. Ex. 3 at ¶¶ 101-102. Mr. Fatai-Owolabi appealed the Immigration Judge's denial of his request for a continuance to the Board of Immigration Appeals ("BIA"). *Id.* at ¶ 103. On March 13, 2020, the BIA dismissed the appeal. *Id.* at ¶ 105. As a result, Mr. Fatai-Owolabi became subject to a final order of removal on March 13, 2020. *Id.*

Mr. Fatai-Owolabi is now detained pursuant to 8 U.S.C. § 1231, and he is held under the mandatory language applicable to the detention of aliens during the 90-day removal period. *Id.* at ¶ 106. *See* 8 U.S.C. § 1231(a)(1), (2). He was scheduled for removal to Nigeria in early May 2020, but the airline cancelled the flight due to COVID-19 mitigation. Ex. 3 at ¶¶ 107, 109. He is currently scheduled for removal the week of July 6, 2020. *Id.* at ¶ 110.

Although Mr. Fatai-Owolabi has no known criminal record in this United States, his imminent removal counsels against Court intervention and release, as there is no reason to disturb his lawful detention with removal imminent. Further, if he was released on the eve of his removal, he could present a flight risk that would thwart the statutory process that has worked in this case.

3. Medical Conditions

Mr. Fatai-Owalbi has hypertension and diabetes mellitus II. Ex. 2 at ¶ 3. He is taking medication for both conditions. *Id.* Both conditions are well managed by the treatment Mr. Fatai-Owalbi has received from the JCDC and to the extent Mr. Fatai-Owalbi claims they are not, he distorts his medical record. For example, in his declaration, he states that "[s]ince being in detention, I have lost around 30 pounds." Doc. 56 at ¶ 13. During his time at the JCDC, Mr. Fatai-Owalbi's medical record shows that he weighted 170lbs on May 1, 2020, and 183lbs on June 18, 2020. Ex. 2 at ¶ 5. Mr. Fatai-Owalbi has actually gained 13lbs while in custody at the JCDC.

This distortion is emblematic of how Mr. Fatai-Owalbi exaggerates his conditions, twists his medical record, and omits information regarding his actions that affect his condition.

With respect his blood pressure, Mr. Fatai-Owalbi claims his readings "are above normal or at the high end of normal." Doc. 56 at ¶ 10. However, Mr. Fatai-Owalbi's reading of his own blood pressure readings—a medical function he is not competent to perform or testimony about—is inaccurate. His medical record shows that in the month of June, his weekly blood pressure readings have been 132/78, 122/90, 122/84, and 128/80. Ex. 2 at ¶ 4. A normal range is 120/80 and according to the American Cardiologist Association, blood pressure over 140/90 needs to be medicated. *Id*. His blood pressure readings are not high or above normal.

With respect to Mr. Fatai-Owolabi's diabetes, the JCDC medical staff has ordered him to test his blood sugar levels. Ex. 2, ¶ 6. However, he has chosen not to test his blood sugar readings despite his ability to walk to the officer station and do so at any time. *Id.* As a result, there are no blood sugar logs for Mr. Fatai-Owalbi. *Id.*; see Doc. 52 at 10 (finding that "if Petitioner's diabetes is not well-managed, it is because of his own decisions not to check his blood sugar"). Instead of monitoring his blood sugar, Mr. Fatai-Owolabi has chosen to attempt to control his diabetes through diet, exercise, and metformin. *Id.* He has not done a good job though in part because of his diet, for which he has been counseled. *Id.* Despite counseling, Mr.

Fatai-Owolabi's commissary record shows that he often purchases items such as jolly ranchers, oatmeal raisin cookies, hot'n spicy sausage, chilli ramen, jalapeno cheese curds, and Cheetos. *Id.* Mr. Fatai-Owolabi's decision to eat food that complicates his condition while not testing his blood sugar shows that either his condition is not serious or he is not taking it seriously. See Doc. 52 at 32 ("To the extent that Petitioner's diabetes is uncontrolled, the Court finds that this is due to his own willful failure to monitor his health.").

In addition, Mr. Fatai-Owolabi's declaration claims that he has "numbness and tingling in my hands and legs several times a week," frequent headaches, and a heart that races "three or more times each week . . . ." Doc. 56 at ¶¶ 13-16. However, his medical record shows that he has never reported these issues to the JCDC medical staff or sought treatment for them. Ex. 2 at ¶ 7. And although Mr. Fatai-Owolabi claims the JCDC medical staff have not investigated his numbness and tingling in his hands and legs, he had a diabetic foot exam on June 18, 2020, which showed no diabetic neuropathy. *Id.* Also, while Mr. Fatai-Owolabi notes that he experienced a sharp pain in his chest, he omits the fact that it was a due to sitting and praying for 2-3 hours daily during Ramadan; he was seen by medical on May 1, 2020, and proscribed ibuprofen. Ex. 2, ¶ 9.

Mr. Fatai-Owolabi's conditions therefore are not serious or emergencies requiring his immediate release and to the extent the conditions increase his risk with

respect to COVID-19, Mr. Fatai-Owolabi is responsible for contributing to that risk.

In summary, given Fatai-Owolabi's conditions, his own failure to take his conditions seriously, and his potential flight risk given his imminent release, his continued lawful confinement does not violate the Constitution. The Court should deny his petition.

C. Mario Arnaldo Gonzalez-Torres

1. Criminal History

Mr. Gonzalez-Torres was taken into custody upon his arrival at the United States border between Texas and Mexico. Ex. 3 at ¶¶ 29-20. He does not have a criminal history in the United States.

2. Immigration History

On August 3, 2019, Mr. Gonzalez-Torres, a Cuban citizen, was taken into custody near the border and was classified as an arriving alien pursuant to 8 U.S.C. § 1225(b)(2)(A). Ex. 3 at ¶¶ 29-30. During his initial encounter, Mr. Gonzalez-Torres claimed a fear of return to Cuba and was transferred to ICE's administrative custody to allow the Asylum Office to conduct a credible fear review, pursuant to 8 U.S.C. § 1225(b)(1)(A)(ii). Ex. 3 at ¶ 31.

The Asylum Office found that Gonzalez-Torres should proceed before the Chicago Immigration Court. *Id.* at ¶¶ 34-36. He appeared before the Immigration Judge twice, both times *pro se*. *Id.* at ¶ 38. On or about September 12, 2019, he

appeared at a master calendar hearing, during which time the Immigration Judge sustained the charge of inadmissibility. *Id.* Mr. Gonzalez-Torres next appeared on or about October 8, 2019 for a full hearing on his claim for relief from removal. *Id.* at ¶ 39. After hearing the evidence in the case, the Immigration Judge denied Gonzalez Torres relief to remain in the United States and ordered him removed to Cuba. *Id.* In part, the Immigration Judge found that Mr. Gonzalez-Torres was not credible. *Id.*

Next, Mr. Gonzalez-Torres, with the assistance of counsel, filed a timely notice of appeal with the Board of Immigration Appeals ("BIA"), seeking review of the Immigration Judge's removal order. *Id.* at ¶ 41. His removal order did not become final while his appeal was pending. On December 16, 2019, the BIA issued briefing schedules, which were extended to January 27, 2020, at the request of Mr. Gonzalez-Torres' counsel. *Id.* at ¶ 42.

On April 28, 2020, the BIA dismissed Mr. Gonzalez-Torres's appeal and affirmed the Immigration Judge's removal and credibility determinations. *Id.* at ¶ 43. Once the BIA dismissed Mr. Gonzalez-Torres's appeal, the removal order became final, and his detention is now mandatory under 8 U.S.C. § 1231. *Id.* at ¶ 44.

On or about May 8, 2020, ERO began the process of repatriating Mr. Gonzalez-Torres to Cuba. *Id.* at ¶ 46. To date, ERO has not been able to schedule Mr. Gonzalez-Torres's flight back to Cuba. *Id.* at ¶ 47. With the date subject to

change, ERO was notified that the Cuban border is temporarily closed until August 1, 2020, for COVID-19 mitigation. *Id.* ERO will follow up in mid-July regarding flight status and ICE's ability to repatriate Gonzalez Torres before the end of this Summer. *Id.* In light of this situation, ERO began the process of requesting a third country repatriation for Mr. Gonzalez-Torres on June 15, 2020. *Id.* at ¶ 48.

