STATE OF VERMONT

SUPERIOR COURT
WINDSOR UNIT

CRIMINAL DIVISION
Docket No. 263-3-18 WRCR

STATE OF VERMONT

v.

FRANK SANVILLE

STATE'S OBJECTION TO DEFENDANT'S
MOTION TO RELEASE ON PERSONAL RECOGNIZANCE OR TO SET AFFORDABLE BAIL

NOW COMES the State of Vermont, by and through its attorney, David J. Cahill, and hereby objects to Defendant's motion to secure his pretrial release as follows:

1. Defendant is presently held without bail for murdering his estranged wife. At the time of the murder, Defendant was on furlough for his most recent domestic assault conviction against his wife. The term "most recent" is necessary because Defendant was convicted of domestic assault in 2018 and 2012, as well disorderly conduct amended down from domestic assault in 2007.

2. At the time of the murder, Defendant was subject to furlough conditions that prohibited him from:
   a. Having contact with his wife
   b. Visiting his wife's home
   c. Possessing a firearm
   d. Engaging in violent behavior

3. Despite these conditions and despite DOC's highest level of field supervision (furlough), Defendant traveled approximately eighteen miles from his approved residence, acquired a firearm, acquired ammunition, and killed his wife.

4. At arraignment, Defendant did not contest that the evidence of guilt was great. He knew he would be returning to prison on a furlough violation. He also knew that two people, Todd Hosmer and Leland Hosmer, had witnessed him kill his wife. Based upon Defendant's concession, the Court held Defendant without bail pursuant to 13 V.S.A. 7553.

5. Defendant's current motion does not contest that the evidence of guilt is great. Rather, it appeals to the Court's discretion to override the presumption of pretrial detention. See generally, State v. Blackmer, 160 Vt. 451 (1993)(in life

imprisonment cases where the evidence of guilt is great, the presumption is pretrial detention). This exercise of discretion is guided by the factors listed in 13 V.S.A. 7554. Id.

6. Defendant has not demonstrated how the Court, after weighing the 7554 factors, could find that both public safety and Defendant's appearance could be ensured by imposition of conditions of release and bail. Defendant has not offered any proposed conditions or proposed bail amount because no combination thereof would protect the public or secure Defendant's appearance. Indeed, Defendant's multi-decade criminal history is replete with crimes of violence and violations of court orders. Likewise, one cannot conclude that Defendant's years of crime are behind him because he committed this murder as a septuagenarian.

7. Defendant is to be lauded for his transparency in acknowledging that the COVID-19 motion is a template motion. It is an all-or-nothing proposition. Either everyone gets out of jail because DOC's COVID-19 response is inadequate or they don't.

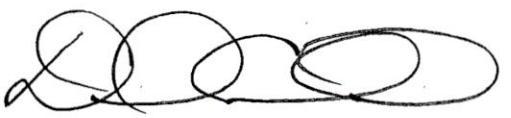
8. However, bail review hearings are specific to the case and the person. The evidence in this case indicates that Frank Sanville is just as dangerous to the public as the novel corona virus. To past and future romantic partners, Mr. Sanville is a bit more like Ebola.

9. With regards to the merits of the COVID-19 form motion, the State adopts the logic of Judge Harris' decision in *State v. Patrick Lowery, et al.,* Entry Order dated March 23, 2020 (attached).

WHEREFORE the State requests that the Court DENY Defendant's motion requesting pretrial release.

DATED at Thetford, Vermont, this 25th day of March 2020.

STATE OF VERMONT



By: _____

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STATE OF VERMONT

SUPERIOR COURT — CRIMINAL DIVISION
CALEDONIA UNIT – Dockets Nos. 697-12-18 Cacr and 629-11-19 Cacr
ESSEX UNIT – Docket No. 76-12-19 Excr

State of Vermont
v.
Patrick O. Lowery,
Defendant

STATE OF VERMONT

SUPERIOR COURT — CRIMINAL DIVISION
ESSEX UNIT – Docket No. 76-12-19 Excr

State of Vermont
v.
Biarchy Mayberry,
Defendant

STATE OF VERMONT

SUPERIOR COURT — CRIMINAL DIVISION
ESSEX UNIT – Dockets Nos. 59-9-19 Excr. 77-12-19 Excr and 78-12-19 Excr

State of Vermont
v.
Jason Fournier,
Defendant

ENTRY ORDER ON MOTIONS TO MODIFY BAIL

Motions to modify bail in these seven actions, involving three defendants and charges in two counties, were heard in the Caledonia Criminal Division on March 20, 2020. The bail modification hearings were consolidated in part as to common issues regarding the impact of the COVID-19 or coronavirus health emergency, and the Department of Corrections' measures to protect the health and safety of detained persons.

