IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FAVIAN BUSBY, ET AL.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No.: 2:20-CV-02359-SHL**
	)	
FLOYD BONNER, JR., ET AL.,	)	
	)	
Defendants.	)	

RESPONDENTS-DEFENDANTS' REPLY TO PETITIONERS-PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Respondents-Defendants submit this Reply to Petitioners-Plaintiffs' Response in Opposition to their Motion to Dismiss (ECF No. 35).

LAW & ARGUMENT

I. PETITIONERS SHOULD NOT BE EXCUSED FROM EXHAUSTING STATE LAW REMEDIES.

Petitioners concede that they did not attempt to exhaust state remedies prior to initiating this § 2241 action. However, they argue that they should be excused from this requirement because (1) state law remedies are unavailable in Tennessee and (2) the exhaustion requirement should be waived "in light of the unique threat posed by COVID-19." (ECF No. 35, PageID 526). Said arguments are without merit, and dismissal is appropriate.

a. State law remedies are available under Tennessee Law.

State courts, like federal courts, are obliged to enforce federal law. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). "Comity thus dictates that when a prisoner alleges that his continued confinement…violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *Id.* It is only when state law remedies do not provide the

petitioner the ability to obtain the relief he seeks that state law remedies are considered unavailable. *See*, *e.g.*, *Fazzini v. Ne.Ohio Corr. Ctr.*, 473 F.3d 229, 236 (6th Cir. 2009).

Contrary to Petitioners' assertions that state law remedies are unavailable, Tennessee courts regularly entertain motions from pre-trial detainees seeking release from custody on the basis that their federal constitutional rights, including rights secured by the Fourteenth Amendment, are being violated due to their detention.[1] These examples and numerous other criminal cases reveal that as part of the "standard review process," pre-trial detainees in Tennessee can – and often do – seek relief, including release, due to alleged violations of their constitutional rights during their pre-trial detainment. Nothing prohibits these Petitioners from asserting such a claim in their respective state court proceedings simply because the underlying cause of their alleged rights violation is a pandemic.

Moreover, in response to COVID-19, the Tennessee Supreme Court ordered that as part of this "standard review process," Tennessee courts must specifically consider the effects of COVID-19 in setting or eliminating bond. *See In Re: COVID-19 Pandemic*, ADM2020-00428 (Tenn. March 25, 2020) (ordering all judicial districts to implement plans to reduce the jail population due to the COVID-19 pandemic through "bond reductions *or eliminations*, deferred sentences, and suspended sentences…."). Trial courts are given "very wide latitude" on whether to set bail. *See*

[1] *See e.g.*, *State v. Burgins*, 464 S.W.3d 298, 307-08 (Tenn. 2015) (considering on appeal pursuant to Rule 8(a) of the Tennessee Rules of Criminal Procedure whether a pre-trial detainee's due process rights as secured by the Fourteenth Amendment were violated when her bond was revoked); *State v. Hill*, 2019 Tenn. Crim. App. LEXIS 643, *6 (Tenn. Crim. App. March 21, 2019) (considering on appeal pursuant to Rule 8(a) of the Tennessee Rules of Criminal Procedure whether a pre-trial detainee's due process rights as secured by the Fourteenth Amendment were violated based upon the trial court's order concerning the conditions of the detainee's pre-trial release); *State v. Clouse*, 2001 Tenn. Crim. App. LEXIS 504, *11 (Tenn. Crim. App. July 11, 2001) (considering whether pre-trial detainee's constitutional right to be free from double jeopardy as secured by the Fifth Amendment was being violated); *State v. Clark*, 2010 Tenn. Crim. App. LEXIS 249, *14 (Tenn. Crim. App. March 18, 2010) (considering whether convicted defendant's right to a speedy trial as secured by the Sixth Amendment was violated when trial court denied a motion to dismiss for denial of a speedy trial prior to trial); *State v. Leavy*, 1999 Tenn. Crim. App. LEXIS 1296, *7 (Tenn. Crim. App. Dec. 21, 1999) (considering whether convicted defendants' pre-trial detention was "punitive").

