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MOOT COURT BOARD

Orison S. Marden Moot Court Competition
Final Round Problem, Spring 2021

Steve Taylor,
Petitioner,

-against-

Darrell Rogers,
Respondent.

Record

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QUESTIONS PRESENTED

(1) Whether the objective test proffered in *Kingsley v. Hendrickson* to determine liability for excessive force claims, brought by detainees under the Due Process clause of the Fourteenth Amendment, extends to conditions of confinement claims.

(2) Whether pretrial detainees have a "clearly established" constitutional right to protection from heightened exposure to COVID-19.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CLOVERTON

Darrell Rogers, Plaintiff,	:	Docket No. 19-CIV-248938
-against-	:	MEMORANDUM OPINION AND ORDER
Steve Taylor, Defendant.	:	

JORGENSON, J.

Plaintiff Darrell Rogers ("Rogers" or "Plaintiff") filed a complaint, pursuant to 42 U.S.C. § 1983, seeking damages against the defendant Steve Taylor ("Taylor" or "Defendant"), the warden of Harleyville Detention Facility ("HDF"), on December 3rd, 2020, claiming that the confinement conditions at the facility violated his Fourteenth Amendment rights. Defendant moves to dismiss on the grounds that first, there was no constitutional violation, and second, even if there was, the right violated was not clearly established at the time of the violation, and thus he is entitled to qualified immunity. Pursuant to its discretion, this Court opts to decide the constitutional question first and holds that there was a violation of a constitutional right, which will inform future qualified immunity suits in this district. However, such a right was not clearly established at the time of the violation such that a reasonable person would have known they were violating a right. Thus, Defendant's motion to dismiss is GRANTED.

FACTUAL BACKGROUND

At this stage of the litigation, the factual record is not substantially disputed by either party. Plaintiff Darrell Rogers has been held in pretrial detention at HDF since January 20th, 2020. He was arrested for an assault and battery, which he allegedly committed on January 3rd, 2020. The judge presiding over his case determined that he should be held pretrial. At the time, the COVID-19 pandemic had not yet materialized in the United States, so there were no health concerns with his detention.

Prior to bringing this damages action, Rogers, who is severely asthmatic and suffers from hypertension, was part of a class of medically vulnerable individuals in

pretrial detention who sought release from confinement at HDF. Their request for a temporary restraining order ("TRO") was filed in the United States District Court for the District of Cloverton on April 4th, 2020 and denied on May 6th, 2020. It was denied, in part, because HDF passed a court-ordered inspection administered on April 25th, 2020. Rogers has since remained in HDF awaiting trial. Other occupants of the facility were released, but Rogers did not meet the criteria set for compassionate release. An internal HDF report, issued on October 30th, 2020, revealed that the number of COVID-19 infections in HDF rose considerably in late October, and that people continued to move in and out. Detainees grew frustrated with the confinement conditions as fear of the virus grew.

HDF is a state detention center located in north-central Cloverton, just 20 miles away from Dino, a city of around 360,000 residents. Dino's government does not implement COVID-19 restrictions, and its daily infection rate was higher than all but two other U.S. cities of at least 250,000 people. Given HDF's positioning, *see* Attachment B, it is a ready conduit for transfers within the detention facility system. Many are transferred from the city center of Dino, the mountainous regions of Western Cloverfield, and elsewhere. Plaintiff alleges that when new detainees are transferred from elsewhere, or taken in generally, only some of them are tested. Also, given the recent wildfires in Western Cloverfield, many detainees from other locations such as Gerritsen were allegedly packed into cars and sent to HDF, but upon arrival, many of them were not tested.

Also, according to Plaintiff, the detainees found it virtually impossible to socially distance themselves. *See* Attachment A. The beds and tables are bolted to the floors and thus immovable. The corrections officers wore masks incorrectly and inconsistently, and other detainees often did not wear masks but were not reprimanded. Plaintiff claims to have seen Taylor himself occasionally walking around with his mask clearly below his nose and conversing with other officers who were improperly wearing them. Plaintiff claims that Taylor did not correct the improper mask-wearing behavior of the other officers.

In addition to the testing issues relating to the transfers, the complaint alleges that testing in general has been wholly inadequate and irregular. Some guards had family members test positive for the virus and told Taylor. Taylor reportedly responded that if they were feeling fine, they should keep working because HDF was barely able to cover shifts. Also due to staffing issues, correctional officers worked shifts in both quarantined and non-quarantined sections. The guards, who were integrated into the Dino community, were tested, but not regularly. There was no reprimand system for failing to receive a test in each week. Making matters worse, the facility has long been rationing soap, and detainees are allegedly not receiving as much as they need. Defendant reportedly responded to a line officer voicing concerns about the conditions with, "look, this clearly isn't Buckingham Palace." He then proceeded to chuckle.

In these conditions, Rogers, and many others, contracted COVID-19 in the second wave of the virus. A medical expert attests to Rogers' long-term lung damage from contracting the disease. He filed a suit under 42 U.S.C. § 1983 against Taylor seeking damages for a Fourteenth Amendment Due Process violation. Rogers has exhausted his administrative remedies and has standing to file in the District Court. Defendant filed a motion to dismiss, asserting that his conduct did not rise to a Fourteenth Amendment violation and, in any event, he is entitled to qualified immunity because any such right was not clearly established at the time of the alleged violation. Defendant does not challenge the sufficiency of the pleadings in the complaint but asserts that he is nonetheless entitled to qualified immunity.

DISCUSSION

I. This Court Elects to Use *Pearson* Discretion to Decide the Constitutional Question First.

In suits against government officials where the qualified immunity defense is asserted, liability hinges on two inquiries: (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) "whether the right was clearly established" such that a reasonable person would have known that his actions violated that right. *Saucier v. Katz*, 533 U.S. 196, 201 (2001), *overruled by Pearson v. Callahan*, 555 U.S. 223 (2009). In *Saucier*, the Court held that any qualified immunity inquiry must analyze both prongs and in that order. *Id.* at 200–01. Thus, if a court found no constitutional violation, the claim was dismissed, but if the court found a constitutional violation, it must then ask if the right at issue was clearly established at the time of the alleged violation, such that a reasonable official would have known they were violating a right. *Id.* at 201–02.

This "sequencing" requirement drew a great amount of criticism, primarily as a waste on judicial resources in cases that would most certainly fail on the "clearly established" prong. *See Pearson*, 555 U.S. at 236–37. It was ultimately overturned in *Pearson*. *Id.* at 227. As such, courts are now permitted to choose which prong to analyze first in any given case. *Id.*

In the present scenario, this Court chooses to exercise its discretion and decide the constitutional issue first. Evidently, injunctive relief did not help the detainees here. Ever since the court-ordered inspection, the confinement conditions have deteriorated. If we find a constitutional violation under relevant law, then this ruling will help serve as a blueprint for what is required of supervisors for the rest of this pandemic and for other potential pandemics, and it should operate as a clearly established legal standard governing similar situations in the context of pretrial detention.

II. Defendant's Acts Violate Plaintiff's Due Process Rights Under *Kingsley*.

The Fourteenth Amendment forbids states and municipal entities from depriving a person of life, liberty, and property without the due process of law. U.S. Const. amend. XIV. Under this protection, a detained individual has the right to reasonable safety and medical care. *See Estelle v. Gamble*, 429 U.S. 97, 103 (1976). The Fourteenth Amendment applies to pretrial detainees, while the Eighth Amendment's prohibition on "cruel and unusual" punishments applies to those who have been convicted. *See, e.g.*, *Banks v. Booth*, No. 20-849, 2020 U.S. Dist. LEXIS 68287, at *21 (D.D.C. Apr. 19, 2020) (stating that the respective distinctive avenues under which pretrial detainees and convicted prisoners bring their claims are undisputed). Protection afforded to pretrial detainees under the Fourteenth Amendment is at least as extensive as that afforded to convicted individuals under the Eighth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (pretrial detainees "retain at least those constitutional rights that . . . are enjoyed by convicted prisoners"). Under *Bell*, conditions of confinement of a pretrial detainee are unconstitutional if they "amount to punishment." *Id.* at 535.