Mr. Gonzalez-Torres's case will be due for a post-order custody review ("POCR") on or about July 28, 2020, which will be 90 days from the time his removal order became final, and ICE will review his continued detention. *Id.* at ¶ 53. On June 2, 2020, Mr. Gonzalez-Torres was served with notice of this upcoming POCR and a Form I-229a, Warning for Failure to Depart. *Id.* at ¶ 54. Mr. Gonzalez-Torres refused to sign that form to acknowledge its service or his obligation to assist with his removal process. *Id.*

Before this Court, Mr. Gonzalez-Torres now asks to be released despite the fact he was found not credible by the immigration judge, is subject to a final removal order, has refused to acknowledge his obligations to assist with the removal process, and is subject to mandatory detention while ICE determines if his removal can be effectuated within the removal period. Mr. Gonzalez-Torres has therefore not proven that he presents no risk of flight.

Moreover, Mr. Gonzalez-Torres' request to be released now despite the results of his immigration process is essentially an attempt to re-litigate the result of

his immigration proceedings in this Court. However, the Supreme Court, on June 25, 2020, held that the writ of habeas corpus should not be used to obtain additional review of immigration proceedings in this manner. *Dep't of Homeland Sec. v. Thuraissigiam*, No. 19-161, 2020 WL 3454809, at *3 (U.S. June 25, 2020) ("[R]espondent's use of the writ would have been unrecognizable at that time. Habeas has traditionally been a means to secure release from unlawful detention, but respondent invokes the writ to achieve an entirely different end, namely, to obtain additional administrative review of his asylum claim and ultimately to obtain authorization to stay in this country."). The Court noted that with respect to review of asylum claims, the Illegal Immigration Reform and Immigrant Responsibility Act "limits the review that an alien in expedited removal may obtain via a petition for a writ of habeas corpus." *Id.* at *5. Congress took this action "to "protec[t] the Executive's discretion" from undue interference by the courts." *Id.* at *5 (quotations omitted). The Supreme Court held that habeas cannot be used to obtain "authorization for an alien to remain in a country other than his own or to obtain administrative or judicial review leading to that result." *Id.* at *9. This limit on habeas protects "Congress's judgment that detaining all asylum seekers until the full-blown removal process is completed would place an unacceptable burden on our immigration system and that releasing them would present an undue risk that they would fail to appear for removal proceedings." *Id.* at *2.

Here, Mr. Gonzalez-Torres' attempt to use this habeas proceeding to obtain additional judicial review or release despite the results of his immigration proceeding is not permissible. While he invites the Court to give him an opportunity to re-litigate the decision of the immigration judge and BIS, the Supreme Court's recent precedent counsels against using habeas in this manner. The Court should not disturb his lawful detention with an entered final order of removal.

3. Medical Conditions

Mr. Gonzalez-Torres has controlled hypertension and elevated cholesterol. Ex. 2 at ¶¶ 10, 12. Like other petitioners, Mr. Gonzalez-Torres distorts his medical record by omitting key facts and disregarding his own responsibilities for his conditions. For example, Mr. Gonzalez-Torres discloses that he has hypertension and takes medication for the condition, but does not disclose that his hypertension has been controlled, as his blood pressure readings have ranged between 110-128/60-80. Ex. 2, ¶ 10. These are within normal limits. *Id.* at ¶¶ 4, 10.

With respect to Mr. Gonzalez-Torres's elevated cholesterol, in his declaration, he states that his cholesterol was elevated in May 2020. Doc. 57 at ¶ 9. But what he fails to mention is that the JCDC medical staff has been actively monitoring his condition and that he has twice refused medication to treat his hypertension. When the JCDC first staff diagnosed Mr. Gonzalez-Torres's condition, his medical record shows that he refused to take medication. Ex. 2 at ¶ 12. Instead, he chose treatment

through diet and exercise. JCDC staff repeated a lipid panel three months later and the condition had improved. Then again in May 2020, lab work showed his cholesterol numbers were higher. At that time, Mr. Gonzalez-Torres again refused medication. Ex. 2 at ¶ 12, Ex. D. This shows that Mr. Gonzalez-Torres's condition is not serious or to the extent it is, he is responsible for increasing his risk by refusing medication.

Mr. Gonzalez-Torres, in his complaint and declaration, states that he suffers from heartburn and rectal pain. Doc. 69 at ¶ 180, DOC 57 at ¶ 10. But he again omits other key facts, such as the fact that when he complained of heartburn and rectal pain on June 2, 2020, after eating, he also told medical staff that tums helped sometimes and he used to treat these pains by drinking tea. Ex. 2 at ¶ 13. The JCDC proscribed omeprazole and tums; he improved. *Id.* When Mr. Gonzalez-Torres next complained of rectal pressure, he told nurses he was not constipated. *Id.* But JCDC staff x-rayed his abdomen, which "showed he had a large amount of stool in the rectal vault." *Id.* He was given milk of magnesia for the constipation twice a day for three times a day. *Id.*

Finally, Mr. Gonzalez-Torres claims in his complaint that he is "clinically obese." Doc. 69 at ¶ 180. While he is overweight, his BMI is just above the obesity line at 30, his weight has fallen from 199lbs at intake to 194lbs, and he has been counseled regarding diet and exercise. Ex. 2 at ¶ 10.

Mr. Gonzalez-Torres' conditions have been appropriately treated by the JCDC and to the extent that they pose any elevated risk to his health, Mr. Gonzalez-Torres is responsible for that risk by refusing to take medication. The conditions present no emergency or reason requiring his immediate release.

In summary, Mr. Gonzalez-Torres' final order of removal, refusal to participate in his removal proceedings, refusal to take medication for his hypertension, and otherwise controlled medical conditions show that his detention does not violate the Constitution. His petition should be denied.

D. Orlando Rafael Chinchilla-Rivas

1. Criminal History

According to Mr. Chinchilla's Declaration, his entire criminal history can be summed up in four sentences as a non-violent misdemeanor. Doc. 58, ¶¶ 47-48. This is far from accurate and appears to be an attempt to minimize his history in order to mislead the Court. In actuality, Mr. Chinchilla has a significant juvenile record, including arrests and findings of delinquency:

- On October 29, 2015, he was arrested and found delinquent for criminal mischief. Ex. 3 at ¶ 86; ICE-USA0838.
- On December 24, 2015, he was arrested and found delinquent for burglary. *Id.*; Ex. 3 at ¶ 86.
- Other juvenile matters include a second arrest for burglary, theft, dangerous possession of a firearm, escape, auto theft, and resisting law enforcement. *Id.*

In addition to his juvenile court record, Mr. Chinchilla admits that he was convicted of Resisting Law Enforcement in March 2019 and sentenced to a suspended sentence of 335 days imprisonment. Doc. 58 at ¶ 48. What he fails to mention, however, is that on October 26, 2019, while he was under probation on the suspended sentence, he was arrested for Carrying Handgun without a License after he was found with a Glock 26 9mm handgun underneath the passenger seat of his vehicle and a Glock 22 .40 handgun with two high capacity magazines inside of a backpack when he was stopped by the Indianapolis Metropolitan Police Department. Ex. 3 at ¶¶ 86, 94. This case remains pending because of Mr. Chinchilla's removal proceedings, and his failure to mention it is misleading at best. It also makes Mr. Chinchilla's claim that he "never violated my parole" appear to be deliberately false. Doc. 58 at ¶ 48.

Mr. Chinchilla's criminal history, including his recent arrest while under probation, therefore indicates that he would pose a danger to the community or not follow the Court's release conditions.

2. Immigration History

Mr. Chinchilla illegally entered the United States from Honduras with his mother when he was four years old. Ex. 3 at ¶ 75. He was placed into removal proceedings before an Immigration Judge approximately 18 months' later and was ordered removed in absentia after he and his mother failed to appear in court. *Id.* at

¶ 76. For the next six years, between December 2006 and March 2013, Chinchilla and his mother remained fugitives. *Id.* at ¶ 78. In March 2013, Mr. Chinchilla's mother was taken into ICE custody after being arrested in Indianapolis, Indiana for a traffic offense, but was later obtained relief through USCIS and was allowed to remain. *Id.* at ¶¶ 79-80.

