STATE OF MINNESOTA

COUNTY OF ST. LOUIS

DISTRICT COURT
CIVIL DIVISION
SIXTH JUDICIAL DISTRICT

Roger Foster and Kristopher Mehle, on behalf of themselves and all others similarly situated; and Adam Dennis Sanborn, on behalf of himself and all others similarly situated,

Petitioners,

v.

Minnesota Department of Corrections; Paul Schnell, Commissioner; Minnesota Correctional Facility- Moose Lake; and William Bolin, Warden,

Respondents.

Court File No. 09-CV-20-633

MEMORANDUM AND ORDER DENYING WRITS OF MANDAMUS AND HABEAS CORPUS AND DIMISSING PETITION

MEMORANDUM

I. INTRODUCTION AND PROCEDURAL POSTURE

The above-entitled matter came before the undersigned Judge of District Court on June 23, 2020, for a hearing on a Petition for a Writs of Habeas Corpus and Mandamus. Daniel Shulman and Ian Bratlie, ACLU-Minnesota, and Cathryn Middlebrook, Chief Appellate Public Defender, appeared on behalf of Petitioners; and Steven Forrest and Cicely Miltich, Minnesota Assistant Attorneys General, appeared on behalf of Respondents.

Petitioners commenced this action on April 15, 2020. Thereafter, the court ordered Respondents to file a return by May 11, 2020, and Petitioners to file any reply by May 15, 2020. Petitioners[1] are two inmates incarcerated at the Minnesota Correctional Facility-Moose Lake (MCF-ML), who assert claims on behalf of themselves and other similarly situated inmates, requesting Writs of Mandamus and Habeas Corpus. On their habeas claim, Petitioners seek release from custody; on their mandamus claim, they seek an order directing MCF-ML to comply with its legal duty to protect them from COVID-19.

Respondents are the Minnesota Department of Corrections (DOC), Paul Schnell, its Commissioner, MCF-ML, and William Bolin, its Warden.

On April 29, 2020, this court issued an Alternative Writ of Mandamus and Order to Show Cause. The court ordered Respondents to show cause why they should not be ordered to perform their legal duty to keep Petitioners reasonably safe from COVID-19 while in custody of the MCF-ML, including measures such as testing, social distancing and providing medical treatment, so long as the pandemic continues.[2] The court had before it the Petition and supporting

[1] During the pendency of this action, Petitioner Mehle was granted work release, and he immediately absconded. The Court will dismiss his claims, without prejudice.

[2] In it April 29, 2020, Order, the Court did not address Petitioners' request for a Writ of Habeas Corpus.

memorandum and declarations. Respondents had not yet addressed the merits of the Petition.

At the request of the parties, the court extended the deadlines for Respondents to respond to the Petition, and for Petitioners to reply. Prior to arguments on June 23, 2020, both parties extensively briefed the issues and submitted numerous declarations. Petitioners assert that contested facts entitle them to an evidentiary hearing. Respondents seek dismissal of both writs, contending an evidentiary hearing is unnecessary.

The court has a robust record before it. Following the arguments, the court took this matter under advisement.

I. THE FACTS AND EVIDENCE PRESENTED BY THE PARTIES' SUPPORTING DECLARATIONS.

This lawsuit stems from the unprecedented COVID-19 global pandemic that has upended our lives in unimaginable ways and caused untold suffering, hospitalizations, and deaths. COVID-19 is a disease caused by the novel coronavirus and presents incredible challenges and risks to public health. COVID-19 is highly infectious and easily transmitted from person to person. It presents a significant mortality and morbidity threat, especially to vulnerable populations. COVID-19 fatality rates increase with age and underlying health conditions such as cardiovascular and respiratory diseases, diabetes, and immunocompromised conditions.

There is no vaccine against COVID-19 and the United States Centers for Disease Control and Prevention (CDC) issued specific recommendations for preventative measures to decrease transmission such as testing, social distancing, wearing masks, and increasing focus on personal hygiene and additional handwashing in correctional settings. Jails and prisons are of particular concern for the spread of COVID-19 because of their inability to impose effective social distancing.

On March 11, 2020, the World Health Organization (WHO) declared COVID-19 a global pandemic. On March 13, 2020, the President of the United States declared a national emergency and that same day Minnesota Governor Tim Walz declared a peacetime emergency, which he extended to July 13, 2020, by Emergency Executive Order 20-75. Despite massive global and state containment efforts, COVID-19 has continued to spread exponentially around the world and within Minnesota, resulting in stay at home orders, businesses shut down, schools closed, sporting seasons cancelled or postponed. Starkly put, halting life, as we knew it. The disease has killed more than 134,000 Americans with no end in sight. Minnesota prisons have not escaped the disease, which first occurred at MCF-ML.

MCF-ML is a medium security facility for individuals serving felony sentences. The top five categories of offenses for inmates at MCF-ML are drug offenses, 25%, criminal sexual conduct offenses, 21%, weapons offenses, 10%,

burglaries, 8%, and homicides, 7%. Excluding life sentences, the average sentence is 87 months.

MCF-ML has the capacity to house 1,023 inmates. As of June 3, 2020, it housed 982 adult inmates. MCF-ML is comprised of eight living units including 128 single cells, 162 two-person cells, 85 three-person cells, 30 four-person cells, ten six-person cells, and 17 eight-person cells. It also has a segregation unit, Unit 4, which has the capacity to house 52 inmates. Unit 4 cells are single occupancy with solid doors and walls, and a toilet and sink in each.

The population at MCF-ML is particularly vulnerable to COVID-19. Once the novel coronavirus is introduced into a facility like a prison, mitigation is difficult because of shared facilities, including, bathrooms, dining halls and telephones, and the difficulty of social distancing in congregate living situations.