Despite the apparent difference between the protection from *cruel and unusual* punishment under the Eighth Amendment standard for post-conviction prisoners and from conditions that amount to *any* punishment under the Fourteenth Amendment for pretrial detainees, courts have generally imported the Eighth Amendment standard in evaluating conditions of confinement claims brought by a pretrial detainee under the Fourteenth Amendment. *See, e.g.*, *Gomes v. U.S. Dep't of Homeland Sec.*, 460 F. Supp. 3d 132, 147 n.33 (D.N.H. 2020) (citing *Surprenant v. Rivas*, 424 F.3d 5, 18 (1st Cir. 2005)) ("[A]pplying Eighth Amendment standard to pretrial detainee's claims, after noting that 'the parameters' of the liberty interests implicated by pretrial detainee's conditions of confinement claims 'are coextensive with those of the Eighth Amendment's prohibition against cruel and unusual punishment[.]'"). To establish that a corrections official violated the Eighth Amendment, a plaintiff must show that (1) they were exposed to an objectively serious risk of harm, and (2) the corrections officer had a "sufficiently culpable state of mind" that showed "deliberate indifference to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citations omitted).

A. *Kingsley* Extends to Conditions of Confinement Claims.

Plaintiff contends that, for their conditions of confinement claim brought under the Fourteenth Amendment, this Court must depart from the previously used Eighth Amendment standard and replace the subjective prong requiring "deliberate indifference" with a lower standard in line with the Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389, 396–97 (2015) (holding a correctional officer liable for

using excessive force against a pretrial detainee because it was "objectively unreasonable" considering the facts and circumstances at the time). We agree.

Although this circuit has yet to rule on whether the explicit objective prong alteration in *Kingsley* with respect to excessive force claims extends to other claims, such as conditions of confinement claims, other circuits have done so. While *Kingsley* operates in the context of a claim that a corrections officer used excessive force, there is nothing in the language of the decision that suggests it should be limited to such claims alone. On the contrary, it crystallizes a preferred interpretation of the standard set in *Bell*, which made it so that any governmental action, not just those pertaining to excessive force, could be evaluated under the new standard. *See Kingsley*, 576 U.S. at 398 (citing *Bell*, 441 U.S. at 561) ("[A] pretrial detainee can prevail by providing only objective evidence that *the challenged governmental action* is not rationally related to a legitimate government objective or that it is excessive in relation to that purpose.") (emphasis added). Further, the *Kingsley* standard offers welcome clarity into the analysis of Fourteenth Amendment violations, which has been muddled by some courts' importation of Eighth Amendment requirements. For the purposes of the District of Cloverton, we decide to extend the objective test proffered in *Kingsley* to conditions of confinement claims. Accordingly, we analyze the facts of this case under this proper standard and determine that Defendant's actions amounted to reckless disregard, thus violating Plaintiff's due process rights under the Fourteenth Amendment.

B. Defendant's Conduct Amounts to a Constitutional Violation.

Given that the *Kingsley* holding extends, and this action is brought by a pretrial detainee, we need not determine whether Defendant's conduct amounts to a constitutional violation under the previously used Eighth Amendment deliberate indifference standard.

Under the Fourteenth Amendment, we start with the framework from *Farmer*: the plaintiff must show (1) they were exposed to an objectively serious risk of harm, and (2) the corrections officer has a "sufficiently culpable state of mind" that shows "deliberate indifference to inmate health or safety." 511 U.S. at 834.

Applying the first prong of the *Farmer* analysis, which *Kingsley* retains for pretrial detainees, confinement in inadequately protective conditions during the COVID-19 pandemic objectively poses a serious risk of harm to detainees, particularly those who are medically vulnerable. At HDF, many have died, and Plaintiff, like many others, retained serious long-term complications from contracting the virus. Furthermore, Defendant does not contest the objective seriousness of the risk of harm from the increased exposure to COVID-19, even to those who are not "medically vulnerable."

The second prong has been described as a "subjective" component. *Id.* at 838–39 (citations omitted). Yet, as *Kingsley* suggests, pretrial detainee plaintiffs in their Fourteenth Amendment claims need not show subjective deliberate indifference in the second prong of the *Farmer* analysis. Instead, they only need to show that the official recklessly disregarded the substantial risk of harm to which they subjected plaintiff. *See Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 ("[T]he test to be applied under *Kingsley* must require a pretrial detainee who asserts a due process claim . . . prove more than negligence but less than subjective intent—something akin to reckless disregard."). This Court reiterates that mere negligence (or even gross negligence) does not amount to a constitutional violation. *See Kingsley*, 576 U.S. at 396 ("[L]iability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process.") (internal quotation marks omitted) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)).

Moving on to the application of the second prong, which, under *Kingsley*, considers whether Defendant's actions were "objectively unreasonable" in response to the serious risk, we hold that Plaintiff has established the reckless disregard necessary to make out a due process violation. Defendant's failure to comply with protocol extends beyond mere negligence. Despite the filing of temporary restraining orders and the issuance of CDC and Bureau of Prison ("BOP") guidelines, Defendant has failed to ensure that his facility complies with them after the inspection.

Defendant claims that they took reasonable steps to abate the increased risk and any finding of deviation from protocol would be mere negligence. *See, e.g.*, *Darnell v. Pineiro*, 849 F.3d 17, 36 (2d Cir. 2017) ("[A] claim for a violation of due process requires proof of *mens rea* greater than mere negligence."). Defendant cites *Wilson v. Williams*, 961 F.3d 829, 841 (6th Cir. 2020), in which the Sixth Circuit found that the Bureau of Prison responded reasonably to the risk posed by COVID-19 and that the conditions therefore could not be found to violate the Eighth Amendment because such a reasonable response could not amount to deliberate indifference.

This case was at a fundamentally different stage of the pandemic, at a point where plaintiffs were rushing to file temporary restraining orders and injunctions in order to save themselves from the heightened exposure inherent in detention or incarceration. At that point, prison officials needed to respond to federally mandated protocols and any TROs or injunctions that were issued against them. Many detainees and prisoners were released under the CARES Act, compassionate release, or otherwise. Supervisors who inadequately responded could blame lack of resources or general knowledge about what was transpiring in explaining their inability to comply, and courts generally granted them that deference. *See, e.g.*, *Wilson*, 961 F.3d at 840 (requiring only that the prison respond reasonably in order to avoid a finding of likelihood of success on a deliberate indifference claim).

But now, in this second wave of the pandemic, nearly a year after it began, the facility supervisors are well aware of the risks and required protocols to protect individuals from infection. Plaintiff points out that Defendant adopted the necessary measures in order to withstand the injunction filed against it. Since they passed inspection, they have waivered on the protocols. They are now, for example, rationing soap, failing to consistently wear masks, failing to disinfect common areas after each use, failing to adhere to proper testing protocols, and exhibiting a general disinterest in maintaining the proper standards.

