

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

ANTHONY SWAIN, et al., individually and
on behalf of all others similarly situated,

Plaintiffs,

Case No.: 1:20-cv-21457-KMW

v.

DANIEL JUNIOR, in his official capacity as
Director of the Miami-Dade Corrections and
Rehabilitation Department, et al.,

Defendants.

**PLAINTIFFS' REPLY IN SUPPORT OF EMERGENCY MOTION TO RELEASE
PLAINTIFF ANTHONY SWAIN ON BAIL PENDING REVIEW
OF THE CLASS ACTION HABEAS PETITION**

In their opposition brief to the emergency motion, ECF No. 118, Defendants mischaracterize various facts and misconstrue the relevant legal standards. In light of the urgency of Plaintiff Anthony Swain's request for release on bail given his active diagnosis of COVID-19, his unique medical vulnerabilities, and the new evidence of extraordinary circumstances, Plaintiffs provide the following abbreviated reply to address these misstatements.¹

First, Defendants argue that this Court has already denied Mr. Swain's request for release and that his latest supplemental declaration "offers no basis" for the Court to revisit its prior ruling. ECF No. 118 at 1. Not so. In the Court's order on Plaintiffs' motion for preliminary injunction, it did not find a likelihood of success on the merits of the 28 U.S.C. § 2241 habeas claim *on a class-wide basis* for the medically vulnerable — but it noted the claim's continued "viability" and observed that evolving circumstances may "necessitate revisiting this determination." ECF No. 100 at 48-49 & n.24. The emergency motion asks that Mr. Swain be

¹ Defendants correctly highlighted in their opposition brief a misstatement made by Plaintiffs' counsel: that Mr. Swain had "never been arrested prior to [his current] charges." ECF No. 118 at 2 (quoting ECF No. 116 at 5). Plaintiffs' counsel regrets the error. What this statement was intended to convey was the understanding that Mr. Swain has never been *convicted* of a crime prior to his current charges.

considered on an individual basis while the Court's ultimate decision on the class action habeas petition is pending.

Defendants also ignore the presence of new, compelling evidence about Defendants' deliberate indifference at Metro West that was not available when the Court addressed the motion for preliminary injunction (including the death of Mr. Hobbs, a detainee who experienced severe COVID-19 symptoms before his passing, unrebutted testimony from multiple declarants about the medical neglect experienced by Mr. Hobbs in his last days and hours, the inadequate care provided to Mr. Swain when he experienced COVID-19 related symptoms, his current medical concerns, and his active COVID-19 diagnosis) that provides a glimpse of the desperate situation that Mr. Swain now confronts. These are precisely the "evolving circumstances" that merit the Court making a determination on an individual basis for Mr. Swain.

The attached declaration of another detainee who was at Metro West further corroborates the sworn testimony already provided by Plaintiffs to the Court.² Mr. King, who was at one point in the same cell as Charles Hobbs, joins the chorus of testimony that people who test positive at Metro West are transferred to and confined together in coronavirus cells. King Decl. ¶ 15, Ex. 1. Mr. King's sworn statements also lend additional support to the accounts of medical neglect shared by Mr. Swain and cellmates of Mr. Hobbs. When Mr. Hobbs passed out and his "face smashed onto the table," the medical emergency unit never responded when called—officers had to rely on another detainee to "wheel him down" to the clinic. King Decl. ¶ 10. And despite all his serious symptoms prior to the day he passed out, including a high fever, "bad[]" cough, congested nose and "seem[ingly]" "failing" respiratory system, Mr. Hobbs had not yet been tested for the virus or seen by a doctor. *Id.* ¶¶ 9-10, 13.

During that same time, Mr. King was experiencing serious symptoms himself: he had fevers between 102 and 105 degrees for multiple days, experienced headaches, diarrhea, vomiting, and dizzy spells, lost his sense of taste, and lost the ability to eat or drink. *Id.* ¶¶ 6-7. At one point, he became "so dehydrated" that he passed out in the shower. *Id.* ¶ 7. When the

² Defendants claim, without citation or supporting evidence, that the facts contained in Mr. Swain's declaration "are overwhelmingly false, particularly his inaccurate claims that Defendants are deliberately indifferent and purportedly failed to give him prompt medical treatment." ECF No. 118 at 2-3. The sworn testimony of detained declarants attached to the emergency motion to release Plaintiff Bayardo Cruz on bail, ECF No. 109, as well as further evidence attached to this reply, provide a compelling corroboration of Mr. Swain's general assertion of deliberate indifference and inadequate medical care.

nurses took his temperature and read his 100+ fevers to him, they gave him Tylenol, then waited fifteen minutes before taking his temperature again. *Id.* ¶ 6. They “repeat[ed] this process over and over again” until his temperature fell below 99 degrees, which was the temperature they then wrote down in their notes. *Id.* Mr. King was taken to the clinic after he passed out, but they provided no treatment besides Ensure (a protein drink) and Gatorade, and he does not recall seeing a doctor. *Id.* ¶¶ 7-8. Mr. King “felt like [he] was being left to die.” *Id.* ¶ 8. He was eventually moved to a coronavirus cell in early May; by that time, he was “going in and out of consciousness.” *Id.* ¶ 15. He continued to exist in this state for a time, where he was “black[ing] out,” “barely conscious” and “not responsive,” and when his fever spiked to 108 degrees he was ultimately transferred out of Metro West. *Id.* ¶¶ 17-18. He is now at Turner Guilford Knight Correctional Center, *id.* ¶ 20, where Defendants say Mr. Swain is currently being confined, ECF No. 118 at 4.

