Vincent Illuzzi
State's Attorney

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STATE OF VERMONT
Office of State's Attorney
Essex County

March 20, 2020

Angel Desilets, Clerk
Vermont Superior Court
Essex Unit, Criminal Division
P O Box 75
Guildhall, VT 05905

Re: State v Patrick Lowery;
Dkt No.: 76-12-19 Excr

State v Biarchy Mayberry
Dkt No.: 15-3-19 Excr

State v Jason Fournier
Dkt Nos.: 77-2-19, 78-12-19, 59-9-19 Excr

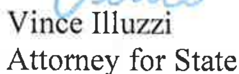
State v Jacob Marshall
Dkt Nos: 79-12-19 and 67-11-19 Excr

Dear Angel, Emily and Robin:

Enclosed for filing with the court in the above mentioned is the *Supplemental State's Opposition To Defendant's Motion For Review Of Bail Of A Defendant In Custody.*

Although I am filing this motion in four Essex cases, I give total and complete credit to Caledonia County Deputy State's Attorney Thomas Paul for doing the research and writing the underlying memorandum.

Sincerely,



Vince Illuzzi
Attorney for State

cc: Laura Wilson, Esq.
Thomas Paul, Esq.

Enclosures

STATE OF VERMONT

SUPERIOR COURT
ESSEX COUNTY

CRIMINAL DIVISION
DOCKET NO.: 79-12-19 EXCR
67-11-19 EXCR

STATE OF VERMONT

V.

JACOB MARSHALL, Defendant

SUPPLEMENTAL
STATE'S OPPOSTION TO DEFENDANT'S MOTION FOR REVIEW OF BAIL OF A DEFENDANT IN CUSTODY

NOW COMES the State of Vermont, by and through its attorney, Vincent Illuzzi, Esq., and hereby requests this court deny Defendant's Motion for Review of Bail and in support hereof states:

1. Medical care of inmates is governed by 28 V.S.A. §801, et seq., which does not create a new or additional private right of action. *28 V.S.A. §801(e)4.*
2. The defendant's remedy, if any, based on the allegations in his motion are available against the Department of Corrections and/or the supervising officer of the facility in which he is confined. *28 V.S.A. §601.*
3. The statutory remedy for claims of inadequate medical care is 42 U.S.C. §1983.
4. A pretrial detainee's claim for deliberate indifference of medical care is evaluated under the Due Process Clause of the Fourteenth Amendment not the Eighth Amendment. *Davis v. McCready, 283 F.Supp.3d 108 (S.D. N. Y. 2017).*

5. The medical care of an inmate is not among the conditions the court shall take into account when setting bail or imposing conditions of release. *13 V.S.A. §7554(b).*

6. Even if this court applies the *Davis v. McCready* standard when considering bail and conditions of release, the defendant has failed at this time to present evidence to support a conclusion that he should be released pre-trial because of the COVID-19 pandemic.

Department of Corrections

Although the COVID-19 pandemic is unprecedented, Vermont statutes clearly provide that the Department of Corrections "shall provide health care for inmates in accordance with the prevailing medical standards." *28 V.S.A. §801(a).* Moreover, this statute does not create a new or additional private right of action. *28 V.S.A. §801(e)4.*
The defendant has failed to prove "the prevailing medical standards" for care and treatment of COVID-19 for a 36-year-old male. All the defendant has alleged is that the Department of Corrections response to the pandemic based is inadequate; and this allegation is based on review of e-mails that are 8-10 days old.
The Department of Corrections has promulgated new COVID-19 guidelines on March 19. (cop attached) The "prevailing medical standards" care and treatment of COVID-19 change daily. By all accounts the Department of Corrections is providing health care in accordance with the prevailing medical standards.

13 V.S.A. §7554(b).

The factors the court shall consider when imposing bail and conditions of release are proscribed by statute. *13 V.S.A. §7554(b).* Inadequate medical care at the facility is

not listed. The court does not have the authority under the bail statute to release a prisoner for medical reasons. Rather, the Department of corrections can take the prisoner outside of the facility with reasonable safeguards. *28 V.S.A. §801(a).*

While COVID-19 pandemic is novel, existing statutory safeguards are in effect to govern the orderly judicial response. Striking bail for a Brady disqualified defendant charged with two felony counts of domestic assault based on an outdated affidavit which itself is based on hearsay is not an orderly judicial response.