Mr. Chinchilla was also granted permission to remain in the United States through September 30, 2018 on a visa. *Id.* at ¶ 81. However, he overstayed and was taken into ICE custody after being arrested for criminal gun charges in Marion County, Indiana in October 2019. *Id.* at ¶ 82.

Mr. Chinchilla was initially detained pursuant to the 2006 removal order. *Id.* at ¶ 83. However, he was allowed to reopen those proceedings in November 2019. *Id.* at ¶ 84. ERO reviewed his custody status under the discretionary provisions of 8 U.S.C. § 1226(a), but determined that Mr. Chinchilla should be held without a bond pursuant to 8 U.S.C. § 1226(a), based on his extensive juvenile criminal record and recent arrest for possession of firearms, which resulted in a finding that he was dangerous to the community and others. *Id.* at ¶¶ 85-86.

On Mr. Chinchilla's request for review, an Immigration Judge denied release on bond on January 6, 2020, finding that Chinchilla was a danger to others based on his criminal history. *Id.* at ¶ 87. Mr. Chinchilla's request for reconsideration was denied on May 13, 2020. *Id.* at ¶ 88. On June 24, 2020, Mr. Chinchilla again asked

that an Immigration Judge reconsider the prior bond denial. Again, the Immigration Judge denied Mr. Chinchilla's bond request, continuing to find him to be a danger. On that same date, Mr. Chinchilla reported, through counsel that his visa extension application had been denied. *Id.* at ¶¶ 89-90. His immigration case remains ongoing to determine if Mr. Chinchilla is eligible to apply for any other relief from removal. *Id.* Mr. Chinchilla represents that his next hearing is set for July 8, 2020. Doc. 58, ¶ 46.

Mr. Chinchilla's immigration history, which includes a finding that he poses a danger to the community based on his extensive record and recent arrest for possession of firearms, shows that Mr. Chinchilla's release would present a danger to the community.

3. Medical Conditions

Mr. Chinchilla is obese, although his obesity is mild and not morbid, as he sits at 30.7 BMI when 30.0 indicates obesity. Ex. 2 at ¶ 14. Beyond his mild obesity, Mr. Chinchilla claims that he has "untreated" asthma. Doc. 69 at ¶ 190. He even alleges that the "the JCDC refuses to provide" him with an inhaler that's needed to treat his "moderate-to-severe" asthma. Doc. 69 at ¶ 191. But the problem for Mr. Chinchilla is that, just as he omitted key information from his criminal history, as detailed below, his medical record shows he has no history of asthma. He has never been diagnosed by a doctor or any medical professional with asthma. Nor is he competent

to self-diagnose and even Petitioner's expert, Dr. Venters, does not purport to diagnose him with asthma, nor could he. Further, the problem with Mr. Chinchilla's self-diagnosis is that, as explained below, once he claimed to need an inhaler to breathe after this litigation started, JCDC medical personnel evaluated him and found he has no such need or condition.

There is no documentation in Mr. Chinchilla's medical records showing that he currently suffers from any sign, symptom, or indication of asthma or pulmonary disease. Ex. 2 at ¶ 14. Mr. Chinchilla's transfer form documenting his conditions when he arrived at the JCDC stated he took no medications and had no significant medical history. *Id.* at ¶ 15. On his intake from, Mr. Chinchilla stated he had asthma but took no medication for it. *Id.* Ex. G. At Mr. Chinchilla's first exam on March 26, 2020, he denied having any medical problems, did not report having asthma, and did not request an inhaler. *Id.* at ¶ 16. His lungs were documented as clear and a previous chest x-ray states his lungs are clear and well aerated. *Id.* After his initial exam, Mr. Chinchilla saw JCDC medical personal somewhat regularly, including on March 29, April 3, April 14, and May 20 for other routine issues. *Id.* at ¶ 17. At each of those visits, he did not complain of asthma or request an inhaler. *Id.*

After this litigation began, Mr. Chinchilla submitted a written request where he asked, for the first time, whether he could have an inhaler in his cell because he had "trouble breathing I don't know what it is and don't have my inhaler so I try to

control my breathing and drink water but sometimes that don't work." *Id.* at ¶ 18. After he was told that inhalers are located at the officer's desk, he submitted another request stating that he went but there was not an inhaler there for him. *Id.* at ¶¶ 18-19. Mr. Chinchilla was informed that per medical, no inhaler had been ordered from his previous facility or currently but if he experienced shortness of breath, to alert medical. *Id.* Mr. Chinchilla then responded and said he would "alert my lawyer about that and my inhauler [sic] i had come from pulaski so if I have an asthma attack it will be on you guys because i did try to get one thats all." *Id.*

In general, inhalers are medication and must be prescribed by JCDC medical staff. *Id.* at ¶ 22. After they are prescribed, they are available at the officer desk to a detainee. *Id.* Detainees are not permitted to keep inhalers in their cells. *Id.* The reason for this restriction is that detainees have a method of extracting the medication and using it to get high. *Id.* No inhaler was located at the officer desk for Mr. Chinchilla because he had never asked for an inhaler and had never been proscribed an inhaler. Ex. 2 at ¶¶ 14-19.

After Mr. Chinchilla made the above written request for an inhaler, on June 16, 2020, JCDC medical staff conducted a peak flow test of Mr. Chinchilla; the test is used to assess breathing according to height, weight, and age and can be used to indicate asthma treatment. See *Id.* at ¶ 20. Mr. Chinchilla's results showed he does not need an inhaler. *Id.* Moreover, Physician's Assistant Shannon Haggard, who has

personally examined Mr. Chinchilla, stated that in her examinations of Mr. Chinchilla, she has "never heard a wheeze when auscultating his lungs, his oxygen saturation has always been 97-99% on room air (well within normal limits), he has always had easy and unlabored respirations, and his chest xray revealed clear lungs. He has never had any sign, symptom, or indication of any pulmonary disease." Ex. 2 at ¶ 20.

Mr. Chinchilla's claim that he has untreated asthma is therefore false and not supported by any medical record, exam, or evidence. His misleading claim should be rejected. Further, Mr. Chinchilla was recently examined by medical staff on June 19—after he claimed to need an inhaler—for rolling his ankle while jogging and playing basketball. *Id.* at ¶ 21. To the extent he has any condition at all, it is not serious and certainly presents no medical reason for immediate release.

Finally, Mr. Chinchilla, like three other Petitioners—Ibrahim, Misankov, and Rositas-Martinez—notes that he has a history of smoking and suggests this is an additional reason why he should be released. Doc. 69 at ¶¶ 31, 98, 110, 116, 127. However, while the CDC has recognized a history of smoking as a risk, the CDC's most recent guidance does not recognize smoking as a condition that places an individual at increased risk of severe illness from COVID-19. See CDC, Coronavirus Disease 2019 (COVID-19), Summary of Recent Changes, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-

medical-conditions.html (last visited July 2, 2020). Instead, the CDC cautions that "Currently there are limited data and information about the impact of underlying medical conditions and whether they increase the risk for severe illness from COVID-19." *Id.* The CDC lists smoking as a condition that "*might* be at an increased risk . . . ." *Id.* (emphasis added); *see also United States v. Mathe*, No. 14-528, 17-92, 2020 WL 3542177, at *4-5 (E.D. Pa. June 30, 2020) (noting the CDC's caution that smoking "might" present a risk factor and finding that a "history of smoking without a secondary diagnosis, such as COPD, is not recognized as a risk factor for worse outcomes from COVID-19 by the CDC"). For someone who is or has a history of smoking, the CDC recommends quitting smoking and contacting a healthcare provider if a person has concerns or feels sick. *Id.* All of these actions are being taken in this case because detainees are not allowed to smoke in prison and are actively being treated by healthcare providers for any underlying conditions.