State v. Melson, 638 S.W.2d 342, 358 (Tenn. 1982). Pursuant to the Tennessee Supreme Court's orders, Tennessee judges have and continue to consider a pre-trial detainee's vulnerability to contracting COVID-19, in addition to other statutory factors, in making determinations on whether to reduce bond and/or to release a pre-trial detainee from custody.

Petitioners rely heavily upon *Cameron v. Bouchard*, 2020 U.S. Dist. LEXIS 89083, **36-37 (E.D. Mich. May 21, 2020) to argue they should be excused from exhausting state law remedies. In *Cameron*, the Court found that Michigan did not have adequate state law remedies available for the petitioners to pursue release due to COVID-19 prior to bringing their habeas petition. There, the Court did not excuse exhaustion because there was not a state law remedy that exactly mirrored a federal habeas petition. The Court excused exhaustion because the Court knew of no Michigan law which allowed state law judges to release detainees as part of the "standard review process." The Court explained:

> Defendants identify four instances where Oakland County Circuit Court judges released Jail inmates due to the coronavirus. In two cases, the state court did not identify the court rule or state statute on which it was relying to grant relief. In the remaining two cases, the court cited Michigan Compiled Laws Section 801.59b, which is part of Michigan's County Jail Overcrowding Act. The statute does not set forth a remedy for inmates to pursue. Instead, it grants judicial officers the authority to suspend or reduce a jail sentence or modify bond in response to "a county jail overcrowding state of emergency." *See id*.; Mich. Exec Order 2020-29 (Mar. 29, 2020). To the extent prisoners have obtained relief through this mechanism during the coronavirus pandemic, it is not part of the "standard review process" and is not a remedy through which state courts have "provided relief ... in the past."

Cameron, 2020 U.S. Dist. LEXIS 89083 at *36-37.[2] Here, unlike in *Cameron*, Respondents have

[2] While Petitioners rely on *Cameron* to assert that they need not exhaust state law remedies because they are "unavailable," the Eastern District of Michigan's analysis of remedies available in the state of Michigan has no bearing on whether remedies are available in Tennessee. Furthermore, federal courts in Michigan are divided on whether state law remedies in Michigan are available to obtain release in light of COVID-19. *See Williams v. Rapelje*, 2020 U.S. Dist. LEXIS 84609, *3 (E.D. Mich. May 14, 2020) (dismissing a § 2254 petition seeking release due to COVID-19 for failure to exhaust state law remedies); *Evil v. Whitmer,* 2020 U.S. Dist. LEXIS 70653, *8 (W.D. Mich. April 22, 2020) (dismissing a petition seeking release due to COVID-19 because the petitioner failed to exhaust state law remedies which were available pursuant to Michigan rules allowing for the modification of pretrial custody orders).

demonstrated that (1) Tennessee courts regularly entertain motions for release from pre-trial detainees based upon allegations that their federal constitutional rights are being violated due to their detention, (2) in-person "proceedings necessary to protect constitutional rights of criminal defendants," have never been suspended in Tennessee during the COVID-19 pandemic, and (3) the Tennessee Supreme Court has specifically directed courts to consider the effects of COVID-19 in setting, reducing, and eliminating bonds. Thus, Petitioners possess the means to challenge their confinement in state courts based upon allegations of constitutional rights violations and pursuant to the Tennessee Supreme Court's orders, state courts *must* consider the effects of COVID-19 in deciding whether to detain or release them. Because state law remedies are available, Petitioners cannot be excused from seeking those remedies, and the petition should be dismissed.

b. No "exceptional circumstances" exist.

Petitioners cite *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982), for the proposition that exhaustion may be excused in "exceptional circumstances." Notably, the *Rose* Court provided no guidance on what "exceptional circumstances" would justify waiving the exhaustion requirement. *See Rose*, 455 U.S. at 515 ("[I]t is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only in rare cases where exceptional circumstances of peculiar urgency are shown to exist.").

Though not cited by Petitioners, five years after *Rose*, the Supreme Court clarified when such "exceptional circumstances" exist. *See Granberry v. Greer*, 481 U.S. 129 (1987). In *Granberry*, the Court found an "exceptional circumstance" existed when the state failed to raise the petitioner's failure to exhaust at the district court level. Notably, even there, the Court held that the district court must balance the principles of comity and judicial efficiency to determine whether exhaustion *should be* waived in such a unique circumstance. *Id*. at 134. The Court again

emphasized, "[I]t is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only in rare cases where exceptional circumstances of peculiar urgency are shown to exist."[3] *Id*.