MCF-ML, like all DOC facilities, provides health care to inmates through health services overseen by a Director of Clinical Operations and a Medical Director. James T. Amsterdam, M.D., is the DOC Medical Director. He is a board certified emergency room physician, with 40 years of experience in hospital, clinical, academic, and high-level administrative settings. MCF-ML has 13 nursing staff and a registered nurse supervisor as well as a part-time dentist and part-time dental hygienist.

Petitioners allege the DOC and MCF-ML failed, almost completely, to act in a coordinated way to prevent COVID-19 from spreading through the prison and failed to provide even the most rudimentary measures of prevention and mitigation. At the time they commenced this action, MCF-ML was the epicenter of the COVID-19 pandemic in the Minnesota prison system. The first inmate was diagnosed on March 29, 2020. As of April 15, 2020, the DOC reported 12 positive tests and 31 presumed positive tests at MCF-ML. The Petition alleges that there was no workable quarantine, employees were coming to work sick, masks were not required, the use of segregation was a deterrent to seeking testing, which was limited, and there was a shortage of cleaning supplies and protective gear. Petitioners further allege that MCF-ML has refused to test them for COVID-19, inmates are unable to practice social distancing, and they are required to practice personal hygiene in unhygienic facilities.

Petitioner Foster has less than 180 days to serve on his sentence and alleges that he has experienced COVID-19 like symptoms since the beginning of April. Petitioner Sanborn alleges that he is particularly vulnerable to COVID-19 because he is a smoker, has asthma, breathing problems, and requires a prescription inhaler.

The record establishes that prior to the Governor's March 13, 2020, declaration of a peacetime emergency the DOC and MCF-ML began preparing for the virus. On March 10, 2020, the Minnesota Department of Health issued its first

guidelines entitled, *Jails and Correctional Settings: Interim Guidance for Administrators*, and updated them on April 1, 2020 and May 1, 2020. The DOC's Medical Director, Dr. Amsterdam, with guidance from the MDH and the CDC, first implemented its guidelines for COVID-19 screening, testing and infection control protocols for all DOC facilities on March 13, 2020. These protocols included enhanced hygienic measures, assessment of all symptomatic patients and inmates entering new facilities, the use of appropriate personal protective equipment by staff, and isolation and quarantine procedures.

On March 16, 2020, MDH appointed an epidemiologist liaison to work exclusively with the DOC. The DOC Medical Director is in nearly daily contact with the epidemiologist to address questions regarding the implementation of CDC and MDH guidelines. Guidance regarding COVID-19 has evolved as the scientific and medical communities have learned more about how the disease spreads. Since March 13, 2020, the DOC has issued 18 updates to its *MNDOC COVID-19 Screening, Testing, and Infection Control Guidelines* policies, each of which the MDH epidemiologist reviewed and approved.

On March 23, 2020, the CDC issued its *Interim Guidance on Management of Coronavirus 2019 in Correctional and Detention Facilities.* Importantly, the CDC's guidelines acknowledged that correctional facilities differ based on a variety of factors, providing in part: "…this guidance will not necessarily address

every possible custodial setting …The guidance may need to be adapted based on individual facilities' physical space, staffing population, operation, and other resources and conditions." The CDC directed correctional and detention facilities to contact the CDC or their health departments if they need assistance applying these principles or addressing topics that are not specifically covered. The DOC Medical Director, in consultation with the MDH epidemiologist, adapted the guidance to each DOC facility, including MCF-ML.

On May 6, 2020, the CDC issued a report, *COVID-19 in Correctional and Detention Facilities-United State, February-April 2020,* which contains a summary of guidance for jails and prisons, all of which the DOC and MCF-ML have implemented.

Beginning in early March, the DOC took the following additional steps, which provide a useful chronology for this case:

1. In a memorandum dated March 6, 2020, to all inmates, Respondent Schnell warned of the dangers of COVID-19 and stressed the importance of offender hygiene. Respondent Schnell encouraged all inmates to contact Health Services with health concerns and waived all medical co-pays.

2. On March 11, 2020, the DOC began distributing additional bars of soap to inmates.

3. On March 11, 2020, the DOC postponed all events that involved people entering DOC facilities

4. On March 11, 2020, the DOC suspended in-person visitation. The DOC offered free phone calls and video visits to inmates.

5. On March 15, 2020, Respondent Schnell activated an Incident Management Team (IMT) and put in place an emergency command structure to help DOC facilities in their preparation and prevention efforts. Respondent Schnell put the Associate Warden of Operations in charge of IMT at MCF-ML. Her duties included communicating directives from the DOC Medical Director to staff to ensure their proper implementation and taking measures to ensure the safety of both staff and inmates.

6. On March 16, 2020, the DOC implemented a mandatory process for all staff and contractors, including completion of a screening form and temperature screening, and began checking all packages and mail entering the facility.

7. On March 18, 2020, the DOC distributed additional handwashing stations. At MCF-ML, stations were placed at the main entrance, at all unit entrances, in unit hallways and various other locations.

8. MCF-ML employed additional inmates to clean and disinfect unit bathrooms and common areas.

9. On March 23 and 26, 2020, MCF-ML staff distributed memoranda to all inmates reiterating the importance of social distancing and encouraging inmates to social distance. Since then, there have been instances of formal discipline for lack of compliance.

10. On March 26, 2020, Respondent Schnell informed inmates that they would not lose pay or work assignments if they reported COVID-19 symptoms.

11. On March 27, 2020, MCF-ML no longer accepted new inmates or transfers of inmates into the facility.

12. On April 1, 2020, facility administration gave all inmates cotton masks and *encouraged* to wear them. In other words, inmates were not required to wear masks.