Moreover, the CDC's warning about limited information with respect to smoking's impact on COVID tracks the fact that not only is there limited data, but the data that exists is conflicting. The CDC acknowledges this by classifying smoking as a "mixed evidence category," for which there are "multiple studies that reached different conclusions about risk associated with a condition." CDC, Evidence used to update the list of underlying medical conditions that increase a person's risk of severe illness from COVID-19, https://www.cdc.gov/coronavirus/

2019-ncov/need-extra-precautions/evidence-table.html (last visited July 2, 2020). Indeed, while some studies show that smoking presents an increased risk, others show mixed results and some even show that smoking may reduce the potential for COVID-19 infection. See Ex. 4, The Jerusalem Post, Israeli study points to nicotine as a potential therapeutic for COVID-19, https://www.jpost.com/health-science/more-studies-point-to-nicotine-as-a-potential-therapeutic-for-covid-19-630576 (last visited July 2, 2020) ("Smoking may offer some protection against the coronavirus, an Israeli study has found."); Ex. 5, Webmd, Smokers Hospitalized Less for Covid-19, https://www.webmd.com/lung/news/20200430/smokers-hospitalized-less-often-for-covid-19 (last visited July 2, 2020).

Thus, while Mr. Chinchilla and other Petitioners' histories of smoking *may* present a risk factor, there is insufficient data or medical consensus regarding the issue. But even to the extent that it might increase their risk, they are being actively treated by their healthcare providers at the JCDC. Their histories of smoking therefore do not present serious medical conditions that require immediate release.

In summary, Mr. Chinchilla's lack of any serious medical condition beyond obesity, coupled with the danger to the community that he may present and lawful immigration detention, shows that his detention does not violate the Constitution. The Court should deny his petition.

E. Yacub Sobhi Ibrahim

1. Criminal History

In his declaration, Mr. Ibrahim mentions only that he was taken into custody while "serving a one-year sentence at Western Illinois Correctional Center for making a false report." Doc. 59 at ¶ 19. A review of Mr. Ibrahim's criminal RAP sheet reflects the following arrests and/or convictions listed below. Ex. 3 at ¶ 71. While these convictions did not contribute to Mr. Ibrahim's removability from the United States, they contribute to ICE's decision to find that he is a public safety threat and should remain in ICE custody:

- June 5, 1996: Convicted of battery. The sentence for this conviction is unknown at this time.

- September 10, 2007: Convicted of reckless conduct; sentenced to six months' supervision.

- October 1, 2007: Convicted of disorderly conduct; sentenced to 12 months' supervision.

- January 30, 2010: Convicted of disorderly conduct and trespass to land; sentenced to 20 days' imprisonment. The original charges also included resisting an officer and assault.

- December 1, 2010: Convicted of false reporting. Mr. Ibrahim was initially sentenced to two years' conditional discharge for this conviction. However, on or about September 9, 2011, his original sentence was revoked and he was re-sentenced to one-year imprisonment.

- December 1, 2010: Convicted of criminal trespass to land; sentenced to 115 days' imprisonment.

- October 17, 2011: Convicted of false reporting of an offense; sentenced to 12 months' conditional discharge.

- September 8, 2011: Convicted of disorderly conduct; sentenced to 30 days' imprisonment.

- October 10, 2012: Convicted of criminal trespass; sentenced to a monetary fine.

- June 27, 2012: Convicted of false reporting and disorderly conduct, stemming from an arrest on or about March 22, 2012. Ibrahim was sentenced to 180 days' imprisonment for false reporting and 250 days' imprisonment for disorderly conduct. On this same date, he was also convicted of theft, stemming from an arrest on or about March 8, 2012. For the theft conviction, he was sentenced to 250 days' imprisonment.

- May 1, 2019: Convicted of false reporting; sentenced to 35 days' imprisonment and 12 months' probation. On or about August 8, 2019, the original sentence was revoked and Ibrahim was re-sentenced to one-year imprisonment.

- On June 15, 2019, bond forfeiture related to charges for assault and trespass. A judgment was entered on a September 12, 2019.

- August 12, 2019: Convicted of false reporting; sentenced to one-year imprisonment.

Id. at ¶ 71. In addition to the convictions delineated above, Mr. Ibrahim has at least 15 other arrests for charges including domestic battery and assault, for which he was either not convicted or no disposition could be located upon review. *Id.*

His omission of his entire and accurate criminal history is not an accident, especially in light of the fact that during prior discovery in this case, his counsel was

provided with a copy of his RAP sheet detailing the above. Records further reflect that Mr. Ibrahim has prior associations with the Two-Six criminal street gang. *Id.* at ¶ 72.

This extensive criminal history, which Mr. Ibrahim did not disclose to the Court, indicates that he would be a clear danger to the community if released.

2. Immigration History

Mr. Ibrahim is a citizen of Brazil, and was admitted to the United States on or about October 2, 1981, as a lawful permanent resident. Ex. 3 at ¶ 55. Immigration officials reviewed Mr. Ibrahim's case for possible removal proceedings approximately three times prior to the commencement of the 2019 removal proceedings discussed below.

- On or about May 7, 2011, immigration officials learned through records checks that Mr. Ibrahim was in state custody for disorderly conduct charges.
- On or about October 16, 2011, immigration officials learned that Mr. Ibrahim was again in state custody, this time for charges of trespass.
- On or about August 24, 2012, immigration officials were again notified that Mr. Ibrahim had been arrested by authorities in Illinois.

Id. at ¶¶ 57-59. However, no action was taken because a review of his records again reflected that Mr. Ibrahim had not been convicted of offenses that carried removal consequences under the Immigration and Nationality Act. *Id.*

Most recently, immigration officials encountered Mr. Ibrahim on or about November 20, 2019, when he was once again in state custody after being convicted of the following convictions, which rendered him removable from the United States:

- On or about August 1, 2014, he was convicted of theft and sentenced to one-year imprisonment (time served).
- On or about February 10, 2017, he was convicted of theft and sentenced to 30 days' imprisonment.
- On or about November 20, 2018, he was convicted of intimidation and sentenced to 180 days' imprisonment, with 60 days suspended.

Id. at ¶ 60. After determining that these convictions rendered Mr. Ibrahim removable from the United States, ICE placed a detainer with the jail requesting notification of Mr. Ibrahim's prospective release date so that ICE could assume administrative custody and commence removal proceedings in the Immigration Court. *Id.* at ¶ 61.

On or about December 2, 2019, Mr. Ibrahim was transferred from state custody into ICE's administrative custody and charged with two grounds of removability under the Immigration and Nationality Act. *Id.* at ¶¶ 62-63. First, based on each of the convictions listed above, Mr. Ibrahim was charged with removability based on two or more convictions for crimes involving moral turpitude, not arising from a single scheme, under 8 U.S.C. § 1227(a)(2)(A)(ii). *Id.* Second, based on Ibrahim's 2014 conviction for theft with a one-year sentence of imprisonment, he was also charged with removability for an aggravated felony offense, under 8 U.S.C. § 1227(a)(2)(A)(iii) and 8 U.S.C. § 1101(a)(43)(G). *Id.*

Mr. Ibrahim appeared before the Immigration Judge approximately seven times in removal proceedings, on or about the following dates:

- December 31, 2019: On this date, the Immigration Judge explained proceedings to Mr. Ibrahim and continued the matter for him to seek legal counsel.

- February 12, 2020: On this date, the Immigration Judge again continued proceedings on Mr. Ibrahim's request to find legal counsel.

- February 24, 2020: Mr. Ibrahim appeared with legal counsel but sought and received a continuance for attorney preparation.

- March 13, 2020: Mr. Ibrahim, through counsel, conceded removability as charged on the NTA and received a continuance to assess whether he would seek relief from removal.

- April 9, 2020: Mr. Ibrahim sought and received another continuance of removal proceedings to allow him to consider whether he would seek relief from removal.

- April 23, 2020: Mr. Ibrahim indicated an intent to seek relief from removal and the matter was set down to a final hearing on the merits of that application.

- June 8, 2020: Mr. Ibrahim appeared for the final hearing on the merits hearing of his relief application, but through counsel, withdrew the application and his intent to seek any relief from removal. The Immigration Judge ordered Mr. Ibrahim removed from the United States to Brazil. Ibrahim waived his right to appeal that decision, thereby making the order final.

