UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CLIFTON BELTON, JR., ET AL. **CIVIL ACTION**

VERSUS

SHERIFF SID GAUTREAUX, ET AL. **NO. 3:20-CV-278-BAJ-SDJ**

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

MAY IT PLEASE THE COURT:

The defendant, the City of Baton Rouge/Parish of East Baton Rouge ("City/Parish"), through undersigned counsel, submits this Reply Memorandum in Support of Motion to Dismiss in response to the Plaintiffs' Memorandum in Opposition.

LAW & ARGUMENT

I. Plaintiffs' § 2241 claim challenging the fact of their confinement ignores the established facts of this case.

Contrary to the plaintiffs' arguments, the circumstances in the EBRP jail regarding COVID-19 are not dire or emergent. Dating back to the original complaint filed on May 4, 2020, there have been seven months of data, observation, research, and response to the global pandemic as it affects the local community. During and throughout that time, the EBRP jail has demonstrated how sound its practices and efforts to combat COVID-19 have proven to be. The plaintiffs offer no affirmative showing that their placement in the jail facility creates or exacerbates an exposure to COVID-19. There have not been any outbreaks in the seven months of this matter to corroborate the plaintiffs' contentions about the risks of COVID-19 in the jail. The plaintiffs' retained expert, Dr. Fred Rottnek, has repeatedly opined that the EBRP jail cannot prevent an outbreak or the spread of COVID-19 within the facility. *Referring to* Rec. Doc. 4-10 at 9, 67-1 at 2, and 98-14 at 1. However, more than six months later from his initial written

opinion, the plaintiffs still cannot demonstrate any such outbreak or spread of COVID-19 in the facility. Moreover and despite those facts, the plaintiffs seek immediate release as their sole form of equitable relief.

In support of their habeas claim, the plaintiffs rely upon the distinguishable case of *Vazquez Barrera v. Wolf*, No. 4:20-CV-1241, 2020 WL 1904497 (S.D. Tex. Apr. 17, 2020) (Disagreed with by *Cureno Hernandez v. Mora*, 467 F.Supp.3d 454 (N.D.Tex. June 15, 2020). In *Cureno Hernandez*, the court properly laid out the distinction between habeas and conditions-of-confinement causes of action:

> Fifth Circuit precedent provides that unconstitutional conditions of confinement—even conditions that create a risk of serious physical injury, illness, or death—do not warrant release. *Spencer v. Bragg*, 310 F. App'x 678, 679 (5th Cir. 2009) (*citing Carson*, 112 F.3d at 820–21). Even allegations of mistreatment that amount to cruel and unusual punishment do not nullify an otherwise lawful incarceration or detention. *Cook v. Hanberry*, 596 F.2d 658, 660 (5th Cir. 1979). Rather, the proper remedy for unconstitutional conditions of confinement should be equitable—to enjoin the unlawful practices that make the conditions intolerable. *See id.* Thus, "allegations that challenge the fact or duration of confinement are properly brought in habeas petitions, while allegations that challenge rules, customs, and procedures affecting conditions of confinement are properly brought in civil rights actions." *Schipke v. Van Buren*, 239 F. App'x 85, 85–86 (5th Cir. 2007) (*citing Spina v. Aaron*, 821 F.2d 1126, 1127–28 (5th Cir. 1987)).
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> **A demand for release does not convert a conditions-of-confinement claim into a proper habeas request.** (Emphasis added). *See Springer v. Underwood*, No. 3:19-CV-1433, 2019 WL 3307220, at *2 (N.D. Tex., Jun. 28, 2019) *rec. accepted*, 2019 WL 3306130 (N.D. Tex., Jul. 22, 2019) (finding that "[Petitioner's] allegations—that exposure to asbestos and mold while incarcerated violated the Eighth Amendment—must be pursued under *Bivens* [*v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)]. And his request for a 'reduction in [his] sentence' ... does not convert his civil rights claims to habeas claims.") (*citing Rios v. Commandant, U.S. Disciplinary Barracks*, 100 F. App'x 706, 708 (10th Cir. 2004) ("In our view, a prisoner may not transform a civil rights action involving the conditions of his confinement into a § 2241 petition merely by seeking sentencing relief in a manner not connected to his substantive claims.")); *see also Archilla v. Witte*, 2020 WL 2513648, at *12 (N.D. Ala. May 15, 2020) ("But tacking a traditional habeas remedy on to a prototypical conditions-of-confinement claim does not

convert that classic civil rights claim into a habeas claim"). In sum, it is well established in this circuit that a detainee is not entitled to habeas relief if he raises civil-rights claims related to the conditions of his confinement. *Sanchez v. Brown*, No. 3:20-CV-00832, 2020 WL 2615931, at *12 (N.D. Tex., May 22, 2020) (collecting cases). *Cureno Hernandez*, 467 F.Supp.3d at 460-61.