13. One week later, on April 8, 2020, the April 1 policy became more stringent, *requiring* all inmates to wear masks while in the presence of others, with limited exceptions.

14. One week later, on April 15, 2020, the DOC again strengthened its policy, *requiring* MCF-ML staff to wear N95 masks while in the presence of other staff or inmates.

15. On May 11, 2020, the DOC somewhat relaxed the N95 mask policy after consultation with the Medical Director and MDH:

a. Staff is required to wear N95 masks when they are in the presence of symptomatic inmates, conducting on hospital runs, and making rounds in the isolation and step-down units.

b. Cloth masks are required at all other times staff is in the presence of others.

16. MCF-ML has limited movement between units and prohibited inmates from comingling with inmates from other units. Inmates are on a strict schedule with no comingling during recreation time or during other activities. Staff delivers meals to individual units instead inmates using the community dining hall.

17. When the first MCF-ML inmate tested positive for the virus on March 29, 2020, the facility immediately began implementing the isolation and quarantine procedures developed by the DOC's Medical Director in consultation with the MDH epidemiologist.

18. The policy requires isolation of inmates who test positive and quarantine of members of his unit. Inmates leave their cells only to use the bathrooms, which are subject to enhanced cleaning.

19. As COVID-19 continued to spread, MCF-ML continued to isolate inmates who were determined by health services to have COVID-19-like symptoms. Symptomatic inmates move immediately to an individual cell in Unit 4.

20. Before an inmate may leave Unit 4, he must be fever free without medication for three days and without progressive symptoms for ten. If previously isolated inmates still test positive for COVID-19, they move to a step-down area in another part of the facility for 14 days before returning to their living units.

21. Medical staff monitors offender health while they are in isolation or in the step-down unit.

22. Concurrently, the cellmates of an offender who has moved to Unit 4 isolation quarantine as a group and must ask permission to use the bathroom to maintain social distance. They also have yard time together and cannot commingle with others.

23. As of June 3, 2020, there were no inmates quarantined because their cellmate was in Unit 4. As of the date of the hearing, 16 inmates were in quarantine, as they prepared to leave MCF-ML.

24. Given the restrictive nature of isolation and the adverse employment consequences of quarantine, inmates retain their jobs, and those in isolation may use their electronic devices. The "no work, no pay" policy was modified on April 5, 2020.

25. Since the beginning of the pandemic, the facility has been able to accommodate all inmates who were symptomatic in Unit 4. As of June 3, 2020,

MCF-ML staff has cleared 79 inmates from isolation. As of June 3, 2020, only one offender remained in isolation.

26. Neither Petitioner has been in isolation, quarantine, or step-down.

27. MCF-ML initially tested inmates in isolation and in quarantine for COVID-19 on day 12. Since the beginning of this action, the DOC has begun mass testing in its facilities under the direction of the MDH. The DOC followed the evolving protocols and guidance of the CDC and MDH and as testing capabilities improved. As of July 8, 2020, MCF-ML performed 1,330 tests, with 46 confirmed positive, 1281 negative, and 3 pending. There were also 31 presumed positive tests. Seventy-four inmates who had tested positive no longer require isolation. Staff testing resulted in 36 positive and four presumed positive. Thirty-eight staff members had recovered and returned to work as of June 23.

28. Respondent Schnell has statutory authority to release inmates under some circumstances. He has exercised this authority in a variety of ways.

a. On April 16, 2020, the DOC implemented a newly developed COVID-19 Conditional Medical Release program, extending the medical release program to those inmates at higher risk of grave harm from COVID-19 because of their existing medical conditions. All inmates received notice of the program.

b. The DOC provided information on how to apply for the program and developed an instruction guide.

c. The DOC coordinated with local law schools to provide inmates with legal assistance in completing applications.

d. As of June 1, 2020, the DOC had received 1,523 applications and granted 84, including 17 from MCF-ML. At that time, 689 applications were pending.

e. The DOC expanded the work release program. As of June 1, 2020, it deemed 166 inmates system-wide eligible for early release.

f. Regarding offenders on release who violate their conditions of release, the DOC has worked to limit the number of revocations.

These efforts resulted in a reduction in the Minnesota prison population by 675 offenders in 3 months, bringing the prison population to its lowest level in 15 years.

29. The DOC implemented a paid COVID-19 leave policy for staff and sent memoranda to staff urging them to stay home if sick. The DOC also provided staff with information on how to protect themselves and their families and disinfect their vehicles. The DOC also follows the CDC guidelines for essential workers exposed to COVID-19.

30. The medical records of Petitioners and their cellmates reveal no COVID-19 symptoms.

31. Petitioner Foster sought medical attention on April 1 and 3, 2020. He complained of a cough, but he had no fever, no difficulty breathing, his lungs were clear, and his oxygenation at 98%. He saw medical staff again on April 14, 2020, for a medication review and a toe injury. He again reported no COVID-19 symptoms and his lungs were clear.

II. HABEAS CORPUS

The Writ of Habeas Corpus is a statutory civil remedy available to obtain relief from unlawful imprisonment or restraint. Minn. Stat. Chapter 589; *State ex rel Guth v. Fabian*, 716 N.W. 2d 23, 26 (Minn. Ct. App. 2006). Habeas Corpus lies to challenge unlawful imprisonment or restraint based upon statutory or constitutional violations, jurisdictional defects, and cruel and unusual punishments. *Kelsey v. State*, 283 N.W. 2d 892 (Minn. 1979); *State ex rel Crosby v. Wood*, 265 N.W.2d 638 (Minn. 1978); *Rud v. Fabian*, 743 N.W.2d 295 (Minn. Ct. App. 2007).