In determining whether there was a constitutional violation, courts must look at the facts in the light most favorable to the party asserting the injury. *See, e.g.*, *Saucier*, 533 U.S. at 201, *rev'd on other grounds by Pearson*, 555 U.S. at 227. The facts indicate that Defendant's actions and inactions exhibited a reckless disregard to detainee health and safety. A reasonable supervisor would have worn a mask properly as they were walking around the section. A reasonable supervisor would have ordered guards failing to properly wear masks to correct their conduct or face reprimand, and additionally would have ensured that detainees wore them properly in common areas. A reasonable supervisor would have ensured that common areas were cleaned adequately after each use, and that detainees were given enough soap. Defendant's analogies to Buckingham Palace and instructions that guards continue to work despite having family members test positive further attests to the reckless disregard.

Defendant claims that they cannot be held responsible for the actions of those under them. *See Ashcroft v. Iqbal*, 556 U.S. 622, 676 (2009) ("A public officer or agent is not responsible for the misfeasances or positive wrongs, or of the nonfeasances, negligences, or omissions of duty, of the sub-agents or servants or other persons properly employed by or under him, in the discharge of his official duties."). Plaintiff is not asserting a claim of liability under a theory of *respondeat superior*, nor are they making a claim of intentional discrimination, as in *Iqbal*, where they must show a supervisor's invidious state of mind; they are alleging that Defendant was directly involved in these violations. Proof of direct involvement only requires a plaintiff to show that the individual defendant was personally involved in the alleged constitutional deprivation, or that there is a sufficient causal connection between an individual's wrongful action or inaction and the constitutional violation. *See, e.g.*, *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (holding in a conditions of confinement case against a prison supervisor that all the plaintiff needed to show was acquiescence to the subordinates' misconduct to prove deliberate indifference). Plaintiff has done so here.

III. The Right Was Not "Clearly Established" at the Time of the Offense and Thus Defendant Is Entitled to Qualified Immunity.

While this Court finds going forward that Plaintiff's current confinement conditions amount to a Fourteenth Amendment violation, it is not evident that Plaintiff's right to be free from substantial risk of harm due to COVID-19 was so clearly established *at the time of Defendant's conduct* that a reasonable person would have known they were violating that right. There is a difference between a reasonable person knowing what objectively needs to be done to prevent the spread of communicable disease and a reasonable person knowing that failure to do so is a constitutional violation—especially amidst unclear, changing minimum standards. As a result, we find that the combination of the evolving nature of COVID-19 and lack of standardization in safety procedures precludes finding a "clearly established" right at the time of Defendant's conduct.

Qualified immunity shields government officials from civil liability unless their conduct violated "clearly established" statutory or constitutional rights of which a reasonable person would have known. *Pearson*, 555 U.S. at 231. The right must be defined with a level of particularity, not abstractly or generally, and the unlawful behavior must be apparent in light of precedent. *See Rish v. Johnson*, 131 F. 3d 1092, 1095 (4th Cir. 1997) (finding that there is no clearly established law dictating that prison officials are deliberately indifferent to substantial risk of bodily harm for failing to provide inmates with PPE when being exposed to HIV+ body fluids while cleaning housing, medical, mental seclusion, and hospital areas of the prison). This is not to say only past cases involving the exact same factual scenario can be used to demonstrate a clearly established right. Yet there must be enough existing precedent that the liability of the conduct at issue is "beyond debate." *Tate v. Ark. Dep't of Corr.*, No. 4:20-CV-558-BSM-BD, 2020 U.S. Dist. LEXIS 236166, at *29 (E. D. Ark. 2020) (citing *Dillard v. O'Kelley*, 961 F.3d 1052 (8th Cir. 2020)) (holding that due to the unique issues presented by COVID-19, no reasonable official would have known that prison facility precautions short of the full CDC recommended guidelines would violate an established constitutional or statutory right). As a result, officials can only be held liable for bright line transgressions. Bad guesses in gray areas, however unfortunate, are protected. *Id.*

Here, Plaintiff has failed to plead facts showing that Defendant violated their clearly established constitutional rights. Rogers points to the lack of mask wearing at HDF by officers and detainees alike, the inability to social distance, and the facility's rationing of soap, arguing that such behavior violates their right to protection from a substantial risk of contracting a communicable disease. Yet prior law does not support such a conclusion "beyond debate." *Rish*, 131 F. 3d at 1100. Furthermore, while the CDC may recommend precautions against communicable diseases, those recommendations are not binding on officials and do not independently establish liability. *See id.* at 1099 (finding that the CDC's

recommendation for all health care workers to use appropriate barriers such as gloves, eye protection, and protective clothing when in contact with blood or body fluids as not controlling for demonstrating a clearly established right). Current CDC guidance for COVID-19 in correctional facilities is extensive. *See* Attachment C. Yet even the CDC recognizes that not all of its recommendations are feasible. For example, they suggest providing 60% alcohol-based hand sanitizers *where permissible based on security restrictions.* Mask wearing, though heavily recommended, is only advocated as mandatory for individuals showing signs of a COVID-19 infection. Thus, Defendant's exercised judgement seems to fall in line with a protected bad guess or grey zone area. There was no clearly established precedent to guide their actions at the time, thus permitting their protection under qualified immunity.

Additionally, Plaintiff's allegations surrounding Defendant's failure to take affirmative actions to maintain social distancing amongst officers and detainees and failure to remedy staffing shortages, even when considered in their most positive light, do not amount to violations of clearly established constitutional rights. Moreover, the ever-evolving nature of COVID-19, combined with the inconsistency across facilities and locales nationwide about what, if any, COVID-19 precautions are in place, makes it impossible for ordinary officers to ascertain what the established minimum standard is regarding protections from COVID-19 that all detained persons deserve. *Cf. Tate*, 2020 U.S. Dist. LEXIS 236166 at *29 (holding that due to the unique challenges posed by a "novel" coronavirus, a reasonable official could not have known that their response to COVID-19 at their facility violated Plaintiff's clearly established constitutional rights). Again, bad judgement guesses in grey zones, though sufficient in this case to meet the threshold for a constitutional violation as a forward-looking matter, fail to meet the bar for a violation of a right that was clearly established at the time, given the lack of precedent and novel conditions. *Id.*

Plaintiff's complaint also fails to meet precedential standards for when an officer's course of conduct is so obviously reckless or cruel that it provides notice in and of itself that the conduct is unconstitutional. In *Hope*, the Supreme Court found that handcuffing an incarcerated individual to a hitching post for seven hours in the harsh, burning sunlight, with no bathroom breaks, highly restricted water consumption, and blatantly antagonistic and dehumanizing taunts constituted improper corporal punishment under the Eighth Amendment. *Hope v. Pelzer*, 536 U.S. 730, 735 (2002). However, this finding *alone* was not enough to find the violation clearly established; the court highlighted how that *specific* facility was advised by the Department of Justice (DOJ) of their unconstitutional practices before the event with the plaintiff took place. *Id.* at 744. Plaintiff's situation simply does not compare. Rogers does not assert that he was denied basic provisions of life such as water or the ability to excrete his waste. Nor does he allege that Defendant responded antagonistically to any of his supervisees or assigned detainees. Furthermore, even if any condition of punishment could be found, there is no fact in the complaint that points to the CDC, DOJ, Bureau of Prisons, or any other adequate federal or state

authority directly telling HDF that their current coronavirus practices are unconstitutional—effectively precluding any finding of a clearly established right violation.

In conclusion, Defendant's actions did not violate a right that was clearly established at the time of the offense. Correctional officers working during this trying period should not be judged with 20/20 hindsight but rather based on the existing precedent at the time of their actions. Defendant is entitled to qualified immunity in this suit but should be on notice in future circumstances that these confinement conditions are constitutionally impermissible under *Kingsley*.

CONCLUSION

For the foregoing reasons, this Court finds that Defendant's conduct did amount to a violation of Plaintiff's constitutional rights under the Due Process clause of the Fourteenth Amendment, but this right was not clearly established at the time of the offense. Thus, Defendant's Motion to Dismiss is GRANTED.