Id. at ¶ 66. Once the Immigration Judge entered the final removal order, Mr. Ibrahim's detention was no longer governed by 8 U.S.C. § 1226(c)(1). *Id.* at ¶ 67. Rather, detention authority converted to 8 U.S.C. § 1231, which as stated previously,

mandates Ibrahim's detention in ICE's custody during the 90-day removal period. *Id.* at ¶ 67.

On June 10, 2020, ICE began the process of requesting Mr. Ibrahim's travel documents from the Brazilian Consulate. ICE received these travel documents on June 22, 2020. *Id.* at ¶ 68. At this time, ICE plans on removing Ibrahim to Brazil in early July 2020. *Id.* at ¶ 69.

Given the offenses that led to Mr. Ibrahim's removal proceedings, including intimidation and theft, the fact that Mr. Ibrahim withdrew his application for relief from removal and is no longer challenging removal, as well as his upcoming removal in July, he should not be released from his lawful detention.

3. Medical Conditions

Mr. Ibrahim has a history of hypertension. He has no history or diagnosis of asthma. Mr. Ibrahim's claims regarding his medical history, like other petitioners, either distort or exaggerate his actual medical record while omitting key facts. This is consistent with Mr. Ibrahim's glaring omissions to the Court regarding his criminal history.

First, with respect to Mr. Ibrahim's hypertension, on his December 2, 2019, intake form, he reported hypertension as a medical problem and that he took two medications for the condition from a pharmacy. Ex. 2 at ¶ 24. The JCDC contacted the pharmacy to verify the prescriptions. The JCDC discovered that while Mr.

Ibrahim had prescriptions for his hypertension, he had not filled them for two years. Ex. 2 at ¶ 24, Ex. L. The JCDC nevertheless prescribed the medications for Mr. Ibrahim. *Id.*

In his complaint, Mr. Ibrahim claims that the JCDC has failed "to check his blood pressure regularly" and this "raises concerns that his blood pressure is not being adequately controlled or monitored." Doc. 69 at ¶ 201. These claims are baseless and belied by the actual medical record. Mr. Ibrahim's hypertension medications began on December 3, 2019, and from that date until March 30, 2020, his blood pressure was checked weekly. Ex. 2 at ¶ 28. On March 30, 2020, because his hypertension was controlled and blood pressure readings stable, the weekly checks were discontinued. *Id.*

Later, on June 17, 2020, after Mr. Ibrahim complained of a headache, his blood pressure readings were restarted and taken daily. Ex. 2 at ¶ 29. On June 27, 2020, his Lisinopril was increased due to elevated blood pressure readings. *Id.* A follow up lab was scheduled for June 30, 2020. Mr. Ibrahim, in a declaration signed on June 25, 2020, claims that "JCDC staff still do not check my blood pressure regularly." DOC 59 at ¶ 11. However, medical documentation in his file shows that except for two days, his blood pressure has been taken and recorded by the JCDC daily since being restarted on June 17, 2020, something he is certainly aware of because he participates in his blood pressure being taken. Ex. 2 at ¶ 29, Ex. O. His

hypertension has therefore been adequately treated by the JCDC and his allegations to the contrary are false.

Second, Mr. Ibrahim claims he has "untreated asthma" and is not "receiving prescribed asthma medication, despite repeated requests." Doc. 69 at ¶ 202. These allegations are false and not supported by any medical evidence in the record. Further, as detailed below, he has never been diagnosed by a doctor or any medical professional with asthma. Nor is he competent to self-diagnose and even Petitioner's expert, Dr. Venters, does not purport to diagnose him with asthma, nor could he.

With respect to Mr. Ibrahim's medical record, there is no documentation in Mr. Ibrahim's medical records showing that he currently suffers from any sign, symptom, or indication of asthma or pulmonary disease. Ex. 2 at ¶ 23. On Mr. Ibrahim's December 2, 2019, intake form, he reported hypertension as a medical problem but did not report asthma as a medical issue. Ex. 2 at ¶ 24, Ex. K. Mr. Ibrahim was seen by medical staff weekly to draw his blood from December 3, 2019, until March 30, 2020, to check his blood pressure, as well as for other health appointments on 12/5/19, 12/6/19, 1/16/20, 2/13/20, 2/20/20, 3/5/20, 3/11/20, 3/30/20, 4/2/20, 4/23/20, 5/12/20, 6/22/20, and 6/26/20. Ex. 2 at ¶ 26. He never reported or complained of asthma. His chest has been x-rayed and his lungs were clear with no abnormal findings. Ex. 2 at ¶ 25, Ex. M. In addition, Mr. Ibrahim has never mentioned asthma at any chronic care visit, including his more recent chronic

care visit on June 27, 2020. Ex. 2 at ¶ 25.

Further, despite Mr. Ibrahim's claim that he has "filed out written requests on the computer" for an inhaler, the records again refute his claim. Doc. 59 at ¶ 14. Mr. Ibrahim has never submitted a written kiosk request, sick call request, or request of any kind to medical regarding asthma or an inhaler. Ex. 2 at ¶ 27. Instead, the only written requests has submitted are the following: (1) a 4/22/20 request for ibuprofen instead of naproxen; the request was approved; and (2) a 5/11/20 request for his ears to be flushed out; he was given eardrops. *Id.* The medical record therefore does not support Mr. Ibrahim's claim that he has asthma.

In summary, Mr. Ibrahim's managed hypertension provides no reason requiring his immediate release. Coupled with his extensive criminal history, final order of removal, and upcoming removal in July 2020, his confinement does not violate the Constitution. The Court should deny his petition.

F. Ismail Misankov

1. Criminal History

In June 2011, Mr. Misankov was charged with conspiracy, access device fraud, and aggravated identity theft, in violation of 18 U.S.C. §§ 371, 1029(a)(4) and 1028A in the United States District Court for the Eastern District of Pennsylvania. Exhibit 3, ¶ 126. During pretrial proceedings, the magistrate judge denied Mr. Misankov release from detention, finding that he posed a danger to others and a risk

of flight. *Id.* at ¶ 127. A superseding indictment subsequently charged Mr. Misankov and his co-conspirators with one count of conspiracy, in violation of 18 U.S.C. § 371, three counts of possession of device-making equipment, in violation of 18 U.S.C. § 1029(a)(4), five counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A, one count of bank fraud, in violation of 18 U.S.C. § 1344, and an aiding and abetting count, under 18 U.S.C. § 2. *Id.* at ¶ 130. These charges stemmed from his conspiring with others to engage in a scheme to place skimming devices on bank ATMs, steal ATM card information from victims, use that stolen information to create counterfeit ATM cards, and then use those card to withdraw thousands of dollars from the victim's bank accounts. *Id.* at ¶ 131.

On or about November 27, 2012, he was convicted of these charges and sentenced to a total of 18 months' imprisonment and three years' supervised release, plus an $800.00 assessment and $82,310.00 in restitution. *Id.* at ¶ 132.

This history, which includes a crime involving dishonesty and judicial finding of a flight risk, indicates that Mr. Misankov should not be released, as he may still pose a danger to the community. Further, as detailed below regarding Mr. Misankov's medical history, Mr. Misankov's record for dishonesty continues beyond his conviction and into this case, as he has submitted deliberately misleading information to the Court. This shows he cannot be trusted in the community, nor would he be likely to follow any release conditions.

2. Immigration History

Mr. Misankov came to the United States from Bulgaria and became a lawful permanent resident in April 2005. Ex. 3 at ¶ 118. On or about January 31, 2020, Mr. Misankov was placed into immigration proceedings based on his criminal convictions for having committed a crime involving moral turpitude. *Id.* at ¶ 120. Mr. Misankov was encountered by ICE officials when he returned from travel abroad and was classified as an inadmissible arriving alien, meaning he was subject to mandatory detention as an arriving alien. Ex. 3 at ¶ 120. He is also subject to mandatory custody under 8 U.S.C. § 1226(c)(1), based on his criminal convictions. *Id.* His immigration case is currently ongoing and has been continued four times at his request. *Id.* at ¶ 121. The next hearing is now set for July 13, 2020. *Id.* at ¶ 122.