Habeas corpus is available to challenge conditions of confinement. *Helling v. McKinney*, 509 U.S. 25, 31 (1993); *State ex rel Guth v. Fabian*, 716 N.W.2d 23 (Minn. 2006); *Kelsey v. State*, 283 N.W.2d 892 (Minn. 1979); *State ex rel Crosby v. Wood*, 265 N.W. 2d 638 (Minn. 1978); *State ex rel Cole v. Tahash*, 129 N.W.2d 903 (Minn. 1964); *Beaulieau v. Minnesota Dept. of Human Servs*., 798 N.W.2d

542, 544 (Minn. Ct. App. 2011), *aff'd* 825 N. W.2d 716 (Minn. 2013); *Loyd v. Fabian*, 682 N. W.2d 688, 690 (Minn. Ct. App. 2004).

Under the Eighth Amendment to the United States Constitution, prison officials are required to provide humane conditions of confinement, ensuring that inmates receive adequate food, clothing, shelter and medical care and must take reasonable steps to ensure the safety of inmates. *Farmer v. Brennan*, 511 U. S. 825 (1994). Prison officials have a duty to protect inmates from the spread of serious communicable diseases, including where the complaining inmate does not show symptoms of the disease or where the possible infection may not affect all those exposed. *Helling v. McKinney*, 509 U.S. 25 (1993); *Hutto v. Finney*, 437 U.S. 678 (1978); *DeGidio v. Pung*, 920 F.2d 525, 526, 533 (8th Cir 1990). The rationale for this is simple enough: The State violates the Eighth Amendment when it restrains an individual's liberty, rendering him unable to care for himself, and at the same time fails to provide for his basic needs. *Estelle v. Gamble, supra*; *DeShaney v. Winnebago Cty. Dep't of Soc. Serv.*, 489 U. S. 189,200 (1989); *Cooney v. Hooks*, *supra*. Reasonable safety means protecting against future harm including conditions of confinement that are likely to cause future serious illness and needless suffering.

A. Petitioners' Burden.

An incarcerated person requesting a writ of habeas corpus bears the burden of establishing that his confinement violates a fundamental constitutional right. *Edstrom v. State*, 378 N.W.2d 90, 93 (Minn. Ct. App. 1985). A petitioning inmate must establish correctional facilities have been deliberately indifferent to a substantial risk of serious harm to their health or safety. *Estelle v. Gamble*, 429 U. S. 97 (1976). There is both an objective and subjective part to this analysis.

To establish an Eighth Amendment violation based on a failure to prevent harm, a petitioner must first show that he is incarcerated under conditions posing a substantial risk of serious harm. *Farmer, supra*. Of this, there is no doubt given the unprecedented COVID-19 pandemic and the risks it poses to both the community at large in general, and to prison populations, in specific. An inmate can face a substantial risk of serious harm from COVID-19 if a prison does not take adequate measures to counter the contagion. Courts have long recognized that conditions posing an elevated chance of exposure to an infectious disease can pose a substantial risk of serious harm.

Next, a petitioner seeking a writ of habeas corpus must demonstrate that prison officials have a sufficiently culpable state of mind, which, in this case, requires deliberate indifference to inmate health or safety. A petitioner must prove more than ordinary lack of due care; he must prove that prison officials acted with deliberate indifference to serious medical needs or reasonable safety. *Estelle v.*

Gamble, 429 N. W.2d 97 (1976); *Whitley v. Albers*, 475 U. S. 312, 319 (1986); *Schaud v. Von Wald*, 638 F. 3rd 905,914 (8th Cir. 2011). A consistent pattern of recklessness or negligent conduct is sufficient to establish deliberate indifference. *DeGidio v. Pung*, 920 F.2d 525 (8th Cir. 1990). Thus, deliberate indifference is somewhere between the poles of negligence on one end and purpose or knowledge on the other end. *Farmer, supra*.

There is no violation of the Eighth Amendment when prison officials know of a substantial risk and respond reasonably, even if the response does not ultimately avert the harm. As the Supreme Court noted in *Farmer*, in determining whether officials have been deliberately indifferent, courts must give due regard for prison officials' unenviable task of keeping dangerous offenders safe in custody under humane conditions, and consider arguments regarding to the realities of prison administration. *Id*. The incidence of diseases or infections alone does not imply unconstitutional conditions of confinement since any densely populated living situation may be subject to an outbreak.

It is important to recognize that deliberate indifference is not a static determination. Deliberate indifference must be determined in light of prison officials' current attitudes and conduct. Both parties may rely on developments that postdate the pleadings. *Farmer, supra.* Habeas corpus is appropriate if a petitioner can establish present and continuing mistreatment amounting to cruel and unusual

punishment. *State ex rel Crosby v. Wood, supra*. Where the risk of serious harm is substantial, but prison officials have undertaken significant steps to try to reduce the harm and protect inmates, there is no Eighth Amendment violation. *See, Butler v. Fletcher*, 465 F.3d 34 0,345 (8th Cir. 2006).

B. Petitioners Fail to Meet Their Burden to Establish Deliberate Indifference of the DOC or MCF-ML.

The record does not show that Petitioners are being subjected to present and continuing mistreatment amounting to cruel and unusual, or cruel or unusual, punishment in violation of the Eighth Amendment or the Minnesota Constitution, Minn. Const. art. I, § 5.

Petitioners take issue with the application of this standard. They argue that Minnesota law does not limit habeas relief to only a showing of cruel and/or unusual punishment. This is true, but the cases Petitioners rely on are inapplicable here, where they are challenging their conditions of confinement. Courts evaluate conditions of confinement under the Eighth Amendment's prohibition against cruel and/or unusual punishment. The court rejects Petitioners' argument because they fail to cite any such statute.