The tragic experience of Mr. King, like the recent experience of Mr. Swain and the fatal experience of Mr. Hobbs, is new evidence of extraordinary circumstances in this case that merit Mr. Swain’s individual release on bail. *See also* ECF No. 109 at 4-5 (summarizing new evidence); ECF No. 116 at 2-5, 6-8 (summarizing new evidence). Defendants provide no evidence contradicting any of the sworn evidence submitted by Plaintiffs, all of which corroborates a multitude of declarations alleging similar medical neglect for months.

Defendants also insist, without evidentiary support, that Mr. Swain was not hospitalized for COVID-related symptoms — but they acknowledge that he experienced shortness of breath, tachycardia, and chest pain. ECF No. 118 at 3. It is undisputed that the Centers for Disease Control and Prevention identifies both “[t]rouble breathing” and “[p]ersistent pain or pressure in the chest” as “emergency warning signs” for COVID-19 that require “emergency medical care.”³ Moreover, Defendants also acknowledge that Mr. Swain did in fact test positive for COVID-19. ECF No. 118 at 3. Defendants attempt to minimize Mr. Swain’s condition by asserting that he did not require respiratory support or oxygen supplementation when he was hospitalized, ECF No. 118 at 3, but these exigent and severe interventions are required only for the most advanced symptoms—that Mr. Swain thankfully did not require such interventions in the last few days has

³ *See* ECF No. 116 at 3 (identifying shortness of breath as a symptom of COVID-19); “Symptoms of Coronavirus,” Centers for Disease Control and Prevention (last visited May 3, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.

no bearing on whether his condition will worsen as the disease progresses, given his active diagnosis and his pre-existing conditions.

Moreover, Defendants provide no basis for insisting that Mr. Swain rely on a state court process that he has already engaged in and that has failed to either schedule a hearing or produce a ruling in the month that has passed since he filed his emergency motion to reduce bond. ECF No. 95-2. Defendants attempt to place the blame at the feet of Mr. Swain or his attorney, ECF No. 118 at 4-5, but the undisputed fact remains that the state court has *not* set a hearing or ruled on a motion that has now, in the midst of an escalating pandemic, been pending for a full month (and which was followed by a supplement asking the court again to take action). Defendants instead rely on Judge Sayfie's rebutted testimony that state court criminal judges are hearing motions for release en masse "on an expedited and daily basis," ECF No. 118 at 5, but this generalized testimony is belied by Mr. Swain's actual experience of a month-long delay — and it is Mr. Swain's individual request for bail that is before the Court.

Defendants also argue that the court's unreasonable delay in resolving Mr. Swain's case "does not render the entire process unavailable," especially given the release of others in the interim time period, *id.* — but Defendants confuse the relevant standard. Mr. Swain need only demonstrate that the state court remedy is unavailable to him, not to everyone detained at Metro West. The shifting goal posts in Defendants' arguments are notable: during the preliminary injunction hearing, Defendants argued that Mr. Swain had never filed a bail reconsideration motion and, if he had, it would be heard within days; Mr. Swain then filed a copy of the April 15 motion with the Court, demonstrating not only that he had filed a motion, but that it had not even been scheduled to be heard in the thirteen days since filing, ECF No. 95, 95-2; now, they argue it is Mr. Swain's fault that the very process they claimed to be expedient has inexplicably failed him, ECF No. 118 at 4-5. The copy of the motion that is already in the record demonstrates that he *has* presented the relevant constitutional claims to the state court, ECF No. 95-2, contrary to Defendants' inaccurate assertion, ECF No. 119 at 5.

The delay that the state court process has already demonstrated, especially given Mr. Swain's medical vulnerability as well as his recent diagnosis of COVID-19, amounts to futility and prejudice that excuses an obligation to exhaust. *See, e.g., Martinez-Brooks et al. v. Carvajal*, No. 3:20-cv-00569-MPS (D. Conn. filed May 12, 2020), Ruling on Mot. for Temporary Restraining Order and Mot. to Dismiss, ECF No. 30, at 39-40 (excusing plaintiffs from

exhaustion given that “the rapid spread of COVID-19 at [the correctional facility],” the delays in the Warden’s determination of compassionate release and home confinement requests, and the prison’s two-layered review of the Warden’s decision provided “sufficient facts to support a finding” of undue prejudice from delay); *see also Granberry v. Greer*, 481 U.S. 129, 134 (1987) (exhaustion is excused “in rare cases where exceptional circumstances of peculiar urgency are shown to exist”). And as noted in the emergency motion, Judge Sayfie has testified that Mr. Swain’s only recourse would be the extraordinary writ of mandamus, and longstanding precedent states that a person is not required to pursue extraordinary writs to exhaust. *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

Finally, Defendants cite no case suggesting there is a jurisdictional bar to hearing an individual request for temporary release on bail relating to a habeas claim while Defendants appeal the preliminary injunction concerning a separate § 1983 claim, let alone any case barring such emergency consideration based on new information.

Accordingly, in light of the new evidence of extraordinary circumstances and Mr. Swain’s unique medical vulnerability, Plaintiffs request that he be released on bail pending the Court’s ultimate decision on the class action habeas petition.

Dated: May 15, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 15, 2020 a true and correct copy of this document was electronically filed with the Clerk of the Court U.S. District Court, Southern District of Florida, using the CM/ECF system which will send notification of such filing to counsel of record.

/s/ Tiffany Yang
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