Additionally, on June 2, 2020, Mr. Misankov's detention status was evaluated by ERO in light of the COVID-19 pandemic and the *Fraihat* class. *Id.* at ¶ 134. ERO determined that Misankov would stay in custody at JCDC because his convictions constitute aggravated felony offenses under the Immigration and Nationality Act and he presents a risk to public safety. *Id.*

3. Medical Conditions

Mr. Misankov's medical record shows that he has no current significant medical issues. Ex. 2 at ¶ 30. Notably, Mr. Misankov does not actually claim to have any *current* diagnosed serious health condition. Still, in his complaint, Mr. Misankov

claims that he has a "recent history of respiratory issues, including pneumonia . . . ." DOC 69 at ¶ 210. Like other petitioners, Mr. Misankov distorts his medical record and omits key information in attempt to exaggerate his conditions and side-step his own actions in not using treatments and resources available to him. He does this so that he can falsely claim the JCDC has not provided adequate care. As detailed below, his misrepresentations to the Court are easily belied by the record.

In his declaration, Mr. Misankov implies that he was sick when he transferred to the JCDC. Doc. 60 at ¶ 8. However, on Mr. Misankov's March 15, 2020, intake form, he reported no significant problems and that he felt "good." He said he had not had a significant fever, coughing, or night sweats. His vitals, including temperature and blood pressure, were normal. Ex. 2 at ¶ 31, Ex. P. At a general exam on March 23, 2020, he reported that he felt well and denied having any medical problems. Ex. 2 at ¶ 32.

With respect to past pneumonia, Mr. Misankov was examined on April 9, 2020, after he reported through sick call that he experienced shortness of breath when walking up stairs or long distances. He stated no history of asthma. He also said his heart raced. Ex. 2 at ¶ 33. His chest was x-rayed and this showed an infiltrate of pneumonia. *Id.* He also had an EKG done which showed normal sinus rhythm. *Id.* He was prescribed an antibacterial medication, Azithromycin. However, Mr. Misankov's records show that he did not follow orders and only took the proscribed

Azithromycin for two of the ordered five days. *Id.*

The JCDC examined Mr. Misankov at a follow-up appointment on April 17, 2020. *Id.* at ¶ 34. Mr. Misankov reported he was "doing ok" and had no cough. *Id.* The JCDC ordered an inhaler for him to use three times per day for ten days as needed due to the infiltrate of pneumonia. *Id.* This is where a close of examination of Mr. Misankov's statements and the record reveals his attempt, much like Mr. Crainic, to mislead the Court and not take responsibility for his decisions to not utilize the treatment available to him.

Mr. Misankov declares under oath that "*never received* this inhaler. I asked the nurses about it two times and *nobody has brought me an inhaler*." Doc. 60 at ¶ 11 (emphasis added). Of course, the JCDC does not give inhalers to inmates to keep in their cells because they contain medication that can be abused. Ex. 2 at ¶ 35. Instead, a detainee can walk to the officer station at any time and ask to use his inhaler. This procedure was explained to Mr. Misankov. *Id.*

Again, Mr. Misaknov's statements are key: he claims he has "never received" his inhaler and no one has "brought me an inhaler." Doc. 60 at ¶ 11. In his complaint, he claims "Though doctors prescribed him an inhaler, Mr. Misankov has *yet to receive it* despite multiple requests for that." Doc. 69 at ¶ 211 (emphasis added). These statements are misleading because Mr. Misankov knows that no one will bring him an inhaler and he will never receive one to keep in his cell. All he has to do is

walk to the officer station and ask for it, something he can do at any time.

Mr. Misankov's misleading statements are even more galling because the JCDC proscribed an inhaler for him, placed it at the officer station, and despite his representations to the Court has he has not received adequate medical care because he has not been given an inhaler, in truth, Mr. Misankov has simply never walked to the officer station and used the inhaler that is available to him. As proof, the following is a picture taken on July 1, 2020, of the inhaler proscribed specifically to Mr. Misankov that has been sitting at the officer station since April and has never been opened or used:

Ex. 35, ¶ 35, Ex. V; see also Doc. 52 at 10 (finding that if a condition "is not well-managed, it is because of his own decisions").

Mr. Misankov's final exaggeration is easily refuted by the medical record. He

states that he cannot breathe well when exercising and an inhaler would help him "feel better." Ex. 60 at ¶ 12. Mr. Misankov was examined on June 2, 2020, after complaining of difficulty breathing "when doing push up type exercises a few days ago." Ex. 2 at ¶ 36. His vitals were stable and at a follow-up evaluation on June 3, he stated he experiences shortness of breath "only when exercising." *Id.* He denied a cough, fever, body pain, or asthma, while stating he had "improved a lot." *Id.* The JCDC counseled him on diet and exercise and scheduled a chest x-ray for June 4, 2020. That x-ray showed "clear" lungs and structures within "normal" limits and no acute process. Ex. 2 at ¶ 36, Ex. S.

Experiencing shortness of breath "only when exercising" while an x-ray shows clear lungs is not a serious health condition requiring or even suggesting a reason for Mr. Misankov's release. Moreover, Mr. Misankov's recent pneumonia was treated and to the extent Mr. Misankov claims it was serious, he bears responsibility for his condition by refusing to follow orders and take all of his proscribed medication and never once using the inhaler made available to him. See also Doc. 52 at 10 (finding that if a condition "is not well-managed, it is because of his own decisions").

In summary, because of Mr. Misankov's demonstrated pattern of dishonesty in his criminal conviction and this case, as well as his lack of any serious current health condition, his confinement does not violate the Constitution. The Court

should deny his petition.

G. Juan Manuel Rositas-Martinez

1. Criminal History

Contrary to his carefully worded assertion in his declaration suggesting that he has one criminal conviction arising out of a simple dispute with his then-wife (Doc. 61, ¶¶ 25-26), Mr. Rositas-Martinez has a much more extensive criminal history. Records reflect that he has been arrested for the following offenses on or about the listed dates:

- September 18, 1989: Convicted of Battery; sentenced to supervision and a fine;
- August 20, 1990: Arrested for Carrying/Possessing a Firearm in Public and other weapon offenses (disposition unavailable based on review of RAP sheet);
- May 16, 1991: Arrested for Resisting a Peace Officer (stricken off with leave to reinstate); Arrested for Possession of Cannabis (2.5 grams) (disposition unavailable based on review of RAP sheet);
- June 16, 2003: Arrested for Contempt of Court (disposition unavailable based on review of RAP sheet);
- January 30, 2007: Arrested for Domestic Battery-Bodily Harm (stricken off with leave to reinstate); Arrested for Possession of a Firearm-FOID Card Expired (disposition unavailable based on review of current RAP sheet)
- August 4, 2010: Arrested for Battery-Bodily Harm (stricken off with leave to reinstate).

Ex. 3 at ¶ 144.

A review of Mr. Rositas-Martinez's file also reflects that his criminal conviction resulting from the seemingly innocuous dispute that he mentions having with his "then-wife" in §§ 25-26 of his Declaration was actually for numerous incredibly violent offenses against both human beings and animals over a period of time. On or about December 16, 2016, Mr. Rositas-Martinez pled guilty to three counts of Animal Torture in Case No. 15-CF-1049 and one count Armed Violence in Case No. 15-CF-1106 in the Lake County Circuit Court, in Lake County, Illinois. *Id.* at ¶ 145. He was sentenced to 10 years' imprisonment for each count, to be served concurrently. *Id.*

In Case No. 15-CF-1049, a Grand Jury returned a nine-count Indictment that included three counts of armed violence, three counts of animal torture, and three counts of aggravated cruelty to animals. *Id.* at ¶ 145; ICE-USA1262-1270. The charges were based on the following: (a) between November 15 and November 20, 2014, Mr. Rositas-Martinez struck a dog named "Bandit" with a hammer and suffocated him; (b) between December 1 and December 25, 2014, Mr. Rositas-Martinez bound the paws of a dog named "Toro" together and beat him with a sledge hammer; and (c) between December 21, 2014 and January 1, 2015, Mr. Rositas-Martinez repeatedly struck a dog named "Ranger" about his body with a hammer. Ex. 3 at ¶ 145; ICE-USA1265-1267.