IT IS SO ORDERED

/s/_____
Hon. Jennifer L. Jorgenson
Cloverton District Court Judge

Dated: December 15, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CLOVERTON

Darrell Rogers, Plaintiff,	:	Docket No. 19-CIV-248938
-against-	:	**NOTICE OF APPEAL**
Steve Taylor, Defendant.	:	

NOTICE IS HEREBY GIVEN that Darrell Rogers, Plaintiff in the above captioned case, hereby appeals to the Court of Appeals for the Fourteenth Circuit the Opinion and Order of the Hon. Jennifer L. Jorgenson of Federal District Court for the District of Cloverton granting Defendant's Motion to Dismiss entered on December 15, 2020.

/s/_____
Nalini S. Nishida, Esq.
Attorney for Plaintiff
American Civil Liberties Union
356 Tennessee St., 13th Floor
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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to Samuel Vishwakumar, Esq., Attorney for Defendant, 457 Tower Park Ave., Dino, Cloverton, 84598 by electronic service, this December 21, 2020

/s/_____
Nalini S. Nishida, Esq.
Attorney for Plaintiff
American Civil Liberties Union
356 Tennessee St., 13th Floor
Washington, District of Columbia 20500

Dated: December 21, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

Darrell Rogers, Appellant,	:	Docket No. 19-CIV-248988
-against-	:	JUDGMENT ON APPEAL
Steve Taylor, Appellee.	:	

Before: ZERN, AMUZIE, and SOTO, Circuit Judges.

SOTO, J.:

Darrell Rogers ("Appellant" or "Rogers") is a pretrial detainee in Harleyville Detention Facility ("HDF"). He contracted COVID-19, which resulted in long-term damage and injury to his lungs. He filed a complaint in the United States District Court for the District of Cloverton pursuant to 42 U.S.C. § 1983 against HDF warden Steve Taylor ("Appellee" or "Taylor"), alleging that Taylor's deliberate indifference to the substantial risk faced by the HDF detainees is in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. In response, Appellee filed a motion to dismiss, claiming that there was no constitutional violation, and even if there was, the right to be free from the government conduct alleged was not clearly established, and thus they are entitled to qualified immunity. The district court elected to use *Pearson* discretion to decide the constitutional question first. They ruled that the Supreme Court's holding in *Kingsley* extends beyond excessive force claims to conditions of confinement claims, and that Taylor's conduct amounts to a violation of the Fourteenth Amendment under the lower standard of culpability proffered in *Kingsley*. However, the district court granted the motion to dismiss on the "clearly established" grounds, opining that given the novel nature of the pandemic and lack of relevant jurisprudence, a reasonable person in Taylor's position would not have known that they were violating a right. Despite dismissing the case, the district court made very clear that their ruling with respect to the constitutional question serves as adequate notice for future conduct in similar circumstances: there is now a clearly established right to protection from substantially similar conditions of confinement in the District of Cloverton.

Adopting the facts as stated by the district court, we review (1) the choice to use *Pearson* discretion under the abuse of discretion standard, (2) the determination

of whether a constitutional violation occurred *de novo*, and (3) the determination of whether such a violation was clearly established at the time of the offense *de novo*.

First, we do not find an abuse of discretion by the district court in electing to decide the constitutional question first. Second, we agree with the district court's determination that *Kingsley* applies, and hold that Appellee's conduct amounted to a constitutional violation under the lower standard of culpability proffered therein. The district court, however, erred in failing to consider whether this conduct would amount to a violation under the more stringent pre-*Kingsley* Fourteenth Amendment standard (which mimicked that of the Eighth Amendment) as well. We hold that it does. Third, given that the conduct amounts to a violation under pre-*Kingsley* law, and for the reasons cited *infra*, we hold that the relevant rights were clearly established at the time of the violation, such that a reasonable person in Appellee's position would have known that they were violating a right.

Thus, Appellee is not entitled to qualified immunity, and we REVERSE.

DISCUSSION

I. The Decision to Address the Constitutional Question First Was Not an Abuse of Discretion.

Pursuant to *Saucier v. Katz*, 533 U.S. 196, 201 (2001), courts were required to perform qualified immunity analysis in the following order: (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) whether the right was clearly established such that a reasonable person would have known that their actions violate that right. After *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), however, the order of analysis was left to the "sound discretion" of the courts. The district court promulgated a new rule because of their apparent desire to limit officials' ability to absolve themselves in the future by saying the law was not clearly established, and that is within their discretion. *See Camreta v. Greene*, 563 U.S. 692, 704–05 (2011) ("[Constitutional determinations] are rulings self-consciously designed to produce this effect, by establishing controlling law and preventing invocations of immunity in later cases.").

II. Appellee's Conduct Amounts to a Violation of a Constitutional Right Under Both the Fourteenth Amendment Standard Altered by *Kingsley* and the Eighth Amendment Standard.

We agree with the district court that *Kingsley* should extend beyond excessive force to other claims brought by pretrial detainees under the Fourteenth Amendment, namely conditions of confinement claims. *See Kingsley v. Hendrickson*, 576 U.S. 389, 396–97 (2015) (holding a correctional officer liable for using excessive force against a pretrial detainee because it was "objectively unreasonable" considering the facts and

circumstances at the time). Given that *Kingsley* applies, the objective evidence in this case leads to a finding of deliberate indifference on the part of the Appellee with respect to the conditions of confinement he subjected Plaintiff and other detainees to.

We would, however, also consider whether it amounted to a violation under pre-*Kingsley* law: the Eighth Amendment subjective deliberate indifference standard. This is within the purview of this Court because it informs the analysis of whether any violation of a right was clearly established before the explicit recognition of *Kingsley*. For the same reasons that Appellee's conduct amounts to "reckless disregard" under the *Kingsley* standard, *see Castro v. City of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (explaining a pretrial detainee asserting a due process claim for failure to protect must "prove more than negligence but less than subjective intent"), we hold that it satisfies the higher standard of subjective deliberate indifference under the Eighth Amendment. Many courts have granted injunctions on the grounds of likelihood of success on an Eighth Amendment claim in the context of COVID-19 in prisons.

HDF initially complied with a court-ordered inspection but has since failed to maintain proper conditions. Many months have passed by and information about the virus and the necessary precautions has only increased. If other courts found deliberate indifference in April of 2020, given the small amount of information they had then, it is another persuasive factor in finding it here—especially when, in addition to the circumstantial reality of inadequate conditions, Appellee is quoted as remarking sardonically "look, this clearly isn't Buckingham Palace."

Thus, we hold that Appellee's conduct amounted to a constitutional violation under either standard and move to deciding whether Appellant's right to be free from such conduct was clearly established at the time of the violation.

III. The Right that Appellee Violated Was Clearly Established at the Time of the Violation, such that a Reasonable Person Would Have Known that Their Actions Violated a Right.

A right is clearly established when the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Castro*, 833 F.3d at 1067 (alteration in original) (quoting *Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003)). The district court erred in determining there is no clearly established right to protection from COVID-19 in the circumstances of this case. There has been longstanding precedent establishing the right of individuals in custody to be free from heightened exposure to serious communicable diseases, even absent a showing of harm or serious symptoms. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) (finding that prison officials may not "be deliberately indifferent to the exposure of inmates to a serious, communicable disease" under the Eighth

Amendment). COVID-19, also a highly communicable disease, should prove no different.