8th Amendment to the U.S. Constitution does not apply to pre-trial detainees

Notwithstanding the lack of current evidence and statutory basis for relief under the bail statute, if this court is to consider the medical issues, the State strenuously objects to the erroneous 8th Amendment standard asserted by the defendant. The defendant erroneously relies upon the 8th Amendment to the U.S. Constitution in support of the argument that he should be released pre-trial because of the COVID-19 pandemic:

> A pretrial detainee's claim for deliberate indifference is evaluated under the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment, as "[p]retrial detainees have not been convicted of a crime and thus 'may not be punished in any manner—neither cruelly and unusually nor otherwise.'

Davis v. McCready, 283 F.Supp.3d 108, 116 (S.D. N. Y. 2017), (citing, Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017))

Applicable law

> To state a claim for deliberate indifference to serious medical needs, a pretrial detainee must satisfy a two-pronged test: First, "the alleged deprivation of adequate medical care must be 'sufficiently serious.'" *Lloyd v. City of New York*, 246 F.Supp.3d 704, 717 (S.D.N.Y. 2017) (quoting *Spavone*, 719 F.3d at 139). Second, the defendant must act with a "sufficiently culpable state of mind." *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996).

Davis v. McCready, 283 F. Supp. 3d 108, 116 (S.D.N.Y. 2017).

State of mind

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In determining whether the *mens rea* prong is satisfied, this court must determine, (without the benefit of medical expertise at this time), whether an objectively reasonable person in the Department of Correction's position would have known, or should have known, that its alleged actions or omissions posed an excessive risk of harm to the defendant. *Id., See Darnell*, 849 F.3d at 35; *Lloyd*, 246 F.Supp.3d at 719.

> It was well accepted that negligence alone could not form the basis for a constitutional claim. *See Estelle*, 429 U.S. at 105–06, 97 S.Ct. 285. Something more than negligence is needed to elevate a claim of medical misconduct to a constitutional tort. *Darnell*, 849 F.3d at 36 ("But any § 1983 claim for a violation of due process requires proof of a *mens rea*

> greater than mere negligence."). The distinction between medical treatment that is merely negligent and treatment that supports a constitutional claim depends on the degree of risk associated with the practitioner's conduct. Presumably any negligent conduct by a medical practitioner yields some increased risk of harm to the patient. If a court finds allegations that a medical provider acted negligently, in order to determine whether a plaintiff has pleaded a viable constitutional claim, the court is now required to evaluate whether the risk associated with the negligent conduct would reasonably be expected to be excessive. Determining whether a reasonable medical provider would expect the conduct to result in excessive risk, as opposed to some lower baseline level of risk associated with any negligent medical conduct, is difficult when the court does not have the benefit of expert opinion.

Davis v. McCready, 283 F. Supp. 3d 108, 120–22 (S.D.N.Y. 2017)

Sufficiently Serious Deprivation

"Determining whether a deprivation is an objectively serious deprivation entails two inquiries." *Salahuddin v. Goord*, 467 F.3d 263, 279 (2d Cir. 2006). Courts must first determine "whether the prisoner was actually deprived of adequate medical care." *Id.* If so, the Court must then consider "whether the inadequacy in medical care is sufficiently serious." *Id.* at 280. *Davis v. McCready, 283 F. Supp. 3d 108, 117 (S.D.N.Y. 2017).*

The seriousness standard is that of "unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 103, 97 S.Ct. 285; *see also Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998) Davis *v. McCready, 283 F. Supp. 3d 108, 119 (S.D.N.Y. 2017)*

"[I]f the unreasonable medical care is a failure to provide any treatment for an inmate's medical condition, courts examine whether the inmate's medical condition is sufficiently serious." *Id.* at 280. *Davis v. McCready, 283 F. Supp. 3d 108, 120 (S.D.N.Y. 2017)*

Defendant does not satisfy the test

Defendant's motion fails to demonstrate that the Department of Corrections was negligent for not implementing COVID-19 guidelines sooner. It merely alleges that in hindsight more could have been done. But it does not prove that the Department knew if the risks of COVID-19 and disregarded them. Further, the defendant presents no evidence of degree of risk posed by COVID-19 to 39-year-old males. Thus, the defendant does not show the culpable state of mind necessary to prove deliberate indifference to the defendant's medical care.

In addition, the defendant fails to prove "unnecessary or wanton infliction of pain." Anecdotally the virus causes fever and shortness of breath. But 39-year-old males are overwhelmingly likely to recover.

WHEREFORE, the State requests this court to deny defendant's motion.

DATED: March 20, 2020

Vincent Illuzzi, Esq.
State's Attorney

cc: Laura Wilson, Esq.
Thomas Paul, Esq.,

STATE OF VERMONT

SUPERIOR COURT
ESSEX COUNTY

CRIMINAL DIVISION
DOCKET NO.: 15-3-19 EXCR

STATE OF VERMONT

V.