The Information filed in Case No. 15-CF-1106 in Lake County Circuit Court

further reveal the violent nature of the conduct that resulted in Mr. Rositas-Martinez' conviction for armed violence. On April 15, 2015, Mr. Rositas-Martinez struck Elizabeth Rositas in the head, causing great bodily harm and threatened to "chop her up" with the machete he wielded when she continued to plead for her life after he told her to stop, resulting in charges of armed violence, domestic battery, and intimidation. Ex. 3 at ¶ 145; ICE-USA1252-1254. The next day, he drug Elizabeth around the house by her hair and threw her puppy "Simba" to the ground, resulting in charges of unlawful restraint and animal cruelty. ICE-USA1256-57. Five days later, when Mr. Rositas-Martinez wanted Elizabeth to come home from work, he threatened to burn her house down and harm her dog if she did not come home immediately, resulting in a second charge of intimidation. ICE-USA1255. The sum of this conduct between August 5 and 10, 2015, caused Elizabeth to fear for her safety and resulted in a stalking charge. ICE-USA1258.

Mr. Rositas-Martinez's deliberate minimization of this conduct in this case shows that he has not truly reflected on his crimes. Regardless, the incredibly violent nature of these crimes, against humans and animals over a period of time, shows that Mr. Rositas-Martinez would present an immediate danger to the community if released.

2. Immigration History

Mr. Rositas-Martinez is a citizen of Mexico who became a lawful permanent resident on or about February 20, 1986. Ex. 3 at ¶ 135. He has a lengthy and serious criminal history in the United States, starting in 1989 and continuing through 2016 and has been in custody since his arrest in 2016. *Id.* at ¶ 136. Immigration proceedings were commenced while Rositas-Martinez was serving his ten-year sentence of imprisonment in the Illinois Department of Corrections ("IDOC") following his 2016 conviction for armed violence and animal torture. *Id.* at ¶ 137. Rositas-Martinez was transferred to ICE custody and charged as removable under 8 U.S.C. § 1227(a)(2)(A)(ii), for having been convicted of two or more crimes involving moral turpitude. Ex. 3 at ¶ 141. The case remains pending, with a final hearing set for July 13, 2020. *Id.* at ¶ 142.

On June 2, 2020, Rositas-Martinez's detention status was evaluated by ERO in light of the COVID-19 pandemic and the *Fraihat* class. *Id.* at ¶ 147. ERO determined that Rositas-Martinez presented a risk to public safety due to his criminality and should not be released from custody. *Id.*

3. Medical Conditions

Mr. Rositas-Martinez has a medical history of hypertension and an ophthalmology issue with his eye. Ex. 2 at ¶ 37. His medical records show his hypertension is controlled through medication and his chief complaint is about

retinal injections, for which he is being evaluated by an ophthalmologist, although he has on at least one occasion refused to come to an eye exam. *Id.* While Mr. Rositas-Martinez does have an elevated BMI that shows obesity, he has been counseled on at least two different appointments regarding nutrition, exercise, and weight loss, with the JCDC monitoring his condition through lab work. See Doc. 61 at ¶ 7; Ex. 2 at ¶ 38.

In his petition, Mr. Rositas-Martinez claims that he "frequently experiences arrhythmic episodes during which his heartbeat is irregular" and a persistent cough. Ex. 69 at ¶ 128; Ex. 61 at ¶ 13. Of course, he omits the fact that he has never reported these issues, never received a diagnosis related to these issues, and never asked for treatment related to this issues. Mr. Rositas-Martinez's medical record shows that he has never complained or sought treatment regarding a chronic cough or racing heart. Ex. at ¶ 39. On his intake form and initial examination, he reported hypertension and an ophthalmology issue, but nothing else. *Id.* at ¶ 38. Mr. Rositas-Martinez's medical records show that he was examined by medical providers on 12/3/19, 12/30/19, 4/9/20, and 4/30/20. Yet he never complained or requested treatment for a cough. *Id.* at ¶ 39. And on April 30, 2020, during a chronic care visit, he denied having heart palpitations. *Id.* He has also been examined by nurses multiples times and never sought treatment or complained of a racing heart or cough. *Id.* There is simply no medical evidence to support his claims.

In summary, Mr. Rositas-Martinez has no medical reason requiring his release. Moreover, given his multiple and violent crimes against humans and animals, his continued lawful detention does not violate the Constitution. Moreover, his release is not appropriate under any circumstances because of his clear danger to the community. His petition should be denied.

IV. Petitioners Have Not Been Denied Due Process

Petitioners have not been denied due process. The implementing regulations and the Board of Immigration Appeals, together, set out the mechanisms by which an alien can seek release and establish the burden of proof for this inquiry. The regulations provide that an immigration officer "may" release an alien detained under Section 1226(a) on bond if "the alien . . . demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8). An alien who is denied bond may, "at any time" during removal proceedings prior to a final order, ask an immigration judge for a redetermination of the officer's decision. *Flores*, 507 U.S. at 309; *see* 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1). Interpreting § 1226(a) and the regulations, the Board of Immigration Appeals has held that the "burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond." *In re Guerra*, 24 I&N Dec. 37, 40 (BIA 2006); *see In re Adeniji*, 22 I&N Dec. 1102,

1111-13 (BIA 1999). If the alien disagrees with the IJ's custody determination, he or she may appeal that determination to the BIA. 8 C.F.R. § 236.1(d)(3)(i), 1236.1(d)(3)(i). And an alien may, at any time, ask an IJ to redetermine bond if "circumstances have changed materially since the prior bond redetermination." 8 C.F.R. § 1003.19(e). The alien may also appeal the outcome of that hearing to the BIA. *See Matter of Uluocha*, 20 I&N Dec. 133, 134 (BIA 1989). As set forth with respect to each individual Petitioner, this meaningful process has taken place here.

While Petitioners may disagree with measures taken by ICE and the JCDC, their concerns do not rise to the level of a constitutional violation warranting immediate release. Petitioners do not present allegations or evidence to show the Government has an "express intent" to punish them. Rather, they allege that the conditions of their confinement amount to per se reckless indifference and violate the Fifth Amendment—nothing less than a guarantee of absolute safety is sufficient in their view.

However, absolute safety and prevention of possible harm has never been required under the Constitution. *Sacal-Micha v. Longoria*, No. 1:20-CV-37, 2020 U.S. Dist. LEXIS 53474, at *15 (S.D. Tex. Mar. 27, 2020) ("that ICE may be unable to implement the measures that would be required to fully guarantee Sacal's safety does not amount to a violation of his constitutional rights and does not warrant his release"); *Hassoun v. Searls*, ___ F. Supp. 3d ___, No. 1:19-CV-00370 EAW, 2020

WL 1819670, at *7 (W.D.N.Y. Apr. 10, 2020) ("The fact that Respondent has not been able to eliminate the risk entirely does not establish deliberate indifference—to the contrary, despite unprecedented efforts by all levels of government, the public as a whole remains at risk of contracting COVID-19.").

In *Kingsley*, 135 S. Ct. at 2474, the Supreme Court made clear that the due process test for conditions of civil confinement is an objective one based on reasonableness. Inherently, reasonableness has limits. The requirement under the Fifth Amendment that Respondents must provide safe and sanitary conditions to those in custody is not—nor could it be—guarantees against injury or infirmity during custody. While the Government is obliged to make reasonable efforts to provide healthy conditions, detention facilities do not operate in a sphere of strict liability. *Steading v. Thompson*, 941 F.2d 498, 499 (7th Cir. 1991) ("neither negligence nor strict liability is the appropriate inquiry in prison-conditions cases."). Rather, Petitioners must show that Respondents have acted with objective disregard, and that this disregard has caused the conditions in which they are housed to become objectively unreasonable and unsafe. *Kingsley*, 135 S. Ct. at 2473; *see also Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001) ("Many Americans live under conditions of exposure to various contaminants. The [Constitution] does not require prisons to provide prisoners with more salubrious air, healthier food, or cleaner water than are enjoyed by substantial numbers of free Americans.") Petitioner is not

relieved of his burden of proof by simply citing to the pandemic. *Sacal-Micha v. Longoria*, No. 1:20-CV-37, 2020 U.S. Dist. LEXIS 53474, at *15 (S.D. Tex. Mar. 27, 2020); *see also, United States v. Raia*, No. 20-1033 (3rd Cir. Apr. 8, 2020) (precedential) ("the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP's statutory role, and its extensive and professional efforts to curtail the virus's spread").

