UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

ANTHONY SWAIN, et al., individually and on behalf of all others similarly situated,
Plaintiffs,
v.
DANIEL JUNIOR, in his official capacity as Director of the Miami-Dade Corrections and Rehabilitation Department, et al.,
Defendants.
_____/

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CONVENING OF THREE-JUDGE PANEL (ECF 85)

One important fact in this case is clear: Metro West currently detains too many people to allow medically necessary social distancing. And without such social distancing, the record evidence establishes that COVID-19 will continue to infect the human beings detained at Metro West. Indeed, the Defendants' deliberate indifference to the medical needs of prisoners afflicted with the disease has already claimed one life. In considering this motion, it is appropriate for this Court to make the factual findings related to deliberate indifference that it deferred in its preliminary injunction opinion and to conclude that the prerequisites for convening a three-judge panel under the PLRA are met. Only that tribunal can provide the relief that is necessary to save lives, if Plaintiffs prove their case to that tribunal by "clear and convincing" evidence. Defendants raise a flurry of arguments in opposition to this clear and common sense proposition, but none are persuasive.

I. The Court Has Jurisdiction to Hear This Case.

Defendants' threshold jurisdictional argument—that this Court cannot "take *any* action that would advance the injunctive relief that Plaintiffs seek," ECF 115 at 3 (emphasis added)—misunderstands the legal precedent on interlocutory appeals. Neither an appeal of, nor a stay of, a preliminary injunction divest this Court of jurisdiction over deciding other motions related to the merits of this case.

"[A]n interlocutory appeal does not completely divest the district court of jurisdiction." *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1309 (11th Cir. 2003); 16A Wright & Miller, Federal Practice and Procedure § 3949.1 (4th ed.) ("An interlocutory appeal

ordinarily suspends the power of the district court to modify the order subject to appeal, but does not oust district-court jurisdiction to continue with proceedings that do not threaten the orderly disposition of the interlocutory appeal."); 11A Wright & Miller, Federal Practice and Procedure § 2962 (similar). Rather, an appeal of a district court's preliminary injunction *only* divests the district court of jurisdiction to enforce or alter that preliminary injunction. *See* Fed. R. Civ. P. 62(c); *Resolution Trust Corp. v. Smith*, 53 F.3d 72, 76 (5th Cir. 1995); *see also Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171, 1174 (6th Cir. 1995) (interlocutory appeal from the district court's preliminarily injunction order did not divest the district court of jurisdiction to continue with the merits of litigation while the appeal from its interlocutory ruling was pending); *Janousek v. Doyle*, 313 F.2d 916, 921 (8th Cir. 1963) (district court had jurisdiction to dismiss an action while an appeal was pending from the denial of plaintiff's motion for a temporary injunction). Indeed, it is commonplace for district courts to render final merits decisions while an appeal of a preliminary injunction is pending. *See, e.g.*, *Heron Dev. Corp. v. Vacation Tours, Inc.*, 763 F. App'x 875, 876 (11th Cir. 2019) (recognizing district court's ability to allow amended complaint and rule on motion to dismiss while appeal of preliminary injunction was pending).

Likewise, an order staying a preliminary injunction pending appeal does not divest a district court of authority to rule on other matters in the case. *See* 11A Wright & Miller, Federal Practice and Procedure § 2962 (recognizing that only a complete stay of lower court proceedings prevents a district court from ruling during pendency of appeal); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Stidham*, 658 F.2d 1098, 1100 & n.4 (5th Cir. Unit B Oct. 15, 1981) (recognizing district court's power to rule on permanent injunction even while preliminary injunction was stayed pending appeal).[1] Nothing short of a complete stay of proceedings divests a district court to decide other motions, particularly in a fast-moving case like this, where the relevant facts are constantly evolving. Motions are thus beyond the district court's jurisdiction only if a ruling on the motion would directly "alter[] the status of the case as it rests before the Court of Appeals." *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990); *see also Green Leaf Nursery*, 341 F.3d at 1309 (similar). This is a high bar, and the Eleventh Circuit has

[1] Federal Rule of Civil Procedure 62(g) recognizes that appellate courts possess both the right to "stay proceedings . . . while an appeal is pending" and the right to, alternatively, "suspend, modify, restore, or grant an injunction" while the appeal is pending. Here, Defendants acknowledge that they only requested, and were only granted, a stay of the injunction rather than a stay of all litigation in this Court. *See* ECF 115 at 3.