BIARCHY MAYBERRY, DEFENDANT

SUPPLEMENTAL
STATE'S OPPOSTION TO DEFENDANT'S MOTION FOR REVIEW OF BAIL OF A DEFENDANT IN CUSTODY

NOW COMES the State of Vermont, by and through its attorney, Vincent Illuzzi, Esq., and hereby requests this court deny Defendant's Motion for Review of Bail and in support hereof states:

1. Medical care of inmates is governed by 28 V.S.A. §801, et seq., which does not create a new or additional private right of action. *28 V.S.A. §801(e)4.*
2. The defendant's remedy, if any, based on the allegations in his motion are available against the Department of Corrections and/or the supervising officer of the facility in which he is confined. *28 V.S.A. §601.*
3. The statutory remedy for claims of inadequate medical care is 42 U.S.C. §1983.
4. A pretrial detainee's claim for deliberate indifference of medical care is evaluated under the Due Process Clause of the Fourteenth Amendment not the Eighth Amendment. *Davis v. McCready, 283 F.Supp.3d 108 (S.D. N. Y. 2017).*

5. The medical care of an inmate is not among the conditions the court shall take into account when setting bail or imposing conditions of release. *13 V.S.A. §7554(b).*
6. Even if this court applies the *Davis v. McCready* standard when considering bail and conditions of release, the defendant has failed at this time to present evidence to support a conclusion that he should be released pre-trial because of the COVID-19 pandemic.

Department of Corrections

Although the COVID-19 pandemic is unprecedented, Vermont statutes clearly provide that the Department of Corrections "shall provide health care for inmates in accordance with the prevailing medical standards." *28 V.S.A. §801(a).* Moreover, this statute does not create a new or additional private right of action. *28 V.S.A. §801(e)4.*
The defendant has failed to prove "the prevailing medical standards" for care and treatment of COVID-19 for a 36-year-old male. All the defendant has alleged is that the Department of Corrections response to the pandemic based is inadequate; and this allegation is based on review of e-mails that are 8-10 days old.
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While COVID-19 pandemic is novel, existing statutory safeguards are in effect to govern the orderly judicial response. Striking bail for a Brady disqualified defendant charged with two felony counts of domestic assault based on an outdated affidavit which itself is based on hearsay is not an orderly judicial response.

8th Amendment to the U.S. Constitution does not apply to pre-trial detainees

Notwithstanding the lack of current evidence and statutory basis for relief under the bail statute, if this court is to consider the medical issues, the State strenuously objects to the erroneous 8th Amendment standard asserted by the defendant. The defendant erroneously relies upon the 8th Amendment to the U.S. Constitution in support of the argument that he should be released pre-trial because of the COVID-19 pandemic:

> A pretrial detainee's claim for deliberate indifference is evaluated under the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment, as "[p]retrial detainees have not been convicted of a crime and thus 'may not be punished in any manner—neither cruelly and unusually nor otherwise.'

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Applicable law

> To state a claim for deliberate indifference to serious medical needs, a pretrial detainee must satisfy a two-pronged test: First, "the alleged deprivation of adequate medical care must be 'sufficiently serious.'" *Lloyd v. City of New York*, 246 F.Supp.3d 704, 717 (S.D.N.Y. 2017) (quoting *Spavone*, 719 F.3d at 139). Second, the defendant must act with a "sufficiently culpable state of mind." *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996).

Davis v. McCready, 283 F. Supp. 3d 108, 116 (S.D.N.Y. 2017).

State of mind

The *mens rea* prong of a deliberate indifference claim brought by a pretrial detainee is to be assessed objectively. *Davis v. McCready, 283 F. Supp. 3d 108, 117 (S.D.N.Y. 2017).*

In determining whether the *mens rea* prong is satisfied, this court must determine, (without the benefit of medical expertise at this time), whether an objectively reasonable person in the Department of Correction's position would have known, or should have known, that its alleged actions or omissions posed an excessive risk of harm to the defendant. *Id., See Darnell*, 849 F.3d at 35; *Lloyd*, 246 F.Supp.3d at 719.