The Western District of Washington and the Western District of New York recently dismissed a similar claim filed on behalf of petitioners who alleged that their detention violated the Fifth Amendment due to the COVID-19 global pandemic. *See Dawson v. Asher*, No. 20-0409, 2020 WL 1304557, at *2 (W.D. Wash. Mar. 19, 2020); *Jones*, 2020 WL 1643857, at *15. In *Dawson*, the district court found that petitioners failed to demonstrate—as required—that the conditions amounted to punishment of the detainee. *Dawson*, 2020 WL 1304557, at *2 (*citing Bell*, 441 U.S. at 535). The district court held the following:

- Plaintiffs do not present allegations or evidence to show Defendants have an "express intent" to punish Plaintiffs. (See generally Amended Joint Petition, Doc. 69)

- Preventing detained aliens from absconding and ensuring that they appear for removal proceedings is a legitimate governmental objective. *See Jennings v. Rodriguez*, —— U.S. ——, 138 S. Ct. 830, 836, 200 L.Ed.2d 122 (2018); *Demore v. Kim*, 538 U.S. 510, 523, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 690-91, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001).

- Plaintiffs' current confinement does not appear excessive in relation to that objective.

Id. The district court found no authority under which the fact of detention itself becomes an "excessive" condition solely due to the risk of a communicable disease outbreak—even one as serious as COVID-19. *Id.* Stated another way, even though "there is no dispute that the respondents have actual knowledge of the petitioners' serious needs" due to COVID-19, "[t]he question is what the respondents have done with the knowledge." *See Jones*, 2020 U.S. Dist. LEXIS 58368, *at 26.

In this case, as evident from Chief Kolitwenzew's declarations and testimony, as well as guidance from CDC, ICE and the JCDC have acted on their knowledge and carefully weighed the multitude of public policy issues raised in the petition. Petitioners do not address how either ICE or the JCDC acted with an express intent to punish them or how their current confinement is excessive in relation to the legitimate governmental objective in detaining them. Nor could Petitioners credibly assert such an argument because JCDC has implemented extensive measures to protect its detainees, staff, and the surrounding community from COVID-19.

Petitioners have, on a number of occasions in this case, revealed that their true position is that there are no conditions of confinement whatsoever sufficient to ever justify detention. In other words, Petitioners believe that there is nothing the JCDC can do that will adequately respond to the pandemic and, so long as COVID-19 is a

worldwide pandemic, they cannot be incarcerated by ICE. Of course, this position is not supported by the CDC or the law.

Applying the *Kingsley* and *Bell* criteria to the facts of this case, the United States has legitimate, non-punitive interests Petitioners' detention that are reasonably related to their continued confinement. Continued detention promotes public safety by protecting the public from the petitioners that have violent and otherwise concerning criminal records, ensures attendance at hearings before the Immigration Courts, facilitates the administration and enforcement of immigration laws, prevents them from absconding in the face of removal, particularly where a final order has been entered, and complies with Congress's determination that detention is appropriate for aliens with their criminal history and immigration statuses. As such, Petitioners' confinement is rationally related to multiple legitimate interests.

Petitioners are in immigration detention because they have violated the laws of the United States and are subject to detention under those laws—in some cases, detention is statutorily mandated based on their criminal history. Consistent with the requirements of due process, their confinement is "rationally related" to a legitimate governmental objective and therefore is not "punishment." *Hubbard v. Taylor*, 399 F.3d 150, 159 (3d Cir. 2005).

The Court next considers whether the current conditions at the JCDC undercut

this conclusion. *Hubbard*, 538 F.3d at 232. The longer time passes without any incidence of COVID-19 in the JCDC, the less reasonable it is to claim that it will only be a matter of time before COVID-19 decimates the detainee population. Thankfully, that feared outcome has generally not come to pass, largely due to the quick and extensive actions of Chief Kolitwenzew and the JCDC staff.

While the United States is cognizant that some of Petitioners have medical conditions, Petitioners have not credibly demonstrated that ICE and the JCDC are not addressing any legitimate needs. Petitioners' arguments amount, at most, to a difference of opinion in medical judgment. Petitioners may disagree with the type of medical care they have been provided, but such disagreements alone cannot justify their release on an emergent application for release from custody. As the district court in Dawson found, "even if Plaintiffs could show a Fifth Amendment violation, Plaintiffs provide no authority under which such a violation would justify immediate release, as opposed to injunctive relief that would leave Plaintiffs detained while ameliorating any alleged violative conditions within the facility." *Dawson*, 2020 WL 1304557, at *2.

Any argument that ICE is punishing the detainees simply because it will not release them based on COVID-19 is, however, undercut by the CDC guidelines for correctional and detention facilities. The purpose of the guidelines is to "assist in preparing for potential introduction, spread, and mitigation of COVID-19 in those

facilities." See DOC 29-3, CDC Interim Guidance, at 1. The guidance makes clear that it "may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions." *Id*. Notably, while the guidelines address methods for preventing the introduction of COVID-19 into the facilities, they clearly also contemplate that COVID-19 will likely enter the facilities and address methods for containing the spread of the disease. The CDC does not recommend that a facility release a detainee or inmate as a method of mitigating or stopping the spread of the virus. Even where the number of laboratory-confirmed positive COVID-19 cases exceeds the available spaces for medical isolation, the CDC guidelines do not recommend release. Instead, in that scenario, the guidelines recommend that the facility prioritize medical isolation for the most vulnerable positive cases of detainees or inmates, i.e., those at higher risk of severe illness from COVID-19. *Id*. at 17.

V. Petitioners Should Not Be Released in the Face of Removal

Moreover, to show that they are entitled to habeas relief and secure release from custody, Petitioners must demonstrate that "there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). They cannot meet this burden. In contrast to the petitioners in Tello, Favi, Ruderman, Ochoa, and Herrera-Herrera, these Petitioners have had hearings before the Immigration Court and reviews for release or bond; some have even

progressed completely through the process or to the final step of the process in less than a year and one has even withdrawn all opposition to the process. Despite efforts to stop or delay removal, ICE has secured final orders of removal for Petitioners Gonzalez-Torres, Fatai-Owolabi, and Ibrahim; although ICE is waiting on travel documents for Gonzalez-Torres and Fatai-Owolabi as a result of flight cancellations due to the pandemic, this situation is temporary. ICE has a travel document for Mr. Ibrahim and anticipates removal the week of July 6, 2020. Petitioner Crainic has been ordered removed; if the BIA denies his appeal, the order will become final, and his removal back to Romania will be quickly effectuated. The remaining Petitioners have hearings during the month of July, during which final orders may be entered. In fact, Petitioner Misankov states in his declaration that he expects removal to be initiated during his upcoming hearing on July 13, 2020. Therefore, it is significantly likely that they will be removed in the reasonably foreseeable future. Consequently, detention pending removal is lawful. *See Zadvydas*, 533 U.S. at 701.

CONCLUSION

Petitioners seek immediate release from their lawful detention at the JCDC. To accomplish this, Petitioners ask the Court to overlook their various criminal histories, which include a gang affiliation, conviction for torturing animals while threating to “chop” up a woman, and crimes of dishonesty. They ask the Court to overlook their various immigration histories that include final orders or removal or

imminent removals. And they ask the Court to conclude that the JCDC has recklessly disregarded their conditions and the pandemic despite the JCDC having taken numerous and significant measures such as reducing its population by 80%, implementing social distancing, spreading cell assignments, and providing facemasks. On this record, the Court should deny their petitions in their entirety and award no relief.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/DOC system which will send notification of such filing to all counsel of record.

Date: July 3, 2020

s/ Kimberly A. Klein
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