only found a court divested of jurisdiction to rule on a separate motion where that decision would fundamentally change the question pending before the Court of Appeals. *See Green Leaf Nursery*, 341 F.3d at 1309 (holding that district court could not grant leave to amend complaint to delete claims that were the subject of pending appeal but could rule on other motions not directly related to appeal); *Doe, 1-13 ex rel. Doe Sr. 1-13 v. Bush*, 261 F.3d 1037, 1064 (11th Cir. 2001) (holding that district court lacked jurisdiction to enter class certification order when issue on appeal was whether court exceeded its authority by granting relief without certifying a class). And neither an appeal nor a stay pending appeal "prevent[s] applicants from seeking new relief in the District Court, as appropriate, based on changed circumstances." *Valentine v. Collier*, 2020 WL 2497541, at *3 (U.S. May 14, 2020) (Sotomayor, J., statement respecting the denial of application to vacate the stay). Although Defendants repeatedly assert that this Court lacks jurisdiction to decide any issues "related" to the issue on appeal, this novel suggestion has no basis in case law. To the contrary, it is only when the district court would alter the *very judgment* on appeal or alter the case in a way that would prevent the Court of Appeals from ruling on the question presented that a court exceeds its jurisdiction.[2]

No such concerns are implicated here. The Plaintiffs' motion to convene a three-judge panel does not in any way affect the Court's preliminary injunction opinion, which is what is currently before the Eleventh Circuit. Nor would this Court's ruling be akin to enforcing the preliminary injunction. Defendants do not disagree: They do not argue that this Court's ruling would in some way undermine or alter the case before the Eleventh Circuit. Instead, they argue the exact opposite—that the Eleventh Circuit's decision on deliberate indifference might inform any decision this Court makes because this Court must find deliberate indifference. ECF 115 at 3-4. But that is not the standard. And given the emergency nature of this case and its rapidly changing facts, this Court should decide the freestanding motions before it because the necessity of taking action during the pandemic to reduce the jail population is measured in days, not months. The practical reality is this: the record in this case, including the shared opinion of the two independent infectious disease experts appointed by this Court, establishes that the release of enough people to

[2] Based on Defendants' own logic, this Court would be without jurisdiction to rule on their motion to dismiss because this Court's ruling would decide questions "related to" Plaintiffs' claims and this Court's legal rulings in its preliminary injunction order. But that is incorrect: no part of the merits of this case is before the Eleventh Circuit. The only subject of the appeal is a preliminary injunction order that is legally distinct from any merits determination this Court makes.

allow for adequate social distancing is the *only* way to reduce the risk of serious illness and death to prisoners, guards, and the general public. An untold number of additional Metro West inmates and staff will suffer the serious, often permanent, effects of COVID-19 if the process for convening the three-judge panel is delayed another month.

What's more, the Eleventh Circuit's stay order does not address, let alone undermine, the legal standard to prove a deliberate-indifference violation *for purposes of a prisoner release order*. This is not an oversight: The Supreme Court has made clear that a prisoner release order is appropriate where a prison's crowding makes "the provision of [medical] care difficult or impossible to achieve," even if the reasons for that crowding were beyond the control of defendants. *Brown v. Plata*, 563 U.S. 493, 502 (2011). In *Brown*, the Court recognized that the reasons for the prison's crowding included the state legislature's indefinite delay of funding to construct new prisons, the state's lack of resources to transfer a sufficient number of prisoners to other facilities, and unwillingness of medical professionals to work at the dangerous and overcrowded prison. *Id.* at 527-29. Nevertheless, it held that plaintiffs had proven an Eighth Amendment violation and were entitled to a prisoner release order. *Id.* at 502, 545; *see also id.* at 567 (Alito, J., dissenting) (invoking deliberate indifference standard). The Eleventh Circuit could not hold that the deliberate indifference standard was not met in this case *for purposes of a prisoner release order* without running afoul of *Brown*. At the very least, the stay order cannot be read to reach such a conclusion without even citing or discussing *Brown*'s contrary holding. The stay panel merely concluded that it was improper for this Court, at least without resolving the factual disputes concerning the actual conditions, to order Defendant Junior to exercise his discretion differently over matters that he does control by faulting him for things beyond his control.

But there is a difference between faulting a municipal actor for "deliberate indifference" to things in his discretion and holding that following state law to enforce state court orders in a manner that creates an intolerable risk of illness and death renders a *state law actor* "deliberately indifferent" for purposes of population reduction. For the purposes of the remedy of *release*, Defendant Junior is a classic *Ex Parte Young* defendant acting as a state actor without discretion to enforce state laws, *see* Doc. 85 at 37-41; *McNeil v. Community Probation Servs., Inc.*, 945 F.3d 991, 996 (6th Cir. 2019); *Moore v. Urquhart*, 899 F.3d 1094, 1103 (9th Cir. 2018), *cert. denied sub nom. Johanknecht v. Moore*, No. 18-1056, 2019 WL 569983 (U.S. May 20, 2019), and a quintessential feature of *Ex Parte Young* defendants is that *they may not have discretion* under

state law to act differently. The facts this Court has already found regarding the serious risk of COVID-19, the impossibility of social distancing, and that social distancing is the "cornerstone" of preventing infection of detainees at Metro West[3] compel the convening of a three-judge panel.