Furthermore, the CDC's guidelines for COVID-19 in detention facilities have effectively established the expected protection and protocols to ensure that the risk of coronavirus is minimized. *See* Attachment C. Information sheets have also been disseminated across the country that emphasize why individual mask compliance *alone* is not sufficient to substantially reduce the risk of contracting or spreading coronavirus via droplets in the air. *See, e.g.*, Nina Bai, *Still Confused About Masks? Here's the Science Behind How Face Masks Prevent Coronavirus*, U.C.S.F. (June 26, 2020), https://www.ucsf.edu/news/2020/06/417906/still-confused-about-masks-heres-science-behind-how-face-masks-prevent (noting the importance of everyone in a community wearing a mask, and that masks alone are not enough). These sources, in conjunction with the expectations set in prior law, make it more than evident that Appellee was violating Appellant's clearly established rights by failing to enforce social distancing and proper mask wearing and failing to procure or attempt to procure sufficient hand soap or alcohol-based sanitizers. Although some of the delineated protections are far more comprehensive than what has been previously mandated, a reasonable officer would have deduced that COVID-19 warranted such heightened precautions given its highly contagious nature, mortality rate, and halting effect on global commerce and movement. *See Maney v. Brown*, No. 6:20–cv–00570–SB, 2020 U.S. Dist. LEXIS 235447, at *19 (D. Or. Dec. 15, 2020) (holding that there is "no dispute that this virus presents a sufficiently substantial risk of harm to [adults in custody], and *it should have come as no surprise* to Defendants [facility officers] that they have a duty to protect [adults in custody] from exposure to COVID-19") (emphasis added). Thus, Appellee should have reasonably understood their duty to default to the established protocol rather than leave the situation up to chance as to whether an individual was improperly complying or had actual medically approved or situationally constrained reasons for noncompliance.

To force pretrial detainees to live in a facility wherein officers like Appellee have such disregard for human health during a global pandemic and work to cultivate unsafe conditions through their misinformation (e.g., recommending potentially asymptomatic carriers of COVID-19 to come in to work) imposes a form of punishment and mental-health attack—neither of which has any place in pretrial detention facilities. *See Bell v. Wolfish,* 441 U.S. 520, 535 n.16 (1979) (noting that pretrial detainees cannot be subjected to conditions of confinement that amount to punishment); *Darnell v. Pineiro*, 849 F.3d 17, 30 (2d Cir. 2017) (acknowledging that risk of serious injury, including that on mental health, is more than sufficient for a Fourteenth Amendment claim) (citations omitted). Moreover, the sheer act of not testing newly arriving individuals from at-risk facilities after placing them in a closed

van for transfer to HDF and then housing them with healthy individuals currently at the facility is also a recognizable violation of clearly established rights. Suggestions that Rogers can simply avoid communal areas to ensure his protection are, quite frankly, ludicrous and impractical.

Though Appellee may have had non-malicious intentions when supervising HDF's COVID-19 response, their conduct ultimately exceeded the boundaries of gross negligence and violated Appellant's clearly established constitutional right to protection from substantial harm of communicable disease, including COVID-19; they were more than put on notice. Extending qualified immunity to officers like Appellee who fail to protect adults in custody would unacceptably give them a free pass to do nothing during a pandemic.

/s/_____
[ ] Soto, Judge
United States Court of Appeals
for the Fourteenth Circuit

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ZERN, J., dissenting:

I. The District Court Abused its Discretion in Addressing the Constitutional Issue First.

Pearson discretion is hardly ever used. *Cf. Jones v. Kirchner*, 835 F.3d 74, 95 (D.D.C. 2016) ("Ever since *Pearson* . . . . [i]n these cases, we have almost invariably declined to decide constitutional questions in qualified immunity cases when it was unnecessary to do so."). In doing so, the district court imposed a forward-looking rule on the State of Cloverton based upon insufficient facts at the pleading stage. *See Pearson v. Callahan*, 555 U.S. 223, 239 (2009) ("[Deciding the constitutional question] is an uncomfortable exercise where . . . the answer [to] whether there was a violation may depend on a kaleidoscope of facts not yet fully developed. . . .") (internal citations and quotation marks omitted). Appellant appealed because their individual claim was technically barred by qualified immunity because the right was not clearly established, but also because of their counsel's aims to establish this holding circuit wide. The majority not only affirmed the applicability of *Kingsley*, but also guilelessly established a constitutional standard that now applies to both pretrial detainees and arguably to post-conviction inmates. The district court's decision to address the constitutional question first was an abuse of discretion, but the majority's decision is even more out of bounds.

The correct approach by the lower court would have been to evaluate the second, "clearly established" prong as a threshold issue and grant Appellee's motion to dismiss backed by the reality that certain confinement conditions during a novel, unprecedented pandemic were not a clearly established right. *See Tate v. Ark. Dep't of Corr.*, No. 4:20-CV-558-BSM-BD, 2020 U.S. Dist. LEXIS 236166, at *29 (E. D. Ark. 2020) (holding that plaintiffs had not pleaded facts showing that their rights were clearly established and noting that the challenges faced by COVID-19 are "unlike any other in the modern era"). Courts should not spend valuable resources and time adjudicating constitutional questions based on insufficient facts when there are other, more pressing issues in front of them, such as injunctions seeking release or changing of conditions.

II. This Court Should Not Have Found a Constitutional Violation.

Notwithstanding the errant election to use *Pearson* discretion, the actual merits of the lower court decision to apply *Kingsley* are based on faulty reasoning. The majority's affirmance of the district court, and corollary holding that the conduct additionally violated the Eighth Amendment standard, are also misguided, and the effective extension of liability to those supervising post-conviction inmates is concerning.

I would decline to extend *Kingsley* beyond excessive force claims. Even if *Kingsley* did extend beyond such claims to other claims brought under the Fourteenth Amendment, the conduct in this case does not amount to reckless disregard. Because it does not amount to reckless disregard, it does not amount to the applicable Eighth Amendment standard: that the Appellant must show Appellee's subjective deliberate indifference towards the serious risk of harm.

A. *Kingsley* Should be Limited to Excessive Force Claims.

First, I again note that this issue should not be before us, given that dismissal should have been granted on the "clearly established" issue and the constitutional question should have been left alone.

Second, extending *Kingsley* in a categorical way will create uncertainty for detention facility officials who are often required to make snap decisions based off insufficient information. *See Bell v. Wolfish*, 441 U.S. 520, 547 (1979) ("[T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices. . . ."). Although the objective reasonableness standard recognizes that negligence alone does not suffice, the standard still gets dangerously close to evaluating the merits of a split-second decision rather than evaluating whether the officer acted in good faith in a circumstance where the proper response is unclear.

Third, the *Kingsley* standard itself is unclear, and courts have struggled to apply it. It is clear to the Supreme Court that even gross negligence does not amount to a constitutional violation. *See, e.g.*, *Kingsley v. Hendrickson*, 576 U.S. 389, 396 (2015) ("[L]iability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process.") (internal quotation marks omitted) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)). It has been described as "something akin to reckless disregard." *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016). Thus, the standard is more than negligence, but less than the recklessness that would suffice for establishing a knowing violation. As courts attempt to extend this beyond excessive force claims, the application gets even murkier. Thus, it makes sense to limit the applicability to that which the Supreme Court has specifically ascribed. *See Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018) ("*Kingsley* does not control because that was an excessive force case, not a deliberate indifference case.").