Indeed, intrusion into state proceedings already underway is warranted only in "extraordinary circumstances." *Atkins v. Michigan,* 644 F.2d 543, 546 (6th Cir. 1981). In the prison context, the Supreme Court has emphasized, "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). Here, in determining whether to release a pre-trial detainee due to COVID-19, Tennessee courts consider its effects along with other factors to make an individualized assessment of a detainee's flight risk and danger to society. *See* Tenn. Code Ann. § 40-11-115. Said assessment is conducted by the state court which is familiar with, among other things, the seriousness of the detainee's charges, the detainee's prior criminal record, the detainee's family-ties, and the strength of the prosecution's case. *Id*. Notably, this is exactly the type of assessment Petitioners propose this Court make in determining which, if any, detainees should be released from the Shelby County Jail and if so, upon what terms they can be released.

Unexplainably, Petitioners stress that if this Court does not swiftly remove them from the Shelby County Jail, they will suffer irreparable harm, yet they have not even attempted to obtain the relief they seek from Tennessee state courts. If Petitioners truly believed their unproven assumptions that they will contract COVID-19 and then suffer significant adverse effects as a

[3] Other than the narrow example provided for in *Granberry*, the Supreme Court has provided no other examples of "exceptional circumstances," by which exhaustion should be excused, and other courts have limited their definition of "exceptional circumstances" to only situations when "state remedies are inadequate or fail to afford a full and fair adjudication of federal claims, or when exhaustion in state court would be futile." *See Victor v. Hopkins*, 90 F.3d 276, 279-80 n.2 (8th Cir. 1996); *Doty v. Lund*, 78 F. Supp. 2d 898, 901 (N.D. Iowa 1999).

result, they would have, at minimum, attempted to obtain relief from Tennessee Courts. Notably, had Petitioners filed motions in their state court proceedings seeking an elimination of their bond due to the alleged violation of their constitutional rights, their motions would have likely been heard prior to the Court's hearing on the Petitioners' motion for temporary restraining order, and certainly prior to the briefing deadlines set by the Court since the hearing. In light of the state law remedies available to Petitioners, "exceptional circumstances" do not exist to justify waiving the exhaustion requirement and the principles of federalism, comity, and judicial efficiency require dismissal of Petitioners' petition.

II. PETITIONERS HAVE NOT SUFFERED A CONSTITUTIONAL DEPRIVATION.[4]

In their request for injunctive relief, Petitioners have also inappropriately attempted to carve out a separate claim for unconstitutional "punishment" in addition to seeking relief from alleged unconstitutional "conditions of confinement" at the Jail. Notwithstanding, the Fourteenth Amendment's due process clause protects pretrial detainees from cruel and unusual punishments. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979); *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018) (explaining that the Sixth Circuit has not determined whether the *Kingsley v. Hendrickson*

[4] Petitioners have likewise failed to state a colorable claim for discrimination under the Americans with Disabilities Act ("ADA") or the Rehabilitation Act ("RA"). As a threshold matter, district courts within the Sixth Circuit have recently explained that alleged violations of the ADA are "inappropriate for a habeas corpus case." *Shaholli v. Deangelo-Kipp*, 2020 U.S. Dist. LEXIS 92014, *27 (E.D. Mich. May 27, 2020) (referencing *Meyers v. Hedgpeth*, 2014 U.S. Dist. LEXIS 67198, (N.D. Cal. May 15, 2014) ("The ADA is not a federal constitutional provision or guarantee."); *see also Cometa v. Warden*, 2020 U.S. Dist. LEXIS 33630, *4 (E.D. Ky. Feb. 27, 2020) ("[T]he Court will not address the merits of these [Eighth Amendment and ADA] claims because they are not proper in a habeas petition filed pursuant to 28 U.S.C. § 2241.")). Moreover, "Inmates alleging claims under the ADA and the RA must show prison officials took the challenged actions because of the inmate's alleged disability." *Finfrock v. Mohr*, 2019 U.S. Dist. LEXIS 192024 (N.D. Ohio Nov. 5, 2019) (citing *Clayton v. Michigan Dep't of Corr*., 2017 U.S. App. LEXIS 27251, **5-6 (6th Cir. Aug. 21, 2017) (explaining that "even accepting as true the inmate's allegation that prison officials denied a request to transfer him to a facility with inpatient mental health treatment, he set forth no allegations to suggest that this denial was due to his HIV status.")). Here, Petitioners have failed to allege sufficient facts or provide substantive evidence to establish that Respondents failed to provide Petitioners with any reasonable accommodations – other than immediate release from Jail – or that any specific action was taken against Petitioners because of their proposed disabilities. Accordingly, Petitioners' ADA and RA claims must fail.