Contrary to Petitioners' allegations, the DOC has engaged and continues to engage in an extensive and systemic approach to combat COVID-19. MCF-ML implemented its emergency Incident Management Team. Beginning in early March, Respondents educated inmates and staff on COVID-19 and prevention

strategies in a series of memoranda. They distributed extra soap, installed additional handwashing stations, and instituted enhanced cleaning protocols. It cancelled events and suspended in-person visits. It employed mandatory screening for staff and contractors entering the facility. MCF-ML stopped accepting new inmates and transfers. MCF-ML distributed and required the use of masks by both inmates and staff. They also limited movement between units, and implemented isolation, quarantine and step-down procedures. The DOC conducts testing in consultation with the MDH. Further actions taken include advising inmates that they would not lose their jobs or pay if they were sick, allowing electronics in the segregation unit, waiving co-pays for medical visits, and provides free telephone calls and video chats. Through a variety of tools, the DOC has released many inmates, bringing Minnesota's prison population to its lowest in 15 years.

The record shows that Respondents have taken the threat seriously and responded with reasonable and appropriate steps to mitigate the spread of COVID-19 and to identify, isolate, and treat those who have contracted the disease. Respondents' efforts have been successful, and at the time of their submissions, only one inmate was in isolation, 16 inmates awaiting release were in quarantine, and three were in step-down. Seventy-nine inmates had recovered and returned to their units. Although the DOC website does not show the number of people now isolated or quarantined, the statistics indicate containment of the virus.

Petitioners' experts, Farris Keeling, M.D., and Susan Hasti, M.D., are critical of the efforts at MCF-ML. Dr. Keeling's declaration indicates that he reviewed the DOC's public website at https://mn.gov/doc/about/covid-19updates/mcf-moose-lake-covid-19-response. It does not appear that he reviewed any other documents submitted in this case. The document Dr. Keeling reviewed briefly summarizes the efforts taken at MCF-ML. Exhibit A to this order illustrates what Dr. Keeling considered in reaching his opinions.

Dr. Keeling felt the measures were good and potentially effective to decrease risk to staff and inmates, if applied conscientiously. He did not believe the measures went far enough and outlined his concerns. Respondents rebutted and addressed Dr. Keeling's concerns regarding quarantine, isolation, social distancing, masks, and cleanliness, including through Dr. Amsterdam's declaration and exhibits. Again, Respondents' actions have been far from deliberately indifferent. Nothing in Dr. Keeling's submissions supports a contrary conclusion.

In her declarations, Dr. Hasti also expresses concerns with the adequacy of the DOC response to COVID-19. She opined in her first declaration that the DOC's response was not adequate on April 15, 2020, when Petitioners filed this lawsuit. This Court must base its determination on the current situation and Respondents have taken significant steps that have developed along with the science and recommendations of the CDC and MDH. Dr. Hasti, like Dr. Keeling,

reviewed the DOC's website. She also focused on pages 4 through 19 of Respondents' Memorandum of Law in Opposition, but she does not appear to have reviewed the voluminous declarations and exhibits cited in the memorandum, which address many of her concerns. Dr. Hasti faults MCF-ML for a lack of masks, the failure to provide staff with information on how to keep their families safe, the testing and tracking of the virus, and the failure to identify vulnerable populations. She also cites the lower positive rates at other DOC facilities as indicating MCF-ML is not doing enough.

Respondents' submissions outline the evolving mask requirements, which now include a mandatory mask requirement for both staff and inmates. Staff is educated on how to protect themselves in both the Interim Guidance for Administrators, Amsterdam Exhibit 2, and the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, with reference to the Occupational Safety and Health Administration website, Amsterdam Exhibit 4. The record shows clearly that MCF-ML is working with the MDH and Mayo Clinic on testing, and it has completed mass testing of its inmates and staff. The court appreciates the concerns expressed by Dr. Hasti; however, the DOC and MCF-ML have addressed many of them.

This court's must determine whether Respondents have been deliberately indifferent to serious medical and safety concerns. None of the concerns raised by Drs. Keeling and Hasti show deliberate indifference. To the contrary, they have implemented guidelines provided by the CDC and MDH in consultation with the MDH epidemiologist.

Petitioners complain of inadequacies in handwashing stations, the amount and quality of soap provided to inmates, the type and frequency of disinfectant use, the length of free phone calls, and the cumbersome process for obtaining medical care. Their criticisms, even if valid in fact, do not evince deliberate indifference or disregard of serious safety concerns.

Petitioner Foster maintains that movement was not restricted between units in March and April. Petitioners also contend that in April and the early part of May, there were not separate times for unit use of common areas and yard time. The DOC and MCF-ML have addressed Petitioners' concerns, and they concede as much.

Petitioner Foster asserts he has suffered from COVID-19 symptoms. His medical records show regular medical visits in April and no symptoms indicating he was suffering from COVID-19. His temperature was normal, he had no trouble breathing, his lungs were clear, and his oxygen levels were normal. Petitioner

Sanborn protests his cellmates had COVID-19 symptoms. This is unsupported by Respondents' review of the medical records of Petitioner Sanborn's cellmates.

Uniformly, Petitioners and the other inmate declarants complain about the inability or impossibility to maintain social distance at MCF-ML. Their declarations assert instances where their fellow inmates and staff are not scrupulously following the DOC and MDH policies.