> It was well accepted that negligence alone could not form the basis for a constitutional claim. *See Estelle*, 429 U.S. at 105–06, 97 S.Ct. 285. Something more than negligence is needed to elevate a claim of medical misconduct to a constitutional tort. *Darnell*, 849 F.3d at 36 ("But any § 1983 claim for a violation of due process requires proof of a *mens rea*

> greater than mere negligence."). The distinction between medical treatment that is merely negligent and treatment that supports a constitutional claim depends on the degree of risk associated with the practitioner's conduct. Presumably any negligent conduct by a medical practitioner yields some increased risk of harm to the patient. If a court finds allegations that a medical provider acted negligently, in order to determine whether a plaintiff has pleaded a viable constitutional claim, the court is now required to evaluate whether the risk associated with the negligent conduct would reasonably be expected to be excessive. Determining whether a reasonable medical provider would expect the conduct to result in excessive risk, as opposed to some lower baseline level of risk associated with any negligent medical conduct, is difficult when the court does not have the benefit of expert opinion.

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"Determining whether a deprivation is an objectively serious deprivation entails two inquiries." *Salahuddin v. Goord*, 467 F.3d 263, 279 (2d Cir. 2006). Courts must first determine "whether the prisoner was actually deprived of adequate medical care." *Id.* If so, the Court must then consider "whether the inadequacy in medical care is sufficiently serious." *Id.* at 280. *Davis v. McCready, 283 F. Supp. 3d 108, 117 (S.D.N.Y. 2017).*

The seriousness standard is that of "unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 103, 97 S.Ct. 285; *see also Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998) *Davis v. McCready, 283 F. Supp. 3d 108, 119 (S.D.N.Y. 2017)*

"[I]f the unreasonable medical care is a failure to provide any treatment for an inmate's medical condition, courts examine whether the inmate's medical condition is sufficiently serious." *Id.* at 280. *Davis v. McCready, 283 F. Supp. 3d 108, 120 (S.D.N.Y. 2017)*

Defendant does not satisfy the test

Defendant's motion fails to demonstrate that the Department of Corrections was negligent for not implementing COVID-19 guidelines sooner. It merely alleges that in hindsight more could have been done. But it does not prove that the Department knew if the risks of COVID-19 and disregarded them. Further, the defendant presents no evidence of degree of risk posed by COVID-19 to 39-year-old males. Thus, the defendant does not show the culpable state of mind necessary to prove deliberate indifference to the defendant's medical care.

In addition, the defendant fails to prove "unnecessary or wanton infliction of pain." Anecdotally the virus causes fever and shortness of breath. But 39-year-old males are overwhelmingly likely to recover.

WHEREFORE, the State requests this court to deny defendant's motion.

DATED: March 20, 2020

Vincent Illuzzi, Esq.
State's Attorney

cc: Laura Wilson, Esq.
Thomas Paul, Esq.,

STATE OF VERMONT

SUPERIOR COURT
ESSEX COUNTY

CRIMINAL DIVISION
DOCKET NO.:77-12-19 EXCR
78-12-19 EXCR
59-9-19 EXCR

STATE OF VERMONT

V.

JASON FOURNIER, Defendant

SUPPLEMENTAL
STATE'S OPPOSTION TO DEFENDANT'S MOTION FOR REVIEW OF BAIL OF A DEFENDANT IN CUSTODY

NOW COMES the State of Vermont, by and through its attorney, Vincent Illuzzi, Esq., and hereby requests this court deny Defendant's Motion for Review of Bail and in support hereof states:

1. Medical care of inmates is governed by 28 V.S.A. §801, et seq., which does not create a new or additional private right of action. *28 V.S.A. §801(e)4.*
2. The defendant's remedy, if any, based on the allegations in his motion are available against the Department of Corrections and/or the supervising officer of the facility in which he is confined. *28 V.S.A. §601.*
3. The statutory remedy for claims of inadequate medical care is 42 U.S.C. §1983.
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6. Even if this court applies the *Davis v. McCready* standard when considering bail and conditions of release, the defendant has failed at this time to present evidence to support a conclusion that he should be released pre-trial because of the COVID-19 pandemic.

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8th Amendment to the U.S. Constitution does not apply to pre-trial detainees

Notwithstanding the lack of current evidence and statutory basis for relief under the bail statute, if this court is to consider the medical issues, the State strenuously objects to the erroneous 8th Amendment standard asserted by the defendant. The defendant erroneously relies upon the 8th Amendment to the U.S. Constitution in support of the argument that he should be released pre-trial because of the COVID-19 pandemic:

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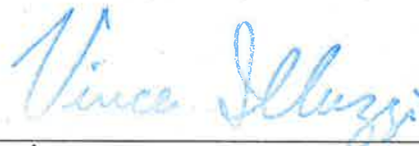
WHEREFORE, the State requests this court to deny defendant's motion.