In any event, even if the Court's previous factual findings are insufficient to establish deliberate indifference as to the need to consider a prisoner release order, there is ample evidence for this Court to make the factual findings about Defendants' deliberate indifference that it declined to make when granting the motion for preliminary injunction. The Eleventh Circuit credited Defendants' affidavits regarding the policies they purportedly adopted because this Court "accepted as true that the defendants implemented these measures . . . and did not resolve any factual disputes in favor of the plaintiffs." Stay Order at 3, *Swain v. Junior*, No. 20-11622-C (11th Cir. May 5, 2020). But as this Court recognized in its opinion, Plaintiffs have adduced substantial evidence in the form of interlocking and corroborating declarations that Defendants have consistently, knowingly failed to *actually* implement its policies in any meaningful way. *See* ECF 100 at 12-19. And Plaintiffs have since provided overwhelming new evidence showing severe medical neglect of COVID-positive inmates in multiple housing units by numerous guards and medical staff, ultimately leading to the death of a man detained at Metro West. *See* ECF 109-1 (Arrington Decl.) ¶¶ 5-14; ECF 109-2 (Garcia Decl.) ¶¶ 7-16; ECF 122-1 (King Decl.); Ex. 1 (Marinho Decl.) ¶¶ 22-29; Ex. 2 (Brown Decl.) ¶¶ 12-19; Ex. 3 (Benn Decl.) ¶¶ 10-16.[4]. This evidence demonstrates institutional behavior that, if credited, unquestionably constitutes deliberate indifference, and Defendants have not challenged it. And that deliberate indifference urgently exacerbates the risk of serious illness. When resolving the factual background for *this* motion, the Court should therefore find as a factual matter that Defendants have exhibited subjective deliberate indifference. Such a finding is not "related" to the Court's preliminary injunction order, which was stayed in part for allegedly "collaps[ing] the subjective and objective components" of deliberate

[3] ECF 100, at 7-8, 12-16, 34-35, 37-41.

[4] One declarant with a fever was given nothing more than a Tylenol before being returned to the general population—days later, when he was finally tested for COVID-19, he tested positive. Marinho Decl. ¶¶ 6-12; *see also* Brown Decl. ¶¶ 8-10. While in the COVID-positive cell, he was unable to socially distance and often had no soap. Marinho Decl. ¶¶ 16-18. And although he has tested positive for COVID-19 and experienced serious symptoms, he has not been seen by a doctor or received any medical treatment beyond temperature checks and blood pressure tests. *Id.* ¶ 20; *see also* Benn Decl. ¶¶ 4-7.

indifference by *not* finding as a factual matter that Defendants had exhibited subjective deliberate indifference.

II. A Three-Judge Panel Is Warranted.

There are only two findings that a district court must make to begin the process of convening a three-judge panel under the PLRA. First, the court must find that it has "previously entered an order for less intrusive relief that has failed to remedy the deprivation" of a federal right. *Brown*, 563 U.S. at 514 (quoting 18 U.S.C. § 3626(a)(3)(A)(i)). Second, the court must find that the defendants have had "a reasonable amount of time to comply with the previous court orders." *Id.* (quoting 18 U.S.C. § 3626(a)(3)(A)(ii)). Both criteria are satisfied here. This Court entered a temporary restraining order on April 7, 2020 that was less intrusive than a release order. *See* ECF 25. For the reasons stated in this Court's order granting a preliminary injunction, along with Plaintiffs' extensive evidence, that order has failed to remedy the unconstitutional exposure to a serious risk of infection and death. And because Defendant Junior himself concedes that, as a state actor enforcing court orders, he cannot depopulate the jail without a court order no matter how much time he is given, he has been given a "reasonable" amount of time to comply with that TRO.

A. This Court Need Not Rule on Crowding

Defendants primarily argue that a three-judge panel is unwarranted because Metro West is operating "below its rated inmate capacity." ECF 115 at 7. According to Defendants, a jail cannot be "overcrowded"[5] if it is operating below its rated capacity. As a preliminary matter, Defendants cite no authority for this proposition, let alone address that the unique facts of an unprecedented viral pandemic might change a facility's safe population threshold.