In *Swain v. Junior,* 958 F3d 1081 (11th Cir. 2020), the Eleventh Circuit addressed many of the same arguments when it reversed the district court's determination that prison officials acted with deliberate indifference in their response to the COVID-19 pandemic. The court wrote:

> A prison official acts with deliberate indifference when he "knows of and disregards an excessive risk to inmate health or safety." A prison "official may escape liability for known risks 'if [he] responded reasonably to the risk, even if the harm ultimately was not averted.' "
> …
>
> The district court treated the increase in COVID-19 infections as proof that the defendants deliberately disregarded an intolerable risk. In doing so, it likely violated the admonition that resultant harm does not establish a liable state of mind. The district also likely erred by treating [the prison's] inability to "achieve meaningful social distancing" as evincing a reckless state of mind. Although the district court acknowledged that social distancing was "impossible" and "cannot be achieved absent an additional reduction in [the prison's] population or some other measure to achieve meaningful social distancing," it concluded that this failure made it likely that the plaintiffs would establish the subjective component of their claim. But the inability to take a positive action likely does not constitute "a state of mind more blameworthy than negligence."

958 F.3d at 1288-89 (internal citations omitted).

The district court found that although the defendants *had* implemented social distancing and other measures, those measures must have been inadequate because (1) the rate of infections rose and (2) social distancing—which it took to be the most critical measure—was not possible. The court of appeals strongly disagreed, writing,

> Whatever deliberate indifference is, the defendants' conduct here doesn't show it. The district court erred in holding that the defendants acted with a deliberately indifferent mental state, equivalent to "subjective recklessness as used in the criminal law." We simply cannot conclude that, when faced with a perfect storm of a contagious virus and the space constraints inherent in a correctional facility, the defendants here acted unreasonably by "doing their best." Because the defendants "act[ed] reasonably," they "cannot be found liable" under the Eighth Amendment.

961 F.3d at 1289 (internal citations omitted).

Swain v. Junior is persuasive here where Petitioners complaints are comparable. Respondents *have* made efforts to allow for social distancing. They *have* provided education on the importance of social distancing. They *have* reduced the population and implemented policies to keep large groups of inmates from gathering, including serving meals on the units instead of the dining hall, and scheduling specific times for yard time and time in the common areas. Respondents' actions demonstrate a reasonable response to the risk posed by COVID-19.

The DOC and MCF-ML reasonably responded to the risk, notwithstanding that the harm has not been fully averted for all inmates. Non-uniform enforcement of social distancing alone is insufficient to establish deliberate indifference. The record does not show by allegations or evidence that Respondents knew of any potential lapses in enforcement and deliberately ignored them. The record reflects examples of discipline when the directives were not followed. Social distancing violations in this case do not reflect Respondents are deliberately indifferent to the risks of the virus in prison settings.

This Court cannot focus on isolated failures or impossibilities but must view Respondents' entire response to this devastating and ever changing virus. When viewing their entire response, it is clear that Petitioners have not demonstrated Respondents' conduct evinces deliberate indifference. To the contrary, Respondents have taken the threat seriously and taken reasonable and appropriate steps to protect and mitigate the risk to Petitioners, other inmates and the staff. These steps resulted in some success in decreasing the number of acutely ill patients in isolation and the number of individuals in quarantine. The DOC and MCF-ML's success further supports that they take the threat posed by COVID-19 seriously and their response is reasonable. The DOC and MCF-ML have not exhibited indifference, let alone deliberate indifference.

Habeas corpus is a summary proceeding. The record before this court is extensive. The law is clear that a court need not hold an evidentiary hearing when Petitioners fails to establish a *prima facie* case, there are no factual disputes, or the issues raised can be determined as a matter of law. *Seifer v. Erickson*, 420 N.W.2d 917, 920 (Minn. Ct. App. 1988); *Sander v. State*, 400 N. W.2d 175, 176 (Minn. Ct. App. 1987). An evidentiary hearing is not necessary, because even accepting Petitioners' allegations as true, Petitioners have failed to establish Respondents' deliberate indifference to Petitioners' health and safety during the COVID-19 pandemic.

III. MANDAMUS

Mandamus is an extraordinary remedy, not a cause of action or claim. *Sinell v. Town of Sharon*, 206 Minn. 437, 439, 289 N.W. 44, 45 (1939). "The authority to issue a writ of mandamus is statutory." *State v. Wilson*, 632 N.W.2d 225, 227 (Minn. 2001); *see* Minn. Stat. §§ 586.01-12 (2019). It is available only when a petitioner has a clear right to the relief sought, the agency has a clear *ministerial* duty to provide the relief sought, and there is no other remedy available. Minn. Stat. § 586.02 (2019). Mandamus is appropriate *only* when the acts to be compelled are clearly and positively required by law; it is not appropriate to control the discretion of a public official. *Northern States Power Co. v. Minnesota Metropolitan Council*, 684 N.W.2d 485, 491 (Minn. 2004); *Tyo v. Ilse*, 380

N.W.2d 895, 897 (Minn. Ct. App. App. 1986); *Powell v. Carlos Township*, 117 Minn. 372, 375, 225 N.W. 296, 297 (1929) (holding that once a town board's discretion is exercised there is no judicial remedy).

Consistent with the extraordinary nature of the remedy, a petitioner bears a high burden. Before a writ of mandamus may issue, a petitioner must prove: (1) the failure to perform an official duty clearly imposed by law; (2) that petitioner is specifically injured by a public wrong due to this failure; and (3) there is no other adequate remedy at law. *Walther v. Lundberg*, 654 N.W.2d 694, 697 (Minn. Ct. App. App. 2002). The writ is available only to compel an official "to perform duties with respect to which [he or she] *plainly [has] no discretion as to the precise manner of performance and where only one course of action is open*." *State v. Davis*, 592 N.W.2d 457, 459 (Minn. 1999) (quoting *State ex rel. Gresham v. Delaney*, 6 N.W.2d 97, 98 (Minn. 1942)) (emphasis supplied). A clear legal duty exists only when the law defines the duty with such precision and certainty as to leave nothing to the exercise of discretion and judgment. A district court's grant of mandamus is only for the "rare cases that the officials act in so clearly an arbitrary and capricious a manner that their action may be reviewed on mandamus." *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 176 (Minn. 2006) (quotation omitted).