DATED: March 20, 2020



Vincent Illuzzi, Esq.
(Deputy) State's Attorney

cc: Laura Wilson, Esq.
Thomas Paul, Esq.,

STATE OF VERMONT

SUPERIOR COURT	CRIMINAL DIVISION
ESSEX COUNTY	DOCKET NO.: 76-12-19 Excr

STATE OF VERMONT

V.

PATRICK O LOWERY, Defendant

SUPPLEMENTAL
STATE'S OPPOSTION TO DEFENDANT'S MOTION FOR REVIEW OF BAIL OF A DEFENDANT IN CUSTODY

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Davis v. McCready, 283 F.Supp.3d 108, 116 (S.D. N. Y. 2017), (citing, Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017))

Applicable law

> To state a claim for deliberate indifference to serious medical needs, a pretrial detainee must satisfy a two-pronged test: First, "the alleged deprivation of adequate medical care must be 'sufficiently serious.'" *Lloyd v. City of New York*, 246 F.Supp.3d 704, 717 (S.D.N.Y. 2017) (quoting

> *Spavone*, 719 F.3d at 139). Second, the defendant must act with a "sufficiently culpable state of mind." *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996).

Davis v. McCready, 283 F. Supp. 3d 108, 116 (S.D.N.Y. 2017).

State of mind

The *mens rea* prong of a deliberate indifference claim brought by a pretrial detainee is to be assessed objectively. *Davis v. McCready, 283 F. Supp. 3d 108, 117 (S.D.N.Y. 2017).* In determining whether the *mens rea* prong is satisfied, this court must determine, (without the benefit of medical expertise at this time), whether an objectively reasonable person in the Department of Correction's position would have known, or should have known, that its alleged actions or omissions posed an excessive risk of harm to the defendant. *Id., See Darnell*, 849 F.3d at 35; *Lloyd*, 246 F.Supp.3d at 719.

> It was well accepted that negligence alone could not form the basis for a constitutional claim. *See Estelle*, 429 U.S. at 105–06, 97 S.Ct. 285. Something more than negligence is needed to elevate a claim of medical misconduct to a constitutional tort. *Darnell*, 849 F.3d at 36 ("But any § 1983 claim for a violation of due process requires proof of a *mens rea* greater than mere negligence."). The distinction between medical treatment that is merely negligent and treatment that supports a constitutional claim depends on the degree of risk associated with the practitioner's conduct. Presumably any negligent conduct by a medical practitioner yields some increased risk of harm to the patient. If a court

finds allegations that a medical provider acted negligently, in order to determine whether a plaintiff has pleaded a viable constitutional claim, the court is now required to evaluate whether the risk associated with the negligent conduct would reasonably be expected to be excessive. Determining whether a reasonable medical provider would expect the conduct to result in excessive risk, as opposed to some lower baseline level of risk associated with any negligent medical conduct, is difficult when the court does not have the benefit of expert opinion.

Davis v. McCready, 283 F. Supp. 3d 108, 120–22 (S.D.N.Y. 2017)

Sufficiently Serious Deprivation

"Determining whether a deprivation is an objectively serious deprivation entails two inquiries." *Salahuddin v. Goord,* 467 F.3d 263, 279 (2d Cir. 2006). Courts must first determine "whether the prisoner was actually deprived of adequate medical care." *Id.* If so, the Court must then consider "whether the inadequacy in medical care is sufficiently serious." *Id.* at 280. *Davis v. McCready, 283 F. Supp. 3d 108, 117 (S.D.N.Y. 2017).*
The seriousness standard is that of "unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 103, 97 S.Ct. 285; *see also Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998) Davis *v. McCready, 283 F. Supp. 3d 108, 119 (S.D.N.Y. 2017)*

"[I]f the unreasonable medical care is a failure to provide any treatment for an inmate's medical condition, courts examine whether the inmate's medical condition is sufficiently serious." *Id.* at 280. *Davis v. McCready, 283 F. Supp. 3d 108, 120 (S.D.N.Y. 2017)*

Defendant does not satisfy the test

Defendant's motion fails to demonstrate that the Department of Corrections was negligent for not implementing COVID-19 guidelines sooner. It merely alleges that in hindsight more could have been done. But it does not prove that the Department knew if the risks of COVID-19 and disregarded them. Further, the defendant presents no evidence of degree of risk posed by COVID-19 to 39-year-old males. Thus, the defendant does not show the culpable state of mind necessary to prove deliberate indifference to the defendant's medical care.

In addition, the defendant fails to prove "unnecessary or wanton infliction of pain." Anecdotally the virus causes fever and shortness of breath. But 39-year-old males are overwhelmingly likely to recover.

WHEREFORE, the State requests this court to deny defendant's motion.

DATED: March 20, 2020

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