B. Even if *Kingsley* Applied, Appellee's Conduct did not Amount to Reckless Disregard.

In evaluating an official's response to a certain risk, the court should consider whether respondents have taken reasonable steps to abate the risk. In *Wilson v. Williams,* for example, the detention facility obeyed COVID-19 protocol and thus responded reasonably in a very uncertain time. 961 F.3d 829, 841 (6th Cir. 2020). HDF passed the court-ordered inspection administered on April 25, 2020. *Cf. Cameron v. Bouchard*, 815 Fed. Appx. 978, 986 (6th Cir. 2020) (holding the passing of a court-ordered inspection as key evidence that reasonable steps were taken to abate the risk). Even if, as Appellant contends, there were isolated occurrences of deviation from this practice after the inspection, mere deviation from protocol is not enough for a constitutional violation. *See id.* at 85 ("[Pretrial detainees] acknowledge that they still must prove something more than that the Defendants acted unreasonably."). I would hold that HDF and Appellee took positive steps in the right direction and thus their actions do not amount to reckless disregard.

Additionally, "precedents do not require that prison officials take every possible step to address a serious risk of harm," *Wilson*, 961 F.3d at 844, and we must take into account the "constraints facing the official[s]." *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). Officials must operate with the tools they are given. HDF allowed people out on programs such as temporary release, furloughs, and home confinement. The facility itself was not overcrowded. Apart from removing every person from the facility, Appellee did everything they could. The majority and the district court fail to recognize the reality behind the situation in that officials are confronting a novel virus.

I would also note that the authority cited by Appellant and considered by the district court and the majority relates to a finding of likelihood of success on the merits, and not to damages. Thus, they do not explicitly consider the causation-related elements to a claim for damages towards a specific officer. Finding a likelihood of success on the merits of a Fourteenth Amendment claim as grounds for granting an injunction seeking release is one thing—announcing a forward-looking rule that would immediately begin to hold officials personally liable for what may or may not constitute a mere deviation from the standard of professional care is entirely another.

Accordingly, I respectfully dissent.

/s/_____
Jorge D. Zern, Judge
United States Court of Appeals
for the Fourteenth Circuit

(ORDER LIST: 1217 U.S.)

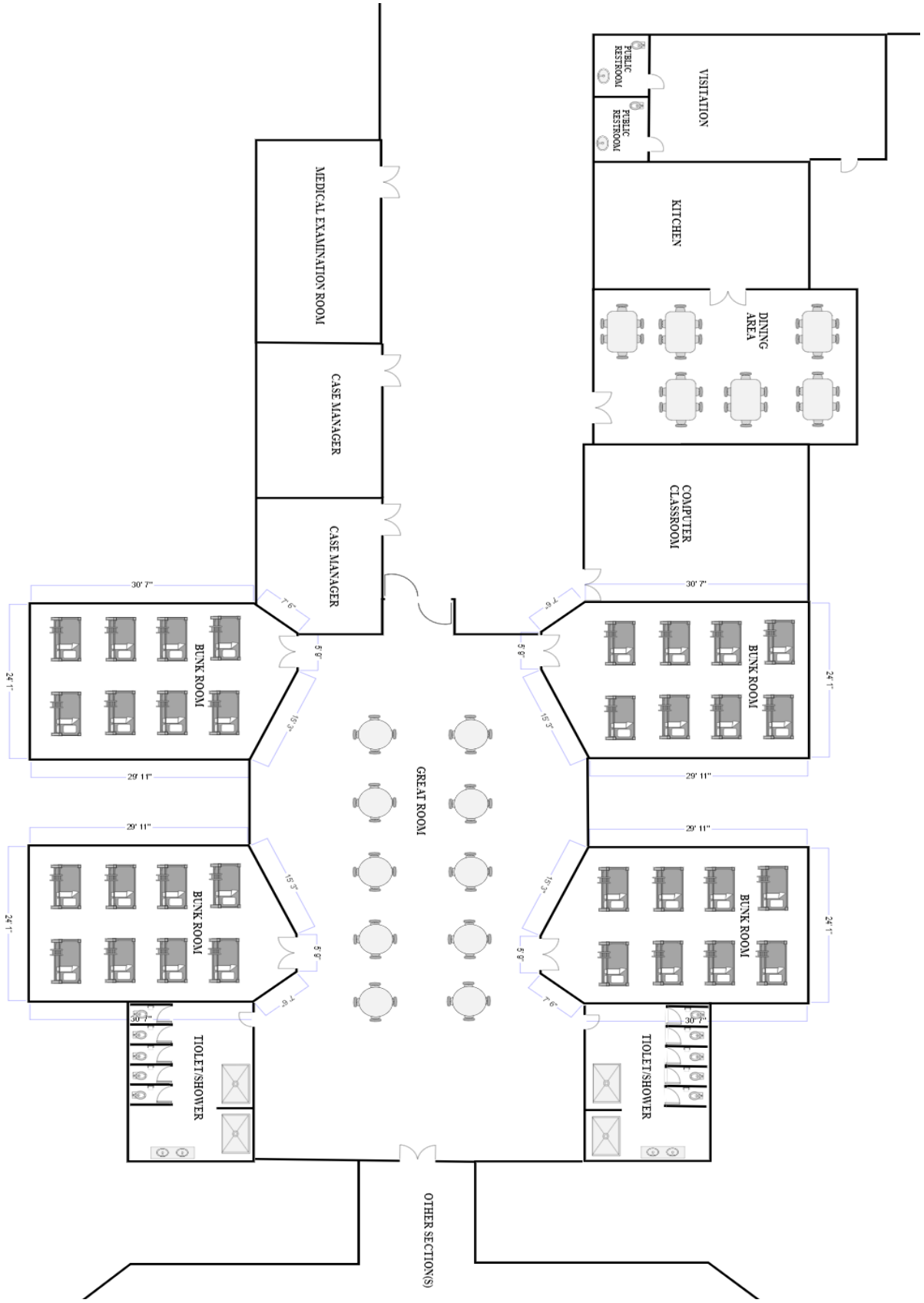
CERTIORARI GRANTED

18 - 122 Steve Taylor v. Darrell Rogers

The petition for a writ of certiorari is granted. The parties are directed to address the following questions:

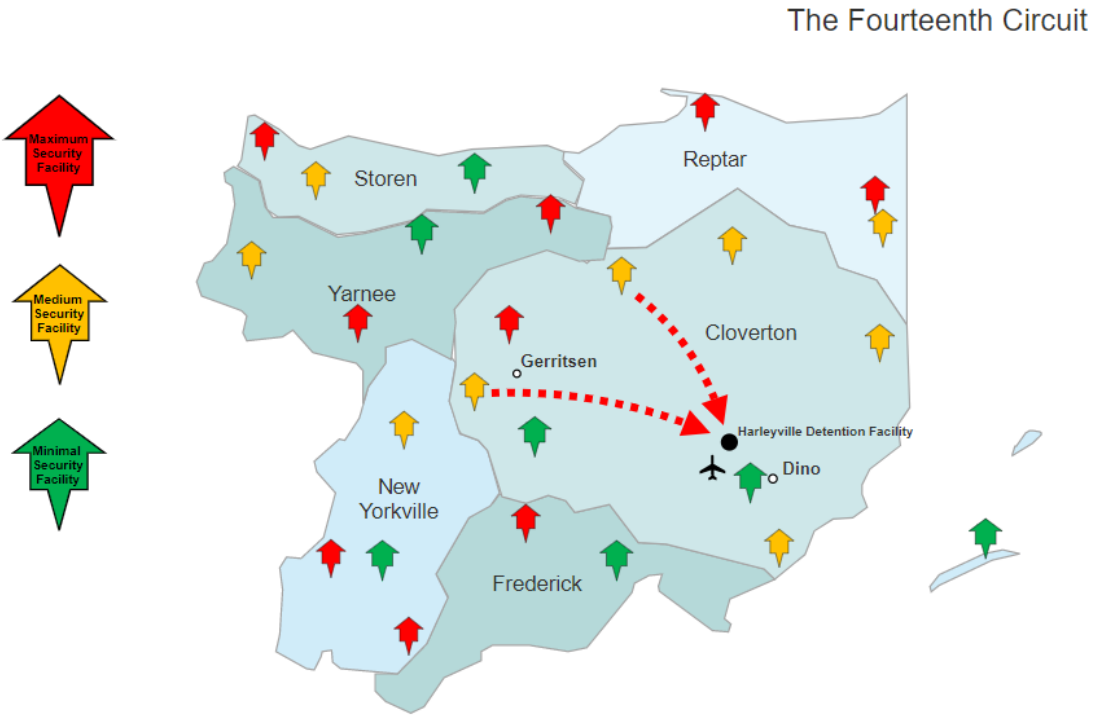
(1) Whether the objective test proffered in *Kingsley v. Hendrickson* to determine liability for excessive force claims, brought by detainees under the Due Process clause of the Fourteenth Amendment, extends to conditions of confinement claims.