In Petitioners' initial pleadings, the allegations were essentially that MCF-ML had done nothing to respond to the COVID-19 pandemic to keep them and other inmates safe. They alleged that the DOC had failed to take even the most rudimentary measures of prevention or mitigation. As noted earlier, it is clear that Respondents have a duty to keep Petitioners safe, and in its April 29 Order, this court ordered Respondents to show cause why it should not grant the relief sought by Petitioners. It noted that a writ of mandamus does not control the particular manner in which a duty is to be performed and does not dictate how the discretion is to be exercised. *State v. Davis,* 592 N.W.2d 457,459 (Minn.1999); *State v. ex rel S. St. Paul v. Hetherington,* 61 N.W.2d 737, 740 (Minn. 1953); *State ex rel Laurisch v. Pohl,* 8 N. W.2d 227, 231 (Minn. 1943).

The Minnesota Legislature delegated to the Commissioner of the DOC the responsibility:

> [T]o accept persons committed to the commissioner by the courts for care, custody, and rehabilitation, and to determine the place of confinement of committed persons in a correctional facility or other facility . . . and to prescribe reasonable conditions and rules for their employment, conduct instruct, and discipline within or outside the facility.

Minn. Stat. § 241.01, subd. 3a (a) and (b). Thus, the legislature invested the Commissioner with broad authority over state prisons that house individuals committed to the Commissioner's custody.

Earlier, this Court described Respondents efforts before Petitioners filed this action and over the nearly three months since. Petitioners acknowledge the DOC and MCF-ML have made substantial progress in taking actions to protect Petitioners. They no longer contend Respondents are not acting, but take issue with how Respondents are exercising their discretion. In essence, Petitioners request a writ of mandamus by which this court would control the particular manner in which the DOC fulfills its duty to provide medical care and reasonable safety measures to incarcerated persons under *Estelle v. Gamble,* 429 U. S. 97 (1976); *Cooney v. Hooks*, 535 N.W.2d 609 (Minn. 1985); and *Sandborg v. Blue Earth County,* 601 N.W.2d 192 (Minn. Ct. App. 1999); *rev'd on other grounds* 615 N. W.2d 61 (Minn. 2000).

Petitioners fail to cite any legal authority requiring the DOC or its facilities to take any particular action or that otherwise limits the agency's discretionary choices on how to best respond to a pandemic.

> [I]f the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities. 'It is no part of the function of a court or a jury to determine which one of two modes [i]s likely to be the most effective for the protection of the public against disease.' ... Such authority properly belongs to the legislative and executive branches of the governing authority.

Marlowe v. LeBlanc, No. 20-30276, 2020 WL 2043425, at *3 n. 4 (5th Cir. Apr. 27, 2020) (quoting *In re Abbott*, 954 F.3d 772, 792 (5th Cir. 2020). Furthermore, Minnesota law is clear that the extraordinary relief of mandamus does not lie to

control how a duty is performed or how discretion is exercised. *Mendota Golf*, 708 N.W.2d at 171.

Not only is mandamus not available as a matter of law, court supervision might well be counter-productive. Court oversight and the delays due additional processes – indeed, through a separate branch of government – would likely interfere with the adaptive, flexible system-wide approach that the DOC is using to respond to the pandemic. COVID-19 has been a massive, rapidly escalating threat throughout the United States. The policies the DOC has adopted in response to the COVID-19 pandemic are not static but ever evolving as the virus mutates, scientists learn more about its spread and its devastating consequences to the human body, research on vaccines and treatments increase, and preventive measures evolve. Mandamus is not only inappropriate as a matter of law, it could impede DOC's the adoption and implementation of best practices for timely responses to the COVID-19 threat, a result that would be detrimental to Petitioners, other inmates, and staff at MCF-ML, the opposite of what Petitioners want. Respondents have been working toward *exactly* what Petitioners seek.

This Court will not step beyond the bounds of its authority and usurp the role of the DOC, with its expertise and experience, on how the DOC further implements its response to the COVID-19 pandemic. It is the Commissioner, not a court, who has the authority, discretion, knowledge and expertise to set and implement policies and protocols to manage this infectious disease within Minnesota's prison system.

IV. CONCLUSION

There is no doubt that COVID-19 poses risk of harm to all Americans, including those in the MCF-ML and DOC facilities system-wide. The record developed in this case demonstrates Respondents recognize their duty to inmates and take seriously the threat of COVID-19, as reflected by their extensive measures to combat the virus. Petitioners have not shown that Respondents have been deliberately indifferent to the risks posed by the COVID-19 pandemic, nor have they shown other statutory or constitutional grounds for habeas corpus relief. Respondents are not failing to fulfill a mandatory nondiscretionary duty as they combat COVID-19 at MCF-ML.

NOW, THEREFORE, the court issues the following:

ORDER

1. Petitioners' request for a Writ of Habeas Corpus is **DENIED**.

2. Petitioners' request for a Writ of Mandamus is **DENIED**.

3. Petitioner Kristopher Mehle's claims are dismissed, without prejudice.

4. The Petition is **DISMISSED**.

BY THE COURT:

Leslie E. Beiers

Beiers, Leslie
Jul 13 2020 8:25 AM

The Honorable Leslie E. Beiers
Judge of District Court

JUDGMENT
I hereby certify that the
foregoing order constitutes
the judgment of the Court,
Court Administrator, Carlton County, by,

Jul 13 2020 8:47 AM

Jul 13 2020 8:47 AM

MCF-Moose Lake COVID-19 Response

(Reviewed June 24, 2020)

Minnesota Department of Corrections Commissioner Paul Schnell has directed each of the state's prisons to implement "Stay with Unit" plans to provide living unit separation, and to minimize the potential for COVID-19 spread. "Stay with Unit" ensures incarcerated individuals participate in facility activities, including any programming, yard time, and dining, only with others in their living unit. By providing living unit separation, better social distancing becomes possible and we minimize the potential for widespread outbreaks across entire facilities.