But *this* Court is not required to decide whether crowding is the primary cause of Plaintiffs' constitutional deprivation. That is a decision a three-judge panel must make, and it is irrelevant to whether this Court should convene such a panel. *See* 18 U.S.C. § 3626(a)(3)(E) (requiring three-judge panel to determine whether "crowding is the primary cause of the violation" alleged by plaintiffs); *Brown*, 563 U.S. at 514 (identifying the two findings the district court must make); *Mays v. Dart*, 2020 WL 1987007, at *32 ("The [district] judge need not consider the likelihood of whether a three-judge court would issue a prisoner release order.").

[5] The word "overcrowded" does not appear in the PLRA. Instead, a three-judge panel may only enter a prisoner release order if it finds that "*crowding* is the primary cause of the violation of a Federal right." 18 U.S.C. § 3626(a)(3)(E)(i) (emphasis added).

Second, even if this Court considered whether Metro West is "crowded," nothing in the PLRA ties the concept of "crowding" to the jail's rated capacity. To the contrary, *Brown* found the PLRA satisfied because there was a severe "shortfall of resources relevant to demand" that created "significant delays in treatment" for mentally ill prisoners. 563 U.S. at 518-19. The Court further concluded that the crowding created "unsafe and unsanitary living conditions," in which "large numbers of prisoners may share just a few toilets and showers," rendering these shared facilities "breeding grounds for disease." *Id.* The Court relied on the testimony of experts that such violations could not be cured without reducing the prison population. *Id.* The Supreme Court reached these conclusions without reference to the approved capacity of the prison. This Court has before it the same type of information considered in *Brown*, including expert testimony and the independent inspection report it ordered, all of which conclude that Metro West cannot be made sufficiently safe unless the jail's population is reduced. *See* ECF 100, at 7-8, 12-16, 34-35, 37-41 (collecting uncontested evidence of crowding at Metro West); ECF 70-1 (inspection report); ECF 80-33 (Greer Decl.); ECF 80-34 (Rottnek Decl.); ECF 80-35 (Franco-Paredes Decl.).[6]

[6] The cases cited by Defendants (ECF 115 at 7-8) are not to the contrary. In *Mays*, the district court explicitly recognized that it need not consider the issue of crowding before deciding whether to convene a three-judge panel. 2020 WL 1987007, at *32. In *Huerta v. Ewing*, the court concluded that it had never entered a previous order, and therefore it did not have the authority to convene a panel. 2018 WL 780509, at *2 (S.D. Ind. Feb. 8, 2018). In *Gilette v. Prosper*, the court concluded that the defendants had not yet had a reasonable time to comply with its previous order because the monitor had reported that they were "starting to make positive strides toward compliance" of a broad remedial order. 2016 WL 912195, at *7 (D.V.I. Mar. 4, 2016). *Rigsby v. Arizona* concerned a plaintiff's failure to submit any evidence showing that the prerequisites for a three-judge panel had been satisfied. 2013 WL 1283778, at *5 (D. Ariz. Mar. 28, 2013). As Defendants' own parenthetical makes clear, *Coleman v. Newsom* is inapt because there, the three-judge panel found that COVID-19 was a new circumstance that warranted consideration before a district court before a three-judge panel could be convened, not that a three-judge panel might not be warranted after consideration in the first instance by the district judge. 2020 WL 1675775, at *7 (E.D. Cal. Apr. 4, 2020). In *Plata v. Newsom*, the district court concluded that the plaintiffs had not proven an Eighth Amendment violation because they agreed at oral argument that if the defendants followed through on their plan to implement a social-distancing plan created by the Receiver, social distancing would be possible at the facility, and any constitutional violation would be cured. Relief was therefore unwarranted. 2020 WL 1908776, at *7, *11 (N.D. Cal. Apr. 17, 2020). However, the court concluded that *if* it had found deliberate indifference, that a three-judge panel would be required because plaintiffs argued "population density must be reduced to alleviate crowding." *Id.* at *10. In *Money v. Pritzker*, the court only interpreted the meaning of a "prisoner release order" under the PLRA and whether the district court had authority to enter such an order, it did not