(2) Whether pretrial detainees have a "clearly established" constitutional right to protection from heightened exposure to COVID-19.



Attachment A – Harleyville Detention Facility Section J

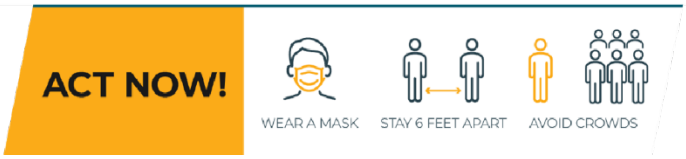
01-R-23



Attachment B – Facility Transfers

Centers for Disease Control and Prevention
CDC 24/7: Saving Lives, Protecting People™

COVID-19



Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities

Updated Dec. 31, 2020

This interim guidance is based on what is currently known about the transmission and severity of coronavirus disease 2019 (COVID-19) as of the date of posting.

The US Centers for Disease Control and Prevention (CDC) will update this guidance as needed and as additional information becomes available. Please check the CDC website periodically for updated interim guidance.

This document provides interim guidance specific for correctional facilities and detention centers during the outbreak of COVID-19, to ensure continuation of essential public services and protection of the health and safety of incarcerated and detained persons, staff and visitors. Recommendations may need to be revised as more information becomes available.

This document is intended to provide guiding principles for healthcare and nonhealthcare administrators of correctional and detention facilities (including but not limited to federal and state prisons, local jails, and detention centers), law enforcement agencies that have custodial authority for detained populations (i.e., U.S. Immigration and Customs Enforcement and U.S. Marshals Service), and their respective health departments, to assist in preparing for potential introduction, spread, and mitigation of SARS-CoV-2 (the virus that causes Coronavirus Disease 2019, or COVID-19) in their facilities. In general, the document uses terminology referring to correctional environments but can also be applied to civil and pre-trial detention settings.

This guidance will not necessarily address every possible custodial setting and may not use legal terminology specific to individual agencies' authorities or processes.

The guidance may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions. Facilities should contact CDC or their state, local, territorial, and/or tribal public health department if they need assistance in applying these principles or addressing topics that are not specifically covered in this guidance.

Guidance Overview

Encourage all persons in the facility to take the following actions to protect themselves and others from COVID-19. Post signs throughout the facility and communicate this information verbally on a regular basis. Sample signage and other communications materials are available on the CDC website. Ensure that materials can be understood by non-English speakers and those with low literacy and make necessary accommodations for those with cognitive or intellectual disabilities and those who are deaf, blind, or have low-vision.

- **For all:**
    - Practice good cough and sneeze etiquette: Cover your mouth and nose with your elbow (or ideally with a tissue) rather than with your hand when you cough or sneeze and throw all tissues in the trash immediately after use.
    - Practice good hand hygiene: Regularly wash your hands with soap and water for at least 20 seconds, especially after coughing, sneezing, or blowing your nose; after using the bathroom; before eating; before and after preparing food; before taking medication; and after touching garbage.
    - Wear masks, unless PPE is indicated.
    - Avoid touching your eyes, nose, or mouth without cleaning your hands
    - Avoid sharing eating utensils, dishes, and cups.
    - Avoid non-essential physical contact.
- **For incarcerated/detained persons:**
    - the importance of reporting symptoms to staff
    - Social distancing and its importance for preventing COVID-19
    - Purpose of quarantine and medical isolation
- **For staff:**
    - stay at home when sick
    - If symptoms develop while on duty, leave the facility as soon as possible and follow CDC-recommended steps for persons who are ill with COVID-19 symptoms including self-isolating at home, contacting a healthcare provider as soon as possible to determine whether evaluation or testing is needed, and contacting a supervisor.

Operations, Supplies, and PPE Preparations

Ensure that sufficient stocks of hygiene supplies, cleaning supplies, PPE, and medical supplies (consistent with the healthcare capabilities of the facility) are on hand and available and have a plan in place to restock as needed.

- **Standard** medical supplies for daily clinic needs
- Tissues
- Liquid or foam soap when possible. If bar soap must be used, ensure that it does not irritate the skin and thereby discourage frequent hand washing. Ensure a sufficient supply of soap for each individual.

- Hand drying supplies, such as paper towels or hand dryers
- Alcohol-based hand sanitizer containing at least 60% alcohol (where permissible based on security restrictions)
- Cleaning supplies, including EPA-registered disinfectants effective against SARS-CoV-2, the virus that causes COVID-19
- Recommended PPE (surgical masks, N95 respirators, eye protection, disposable medical gloves, and disposable gowns/one-piece coveralls). See PPE section and Table 1 for more detailed information, including recommendations for extending the life of all PPE categories in the event of shortages, and when surgical masks are acceptable alternatives to N95s. Visit CDC's website for a calculator to help determine rate of PPE usage.
- Cloth face masks for source control
- SARS-CoV-2 specimen collection and testing supplies

Make contingency plans for possible PPE shortages during the COVID-19 pandemic, particularly for non-healthcare workers.

Consider relaxing restrictions on allowing alcohol-based hand sanitizer in the secure setting, where security concerns allow. If soap and water are not available, CDC recommends cleaning hands with an alcohol-based hand sanitizer that contains at least 60% alcohol. Consider allowing staff to carry individual-sized bottles for their personal hand hygiene while on duty, and place dispensers at facility entrances/exits and in PPE donning/doffing stations.

Provide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing. Provide liquid or foam soap where possible. If bar soap must be used, ensure that it does not irritate the skin and thereby discourage frequent hand washing, and ensure that individuals do not share bars of soap.

- If not already in place, employers operating within the facility should establish a respiratory protection program as appropriate, to ensure that staff and incarcerated/detained persons are "tested for any respiratory protection they will need within the scope of their responsibilities.

Ensure that staff and incarcerated/detained persons are trained to correctly don, doff, and dispose of PPE that they will need to use within the scope of their responsibilities.

Prepare to set up designated PPE donning and doffing areas outside all spaces where PPE will be used. These spaces should include:

- A dedicated trash can for disposal of used PPE
- A hand washing station or access to alcohol-based hand sanitizer - A poster demonstrating correct PPE donning and doffing procedures

Hygiene

Encourage all staff and incarcerated/detained persons to wear a cloth face mask as much as safely possible, to prevent transmission of SARS-CoV-2 through respiratory droplets that are created when a person talks, coughs, or sneezes ("source control").

- Provide masks at no cost to incarcerated/detained individuals and launder them routinely.
- Clearly explain the purpose of masks and when their use may be contraindicated. Because many individuals with COVID-19 do not have symptoms, it is important for everyone to wear masks in order to protect each other: "My mask protects you, your mask protects me."
- Ensure staff know that cloth masks should not be used as a substitute for surgical masks or N95 respirators that may be required based on an individual's scope of duties. Cloth masks are not PPE but are worn to protect others in the surrounding area from respiratory droplets generated by the wearer.
- Surgical masks may also be used as source control but should be conserved for situations requiring PPE.