The following additional measures have been taken to protect those within the Moose Lake facility. This list is not necessarily exhaustive of all measures in place.

Masks: Requirement of N95 Mask has been removed and replaced with the requirement of Barrier Masks to be worn while in the facility. All inmates have received cloth barrier masks, which are also required to be worn.

Co-Pays: Starting June 17th, medical co-pays have been reinstated for most situations: including routine medical, dental, eye and physical exams. **Any individual reporting respiratory/cold/cough systems will NOT be charged a co-pay at this time.** We had previously waived ALL medical co-pays for the duration of the Governor's declared emergency.

Protecting Staff and their Families: MCF-Moose Lake has implemented a number of measures to protect staff and their families. Similar to staff at health care facilities, DOC staff have been provided guidance for steps to take to protect their families while they continue to come to work. Information has been distributed and is on posters at the facility for washing hands when they leave work, designating a door of their home just for them to enter and exit, changing clothes and showering when they get home, and avoiding sharing food, among other steps.

Hand washing stations: MCF-Moose Lake installed hand washing stations in the facility. Four handwashing sinks were installed in the lobby entrance to the facility and other hand washing stations were installed in three high traffic areas in the facility. All individuals are required to wash their hands when entering and exiting the facility. Two additional handwashing stations for the inmate population were placed in the facility's main hallways, along with 57 additional hand sanitizer receptacles installed throughout the facility. Inmate restrooms and kitchenettes also have sinks to wash hands. All individuals (staff and inmates) are encouraged to wash their hands frequently throughout the day.

Screening: All staff are screened on a daily basis, including temperature testing, and need a physician's approval to work if they answer yes to one of the screening questions. All staff are provided with protective masks and are strongly encouraged to wear them.

Isolation Plans: MCF-Moose Lake has an isolation plan in place. Details include those inmates displaying symptoms of COVID-19 and/or testing positive are being placed in an isolation area. While on isolation, inmates have access to phones, mail, JPay tablets, canteen, linen, and medication/pill window, legal calls, showers, library, religious material, and other personal items.

Phones: MCF-Moose Lake inmates now receive two free five-minute phone calls per week in addition to the standard calls they could already purchase. Phone banks are sanitized with germicidal by living unit workers. The number of times is dependent upon who the use is from, non-quarantine inmates and those quarantined. Sanitization with Germ Guard Disinfectant is required after use of those on quarantine status. The areas are sanitized multiple times a day. In addition, shields have been installed between each phone station.

Video Visiting: Loved ones on the outside now receive one free 15-minute video visit per week. Additional video visits can also be purchased at a reduced rate, and hours have been expanded. Additional Kiosks have been activated. Video Kiosks are sanitized with Germicidal Chemical & Germ Guard Disinfectant Deodorant by living unit workers. The number of times is dependent upon who the use is from, non-quarantine inmates and those quarantined. Sanitization with Germ Guard Disinfectant is required after use of those on quarantine status. The video kiosk areas are sanitized multiple times a day.

Showers and Bathrooms: Inmates still have access to showers and bathroom facilities. Moose Lake inmates have access to showers and toilets in the living unit of which they live. This is true of all the living units with the exception of Unit 4 Segregation, which has toilets in each cell.

Recreation, Yard, and Courtyard Time: At Moose Lake, no contact sports are allowed, and any shared equipment is off limits. Social distancing is monitored by security staff.

Food Services: Meals are provided in the living units. They may eat in their cells if desired.

Work: At Moose Lake, inmates who work in Food Service are preparing the meals and preparing the trays for distribution to living units. They are also cleaning the kitchen/dining room after the meals are complete. MINNCOR inmates are also making the cloth barrier mask that are being distributed throughout the department. In addition, the print shop is creating material to be posted regarding safety.

Medication: Pill windows are operating at Moose Lake. Health Service staff are delivering medications directly to the living units, only when necessary.

Mail and Emails: Moose Lake inmates can still send and receive mail and emails as they normally would.

Canteen: Items purchased from the inmate store are distributed in the canteen area. Inmates are called down in small numbers and are to maintain proper social distancing.

Education: Moose Lake is offering distance-learning. Staff in the education department provide the education material to the inmates. When the schoolwork is completed, education staff collect work from the inmates. Inmate tutors are employed in each living unit to help/assist inmates. Library services are taking place in each of the living units.

Treatment: Moose Lake's treatment plans are providing distance-treatment opportunities at this time. Treatment work is being delivered on Mondays and collected on Fridays. The collected material will sit over the weekend, helping reduce the spread of the virus.

Television: Inmates still have access to televisions—both in their room and in the common areas, with the appropriate social distancing which is maintained by security staff and inmates.

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RESEARCH FINDINGS

Gendered Pathways into Co-offending Among a Sample of Adult Burglary and Robbery Offenders
Prison Visitation, Spatial Distance and Concentrated Disadvantage of Visitor Neighborhoods, and Offender Recidivism

CONTACT

DOC Directory
DOC Field Services District Offices
Offender Record Request
Minnesota Government White Pages
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1450 Energy Park Drive
St. Paul, Minnesota 55108

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MN DOC is an Affirmative Action/Equal Opportunity and Beyond The Yellow Ribbon employer, and recognizes that a diverse workforce is essential and strongly encourages veterans, women, racial/ethnic minorities, individuals with disabilities, and members of the LGBTQ+ community to apply.

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