The *Cureno Hernandez* court distinguished both the facts and application of law from *Vazquez Barrera*:

> In *Vazquez Barrera*, the district court granted a temporary restraining order and released one ICE detainee, finding that public safety concerns required denial of relief to the other petitioner. 2020 WL 1904497. Ultimately, the court found that the unique threat of infection in a detention setting was unconstitutional, and given the lack of information and resources at the time, no possible mitigation short of release would protect the detainee's constitutional rights. *Id.* at *3. Thus, the court reasoned that the plaintiffs were challenging the fact of their detention and were entitled to habeas review. *Id.* at *4.
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> The court did not find any express authority for using the writ in this way, but it relied on the fact that the Supreme Court has not "explicitly foreclosed the use of habeas for conditions-of-confinement claims." *Id.* Additionally, the court cited to Fifth Circuit cases acknowledging that the line between habeas and civil-rights actions is sometimes "blurry." *See Poree v. Collins*, 866 F.3d 235, 243 (5th Cir. 2017) (quoting *Cook v. Tex. Dep't of Crim. Justice Transitional Planning Dep't*, 37 F.3d 166, 168 (1994)).
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> The facts present in *Vazquez Barrera* are distinguishable from this case, primarily because of how quickly the medical community has responded to the pandemic and how much has been learned in the last two months. We know more now, on the other side of the initial curve, about preventive measures and successful treatment, and testing is faster and more accessible. Mitigation of the risk is more possible now than it was when *Vazquez Barrera* was decided, making injunctive relief not only possible, but more appropriate. Additionally, the plaintiffs in *Vazquez Barrera* had serious chronic medical issues that are not present here. Further, the decision represents a minority view among district courts to consider this issue in this circuit and relies heavily on the lack of clear guidance from the Supreme Court. Nevertheless, this Court, like most district courts to consider the issue, will follow the bright-line rule established by decades of Fifth Circuit precedent that conditions-of-confinement claims are not the proper subject matter for a writ of habeas corpus. *Cureno Hernandez*, 467 F.Supp.3d at 463.

Here, the plaintiffs offer the unsubstantiated legal conclusion that there are no conditions possible under which the medically vulnerable subclass[1] could be constitutionally detained at the EBRP jail during the pandemic. However, inmates, including the majority of the named plaintiffs, have continued to be housed at EBRP jail since the institution of this lawsuit. Contrary to the plaintiffs' conclusory opinion, there have not been any outbreaks or spreading of COVID-19 in the jail throughout that same timeframe. Conversely, the proactive measures taken by the local authorities, including the City/Parish, in response to COVID-19 have allowed municipal operations, including incarceration, to continue as best it can during these unprecedented times.

As demonstrated by the parties, the City/Parish, through its Chief Administrative Officer ("CAO") Darryl Gissel, has provided jail updates regarding COVID-19 to community members. *Referring to* Rec. Doc. 4-3, 44-9, 47-27, and 107-13. In spite of the City/Parish's transparent operations and applicable law, the plaintiffs unwillingly maintain the baseless conclusion that the sole form of relief is immediate release. Based upon the established facts before the Court and the binding jurisprudence, subject matter jurisdiction for the plaintiffs' § 2241 claim does not exist.

II. Plaintiffs' 1983 claims fail to demonstrate a lack of adequate care and ignore the proactive steps taken at the EBRP jail.