Reinforce healthy hygiene practices and provide and continually restock hygiene supplies throughout the facility, including in bathrooms, food preparation and dining areas, intake areas, visitor entries and exits, visitation rooms and waiting rooms, common areas, medical, and staff-restricted areas.

Provide incarcerated/detained persons and staff no-cost access to:

- Soap—provide liquid or foam soap where possible.
- Tissues and (where possible) no-touch trash receptacles for disposal
- Face masks

Provide alcohol-based hand sanitizer with at least 60% alcohol where permissible based on security restrictions. Consider allowing staff to carry individual-sized bottles to maintain hand hygiene.

Communicate that sharing drugs and drug preparation equipment can spread SARS-CoV-2 due to potential contamination of shared items and close contact between individuals.

Prevention Practices for Incarcerated/Detained Persons

Provide cloth face masks (unless contraindicated) and perform pre-intake symptom screening and temperature checks for all new entrants in order to identify and immediately place individuals with symptoms under medical isolation. Screening should take place in an outdoor space prior to entry, in the sally port, or at the point of entry into the facility immediately upon entry, before beginning the intake process.

- **If an individual has symptoms of COVID-19:**
    - Require the individual to wear a mask (as much as possible, use cloth masks in order to reserve surgical masks for situations requiring PPE). Anyone who has trouble breathing, or

is unconscious, incapacitated or otherwise unable to remove the mask without assistance should not wear a mask.

- Ensure that staff who have direct contact with the symptomatic individual wear recommended PPE.
- Place the individual under medical isolation and refer to healthcare staff for further evaluation.
- Facilities without onsite healthcare staff should contact their state, local, tribal, and/or territorial health department to coordinate effective medical isolation and necessary medical care. See Transport section and coordinate with the receiving facility.

- **If an individual is an asymptomatic close contact of someone with COVID-19:**
  - Quarantine the individual and monitor for symptoms at least once per day for 14 days.
  - The best way to protect incarcerated/detained persons, staff, and visitors is to quarantine for 14 days. Check your local health department's website for information about options in your area to possibly shorten this quarantine period.
  - Facilities without onsite healthcare staff should contact their state, local, tribal, and/or territorial health department to coordinate effective quarantine and necessary medical care. See Transport section and coordinate with the receiving facility.

Consider strategies for testing asymptomatic incarcerated/detained persons without known SARS-CoV-2 exposure for early identification of SARS-CoV-2 in the facility.

Implement social distancing strategies to increase the physical space between incarcerated/detained persons (ideally 6 feet between all individuals, regardless of symptoms), and to minimize mixing of individuals from different housing units. Strategies will need to be tailored to the individual space in the facility and the needs of the population and staff. Not all strategies will be feasible in all facilities. Example strategies with varying levels of intensity include:

- **Common areas:**
  - Enforce increased space between individuals in holding cells as well as in lines and waiting areas such as intake (e.g., remove every other chair in a waiting area).
- **Recreation:**
  - Choose recreation spaces where individuals can spread out
  - Stagger time in recreation spaces (clean and disinfect between groups).
  - Restrict recreation space usage to a single housing unit per space (where feasible).
- **Meals:**
  - Stagger meals in the dining hall (one housing unit at a time; clean and disinfect between groups).
  - Rearrange seating in the dining hall so that there is more space between individuals (e.g., remove every other chair and use only one side of the table).
  - Provide meals inside housing units or cells.
- **Group activities:**

    - Limit the size of group activities.
    - Increase space between individuals during group activities.
    - Suspend group programs where participants are likely to be in closer contact than they are in their housing environment.
    - Consider alternatives to existing group activities, in outdoor areas or other areas where individuals can spread out.
- **Housing**:
    - If space allows, reassign bunks to provide more space between individuals, ideally 6 feet or more in all directions. (Ensure that bunks are cleaned thoroughly if assigned to a new occupant.)
    - Arrange bunks so that individuals sleep head to foot to increase the distance between their faces.
    - Minimize the number of individuals housed in the same room as much as possible.
    - Rearrange scheduled movements to minimize mixing of individuals from different housing areas.

Provide up-to-date information about COVID-19 to incarcerated/detained persons on a regular basis. As much as possible, provide this information in person and allow opportunities for incarcerated/detained individuals to ask questions (e.g., town hall format if social distancing is feasible, or informal peer-to-peer education). Updates should address:

- Symptoms of COVID-19 and its health risks
- Reminders to report COVID-19 symptoms to staff at the first sign of illness
- Address concerns related to reporting symptoms (e.g., being sent to medical isolation), explain the need to report symptoms immediately to protect everyone, and explain the differences between medical isolation and solitary confinement.
- Reminders to use masks as much as possible
- Changes to the daily routine and how they can contribute to risk reduction

Prevention Practices for Staff

When feasible and consistent with security priorities, encourage staff to maintain a distance of 6 feet or more from an individual with COVID-19 symptoms while interviewing, escorting, or interacting in other ways, and to wear recommended PPE if closer contact is necessary.

Ask staff to keep interactions with individuals with COVID-19 symptoms as brief as possible.

Remind staff to stay at home if they are sick. Ensure staff are aware that they will not be able to enter the facility if they have symptoms of COVID-19, and that they will be expected to leave the facility as soon as possible if they develop symptoms while on duty.

Consider strategies for testing asymptomatic staff without known SARS-CoV-2 exposure for early identification of SARS-CoV-2 in the facility.

Perform verbal screening and temperature checks for all staff daily on entry. See Screening section below for wording of screening questions and a recommended procedure to safely perform temperature checks.

- In very small facilities with only a few staff, consider self-monitoring or virtual monitoring (e.g., reporting to a central authority via phone).
- Send staff home who do not clear the screening process and advise them to follow CDC-recommended steps for persons who are ill with COVID-19 symptoms.

Provide staff with up-to-date information about COVID-19 and about facility policies on a regular basis, including:

- Symptoms of COVID-19 and its health risks
- Employers' sick leave policy

If staff develop a fever or other symptoms of COVID-19 while at work, they should immediately put on a mask (if not already wearing one), inform their supervisor, leave the facility, and follow CDC-recommended steps for persons who are ill with COVID19 symptoms.

Staff identified as close contacts of someone with COVID-19 should self-quarantine at home for 14 days, unless a shortage of critical staff precludes quarantine.

To ensure continuity of operations, critical infrastructure workers (including corrections officers, law enforcement officers, and healthcare staff) may be permitted to continue work following potential exposure to SARS-CoV-2 , provided that they remain asymptomatic and additional precautions are implemented to protect them and others.

- **Screening:** The facility should ensure that temperature and symptom screening takes place daily before the staff member enters the facility.
- **Regular Monitoring:** The staff member should self-monitor under the supervision of their employer's occupational health program. If symptoms develop, they should follow CDC guidance on isolation with COVID-19 symptoms.
- **Wear a Mask:** The staff member should wear a mask (unless contraindicated) at all times while in the workplace for 14 days after the last exposure (if not already wearing one due to universal use of masks).
- **Social Distance:** The staff member should maintain 6 feet between themselves and others and practice social distancing as work duties permit.
- **Disinfect and Clean Workspaces**: The facility should continue enhanced cleaning and disinfecting practices in all areas including offices, bathrooms, common areas, and shared equipment.

Staff with confirmed or suspected COVID-19 should inform workplace and personal contacts immediately. These staff should be required to meet CDC criteria for ending home isolation before returning to work.

Attachment C – CDC Guidance