B. Defendants Have Had Reasonable Time to Comply

Defendants argue that they have not had reasonable time to comply with the temporary restraining order, and that convening a three-judge panel would be premature. But this argument flies in the face of Defendants' briefing—both before this Court and to the Eleventh Circuit—arguing that 1) it has fully complied with, and will voluntarily continue to comply with, all of the terms of the Court's temporary restraining order and preliminary injunction, and 2) Defendants have no authority to reduce the population of Metro West.[7] Given these undisputed facts, Defendants have had reasonable time to comply under the circumstances—there is literally nothing more the Defendants could do to reduce crowding (indeed, that appears to be their legal defense on the merits). Under such circumstances, this Court need not wait around doing nothing while more time passes and more lives are lost. *See Brown*, 563 U.S. at 516 (explaining that a court is not required to institute an "unnecessary period of inaction [that] would delay an eventual remedy and would prolong the courts' involvement" to meet the requirements of 18 U.S.C. § 3626(a)(3)(A)(ii)). Indeed, *Brown* articulated that further orders and more time are not necessary when they are *unlikely* to succeed, to say nothing of a situation like this case where further orders and more time is *guaranteed to fail*. *See Brown*, 563 U.S. at 516 ("[T]he District Courts were not required to wait and see whether their more recent efforts would yield equal disappointment.").

This case is thus fundamentally different from *Mays* and *Gillette*, in which courts found that a reasonable time had not yet passed because the defendants were making significant progress in curing the alleged constitutional violations and were likely to make further progress in doing so. *See Mays*, 2020 WL 1987007, at *34 ("Unlike in *Brown*, however, the ongoing remedial efforts in this case might remedy the ongoing constitutional violation . . . if given adequate time."); *Gillette*, 2016 WL 912195, at *7 (D.V.I. Mar. 4, 2016). But in *Mays*, the court recognized that, absent the possibility that more time would allow defendants to cure the constitutional violation, a matter of days might be a "reasonable amount of time" given the extreme and unprecedented nature of COVID-19:

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suggest whether one might be appropriately entered in that case by a three-judge panel because no predicate relief had been previously ordered. 2020 WL 1830660, at *14 (N.D. Ill. Apr. 10, 2020).

[7] ECF 67 at 13-24, 27; ECF 92-2 ¶ 7; ECF 102 at 2; Mot. to Stay Inj. at 12-13, *Swain v. Junior*, No. 20-11622-C (11th Cir. Apr. 30, 2020). Defendants made similar representations before the Court during its preliminary injunction hearing. The transcript of that hearing has not yet been made available.

> The Court recognizes that determination of what amounts to a "reasonable time" to comply with a court's previous orders may depend on the circumstances, and here the circumstances are extraordinary, involving an infectious virus that can be transmitted quickly from person to person. So here, perhaps, a "reasonable time" may amount to days or a small number of weeks, not years as may be the case in other situations. Undue delays in responding to the coronavirus pandemic may place detained persons' health and lives in imminent danger.

2020 WL 1987007, at *33. That is exactly the set of circumstances presented in this case, and it is thus proper to convene a three-judge panel now.

Defendants similarly suggest in a footnote that a temporary restraining order is not sufficient to serve as a predicate order under the PLRA. *See* ECF 115 at n.4. Defendants cite no authority for this proposition, which is inconsistent with the text of the PLRA, which requires only an "order" without qualification as to what type of order. At least one district court has concluded that a temporary restraining order is a sufficient order to satisfy 18 U.S.C. § 3626. *Mays*, 2020 WL 1987007, at *32-33 ("Because the TRO has not remedied the overall claimed constitutional violation—deficient conditions in the Jail during a pandemic—it satisfied the PLRA's previous order requirement."). This Court should reach the same conclusion based on the plain text of section 3626.

C. Only a Single Previous Order Is Required by the PLRA

Defendants' final argument—that multiple prior orders are required to convene a three-judge panel, ECF 115 at 9—has been explicitly rejected by the Supreme Court. In *Brown*, the Court recognized that 18 U.S.C. § 3626(a)(3)(A)(i) is "satisfied if the court has entered *one* order, and this *single order* has 'failed to remedy' the constitutional violation." 563 U.S. at 514. While a court *may* enter multiple orders, and such orders will often be necessary when "a court attempts to remedy an entrenched constitutional violation through reform of a complex institution," *id.* at 516, the entry of multiple orders is not a prerequisite for a prisoner release order. And where, as here, the plaintiffs do not challenge the complex overarching structure of a state prison system, but rather seek narrow, temporary relief, there is no justification for the Court to enter other forms of less intrusive relief that are guaranteed to fail.

CONCLUSION

For the above-stated reasons, the Court should find that the requirements of 18 U.S.C. § 3626(a)(3)(A) are satisfied and convene a three-judge panel pursuant to 18 U.S.C. § 3626(a)(3)(B), (C) and 28 U.S.C. § 2284.

Dated: May 18, 2020

Respectfully submitted,

/s/ Alexandria Twinem

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of May, 2020 a true and correct copy of the foregoing 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/ Alexandria Twinem
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