decision abrogated the subjective component when evaluating the deliberate indifference claims of pretrial detainees); *Martin v. Warren Cty*., 799 F. App'x 329 (6th Cir. 2020) (determining that a district court did not inappropriately apply the deliberate indifference standard to a pre-trial detainee's failure to provide adequate medical care claim and confirming, "[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."); *Cameron*, 2020 U.S. App. LEXIS 16741 at *22 (Bush, J., dissenting) ("In a deliberate indifference claim challenging the conditions of a prisoner's confinement, the plaintiff must satisfy both the objective and subjective components of the Eighth Amendment inquiry. The same requirements apply to a pre-trial detainee's due process rights under the Fourteenth Amendment."). Fourteenth Amendment due process claims "are analyzed under the same rubric as Eighth Amendment claims brought by prisoners." *Huq*, 885 F.3d at 938; *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013); *Cooper v. Montgomery Cty*., 768 F. App'x 385, 392 (6th Cir. 2019); *Taylor v. Madison Cty. Sheriff's Dep't*, 2019 U.S. Dist. LEXIS 212614, *4 n.1 (W.D. Tenn. Dec. 10, 2019) ("Although a pretrial detainee's claim regarding the conditions of his confinement is reviewed under the Fourteenth Amendment's due process clause, the standard is the same."). "In the context of a conditions-of-confinement claim, only extreme deprivations can be characterized as punishment prohibited by the Constitution." *Cox v. Gentry*, 2019 U.S. Dist. LEXIS 209822, *7 (M.D. Tenn. Dec. 5, 2019).

Respondents have shown that they have adhered to and trained their personnel on numerous relevant policies and operating procedures, as well as continued to implement supplementary operational measures in compliance with CDC guidelines, to mitigate the spread of COVID-19. Respondents have further established that said policies, protocols, and measures, as applied, meet the community standard of medical care in a correctional setting, have successfully mitigated the

spread of COVID-19, and have created a safe environment for detainees to reside.

On the other hand, neither Petitioner has claimed, much less established with actual proof, to have personally contracted COVID-19 or even contacted any COVID-19 positive individuals while housed within the Jail. To that extent, Petitioners' own expert testified that Tennessee, unlike the other states referenced within his declaration, is not the site of an outbreak and that an individual is not more likely to contract COVID-19 simply because he is a certain age and/or suffers from an underlying medical condition. In reciting general, unsupported assertions, like "inmates…share sinks, toilets, and showers, as well as eating, sleeping, and living spaces," Petitioners ultimately take the position that "*there is no safe alternative to their confinement short of release*." (ECF No. 35, PageID 527, 529) (emphasis added).[5] However, Respondents have established that neither Petitioner has an assigned cellmate and that all Jail detainees/inmates, including Petitioners, are supplied with masks, cleaning supplies, and adequate hygiene materials.