The plaintiffs offer irrelevant media and other third-party commentary about the EBRP jail as if to be translated into evidence of deliberate indifference. However, the functionality of

[1] The City/Parish maintains its objection and challenge to the plaintiffs' class and subclass certifications. Additionally, the City/Parish objects to the plaintiffs' definition of "medically vulnerable" expanding the definition set forth by the Centers for Disease Control ("CDC").

the facility has allowed for adequate operation at all times during COVID-19. The *Matos* court outlined the root issue now before the Court:

> Detention comes with its flaws. Even *without* a highly contagious pandemic, there is always an unfortunate risk that detainees will be exposed to certain communicable diseases, such as the common cold or tuberculosis. This is due in obvious part to limited space, overpopulation, and lack of resources. **But these shortcomings do not automatically translate into a constitutional violation. The relevant inquiry here is whether the nature of detention in BTC passes constitutional muster.** And a review of the record answers this question in the affirmative. Respondents have made conscious efforts to create a safe environment for the detainees and BTC's staff, despite inherent obstacles and the novel COVID-19 virus. Although these efforts are not perfect, they remedy what is practically possible and constitutionally required without overhauling the entire nature of confinement. (Emphasis added). *Matos*, 2020 WL 2298775 at *10.

The *Matos* court denied the plaintiffs' petition seeking release from the BTS immigration detention center during the pandemic. *Id*. at *12. The *Matos* court found "as long as detention facilities meet their responsibilities in accordance with protections afforded by the Constitution, they must be free to manage the release of those most vulnerable to this virus." *Id*.

Here, the record is replete with the plaintiffs' testimonial offerings, but the substantive data provided and professional endeavors put forth by the City/Parish and the other local officials reflect a safe environment for the inmates housed in the EBRP jail. There have been no facts pled that demonstrate any form of indifference by the City/Parish in providing basic human needs related to its response to COVID-19 at the jail. *In arguendo*, where the plaintiffs' descriptions of the physical structure are accepted as true, there is still no sufficiently pled connection from those allegations to the plaintiffs' exposure to COVID-19. Along the same lines, no set of pled facts demonstrate how the City/Parish has failed to take appropriate measures, which include having local medical professionals examine the steps and methods of protection against COVID-19 at the EBRP jail. Whether under the Eighth or Fourteenth Amendment analysis for the

plaintiffs' § 1983 claims, the Amended Complaint fails to set forth a requisite showing of facts to support such a cause of action.

III. Objection to the plaintiffs' Exhibits 1-9 (Rec. Doc. 107-4 through Rec. Doc. 107-12).

The plaintiffs have provided the Court with ten exhibits attached to their memorandum in opposition to the City/Parish's Motion to Dismiss. Exhibits one through nine are declarations or supplemental declarations of individuals within the EBRP jail facility. However, none of the nine declarations are signed by the declarants. 18 U.S.C. §1746 states, in pertinent part:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
> …
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

Although represented by the plaintiffs that the staff at the EBRP jail facility have not allowed the passage of documents to and from inmates for signature, the representation appears inaccurate. *See* Rec. Doc. 103-1, Supplemental Affidavit of Major Catherine Fontenot, regarding the jail's ability to allow signatures by inmates on legal documents with their attorneys during the pandemic. Accordingly, the City/Parish objects to the use of the plaintiffs' exhibits one through nine, Rec. Doc. 107-4 through Rec. Doc. 107-12, for purposes of the pending Motion to Dismiss.

CONCLUSION

The plaintiffs have failed to establish subject matter jurisdiction pursuant to Rule 12(b)(1) for the declaratory and injunctive relief sought. Along the same lines, the plaintiffs' writ of habeas corpus improperly raises a condition of confinement claim. Finally, the plaintiffs have failed to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

For the foregoing reasons, the defendant, City of Baton Rouge/Parish of East Baton Rouge, prays that its Motion to Dismiss be granted and that Plaintiffs' claims against it be dismissed with prejudice at Plaintiffs' costs.

RESPECTFULLY SUBMITTED:
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was this date sent to all counsel of record by electronic mail to the email address listed with the Court's electronic filing system, facsimile, and/or U.S. mail, postage prepaid and properly addressed. Notice will be mailed to any party or counsel not participating in the Court's CM/ECF system by this date depositing same in the United States Mail, postage prepaid, and properly addressed.

Baton Rouge, Louisiana this 4th day of December, 2020.

/s/ Michael P. Schillage
MICHAEL P. SCHILLAGE