Furthermore, Respondents have shown that they, in conjunction with other law enforcement agencies and local state judicial officials, have engaged in successful efforts to reduce the overall Jail population by accelerating the cases for detainees with serious medical issues, for detainees of advanced age, and for detainees with pending misdemeanor or lesser felony charges. While Tennessee courts already consider numerous factors in determining whether pretrial detainees, like Petitioners, should be released and whether and for what amount bail should be set,[6] the Criminal Court of Tennessee, Thirtieth Judicial District at Memphis has additionally implemented steps "to prevent jail overcrowding during the current health crisis…while not

[5] In an attempt to advance this unsupported narrative, Petitioners again rely upon the Sixth Circuit's recent decision in *Cameron*. Notably, the Court in *Cameron*, clarified, "And, as yet, the district court has not ordered the release of any inmate. If the district court does order the release of a prisoner, that may present a different question." *Cameron*, 2020 U.S. App. LEXIS 16741 at *6.

[6] *See* Tenn. Code Ann. § 40-11-115(b). Courts must also adhere to the Tennessee Constitution, which provides certain basic constitutional rights to the victims of crimes. *See* Tenn. Const. art. I § 35

endangering public safety" and policies that have "greatly reduced the jail population." (*See* ECF No. 35-5).

Based upon the above, Respondents have confirmed that Petitioners cannot establish that Respondents were deliberately indifferent to their constitutional rights at any time.[7] Nevertheless, Petitioners are requesting this Court to assume the role of "super-warden" and to allow Petitioners to completely disregard the widespread efforts taken by Shelby County, Tennessee, the Sheriff's Office, and the local state judicial officers to combat this "unprecedent pandemic." *See Swain v. Junior*, 2020 U.S. App. LEXIS 14301 (11th Cir. May 5, 2020). In doing so, Petitioners have tellingly failed to include insight concerning various practical aspects of their request for wholesale release, including but not limited to: (1) Why is this Court in a better position to evaluate the factors outlined within Tenn. Code Ann. § 40-11-115(b) than the local state judicial officers, especially considering that neither Petitioner has even attempted to request relief in state court; (2) How should the *known* answers to the factors outlined within Tenn. Code Ann. § 40-11-115(b) be balanced against the *possibility* of contracting COVID-19 and its *unknown* consequences for each detainee; (3) How should more immediately dangerous charges, like aggravated domestic violence offenses, be evaluated prior to a detainee's release; (4) Should the victim(s) of crimes have any influence and/or receive notification of a detainee's potential release; (5) Should law enforcement

[7] Likewise, Petitioners have failed to establish that their detention bears no relation to a legitimate, non-punitive purpose. Edgington is being detained on two (2) Class A felony charges involving conspiracy to manufacture/ deliver/sell controlled substance (cocaine) and trafficking high amounts of cocaine. Edgington is one (1) of thirty-eight (38) individuals indicted in a trafficking case and is accused of distributing a controlled substance within a school zone. Edgington's bond was set at $500,000.00. Busby is being detained on numerous criminal charges including involving manufacture/delivery/sale of a host of controlled substances and being a felon in possession of a firearm. Busby sustained injuries after jumping from the second-floor balcony while attempting to evade arrest for said offenses. Busby's bond was set at $239,000.00 for the drug charges and $25,000.00 for the felon in possession charge. Petitioners have failed to provide this Court with actual evidence to warrant an overhaul of the assessment conducted by the local state judicial officers that resulted in Petitioners' respective bond amounts and detainment.

cease their efforts to arrest future violators even if said violators pose a threat to the community;[8] (6) If law enforcement officers are allowed to continue arresting violators, should arrestees be booked in the Jail prior to their ultimate release; (7) How long should arrestees remain within the Jail before their release; (8) What Court should make the determination(s) concerning future detainee release; (9) Should law enforcement officials be prohibited from arresting any detainee that was previously released if s/he commits a subsequent offense; and (10) What Court or official should maintain the authority to permit the Jail to resume "normal" activities and when should said processes resume.[9]

CONCLUSION

Based upon the above and upon the record as a whole, this Court should grant Respondents' Motion to Dismiss in its entirety, should deny Petitioners' Motion for a Temporary Restraining Order, and should deny Petitioners' Motion for Class Certification.

Respectfully submitted,

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[8] The Memphis Police Department and the Shelby County Sheriff's Office are already issuing citations for all misdemeanor arrests unless the defendant poses a threat to the community. (ECF No. 35-5, PageID 555, ¶ 4).
[9] Petitioners' medical expert confirmed that he has never physically visited the Shelby County Jail.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via ECF filing system, upon the following:

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