All hearings were conducted under the auspices of the Vermont Supreme Court Administrative Order No. 49, as amended through 3/18/20. All counsel appeared by phone, and all three defendants appeared for portions of the hearings in succession by video link, with consent provided for Defendants Mayberry and Fournier to be absent during portions of the consolidated COVID-19 testimony relating to their motions. States Attorney Vince Illuzzi

appeared for the State in the hearings as to all three defendants and all Essex County matters, and Deputy States Attorney Tomas Paul appeared for the State in Dockets Nos. 697-12-18 Cacr and 629-11-19 Cacr regarding Mr. Lowery. Attorney Laura Wilson appeared for all three defendants as to all of the Essex County matters and Attorney Swope appeared for Mr. Lowery in Dockets 697-12-18 Cacr and 629-11-19 Cacr.

At the 3/20/20 hearing counsel for all parties agreed they presented their common bail review hearing COVID-19 related evidence and argument. As noted below the individualized bail review proceedings for two defendants requires additional party input to complete conclude their motion determinations apart from the common COVID-19 issues. **The court is issuing bifurcated opinions on the bail review motions. This initial opinion provides the court's analysis and rulings as to the common COVID-19 related arguments of the parties, which appear to be asserted in each additional pending or withdrawn motion to review bail for pretrial detainees with maters pending before the undersigned in Caledonia or Essex Counties.**

Subsequent decisions will issue as to each defendant. Mr. Lowery's motion for bail review is under advisement; the hearing on Mr. Mayberry's bail review hearing, as to his individualized bail review arguments was not heard 3/20/20 due to time and video appearance constraints; Mr. Fournier's bail individualized bail review decision requires the State's additional input as to any objection to the proposed curfew residence, and Mr. Fournier's co-occupants at that residence if the proposed curfew location is allowed and imposed as a condition of release. That proposed curfew location was first proposed and provided at the hearing. Consistent with the analysis and orders in this opinion, the court will issue individualized bail review motion determinations for each of the Defendants.

The factual and legal findings of the court, based on the arguments and evidence presented at the hearings, the motions to modify memoranda, and the past proceedings in these matters, are set out below:

A) Procedural Background

The motions to modify, hearing evidence and arguments of counsel, frame the issues for bail modification requests asserted by the Defendants and opposed, in whole or part, by the respective States' Attorney Offices. The court first notes the detention orders or unpaid bail that presently result in each defendant's detention. (This summary does not list the other associated conditions of release, "COR" which in themselves do not directly cause the defendants' present pretrial detentions):

Patrick Lowery –

[1] Docket 697-12-18 Cacr (amended violation of abuse prevention charge on which sentence was imposed 9/16/19) – a violation of probation ("VOP") hold without bail ("HWOB") order of on or Around 11/19/19, due to the allegations of Docket 629-11-19 Cacr below;

[2] Docket 629-11-19 Cacr (two counts of second degree aggravated domestic assault, with the aggravated charge due to a prior conviction for domestic assault) -$5,000 bail set on 11/19/19;

[3] Docket 76-12-19 Excr (2nd degree aggravated domestic assault after a prior domestic assault conviction and 1st degree domestic assault)- $5,000 bail (concurrent) set on or around 12/17/19 after the alleged 11/19/19 domestic assault incident in Victory, Vermont resulting in these charges.

NOTE: Mr. Lowery is held at present for a HWOP on a VOP and lack of cash bail of $5,000 concurrent in two cases.

Biarchy Mayberry

In Docket 15-3-19 Excr Mr. Mayberry is charged with two counts of aggravated sexual assault involving a victim of under 13 years of age (18 V.S.A, Section 3258(a)(8)). He is being detained on a HWOB mittimus, ordered at his arraignment on or around 3/11/19, under 13 V.S.A. section 7553 (allowing HWOB orders for charges carrying a maximum penalty of life imprisonment).

Jason Fournier

Mr. Fournier has several pending matters but three of them involve bail conditions relating to his present pretrial detention:

[1] Docket 59-9-19 Excr (Unlawful Mischief and Burglary) - $1,500 bail (set on or around 9/23/19);

[2] Docket 77-12-19 (Possession of stolen property under $900) - $1,500 bail (concurrent), set 12/17/19;

[3] Docket 78-12-19 Excr (Grand Larceny) - $1,500 bail (concurrent), set 12/17/19.

NOTE: Collectively Mr. Fournier is held of $1,500 (concurrent) bail.

B) <u>The COVID-19 Related Bail Arguments</u>

The court considers the impact of the COVID-19 national and state emergency declarations and DOC responses upon the defendants' consolidated 13 V.S.A. section 7554(d) bail review arguments.

In essence Defendants collectively argue that the Defendant's pre-trial detentions under DOC's COVID-19 policies presents a risk to each Defendant's health, in violation of the 8th Amendment of the U.S. Constitution, necessitating the need for the court to release each defendant on appropriate conditions, rather than continuing cash bail and/or HWOB orders in the cases.

In support of this argument the Defendants refer to the rapidly changing COVID-19 public health emergency and ask the court to take judicial notice of certain promulgations relating to that public health risk, and proffer a 3/15/20 Affidavit of Dr. Jaimie Meyer (attached

to the motions for bail review in all the relevant matters)[1], an Assistant Professor of Medicine at the Yale School of Medicine, who is board certified in internal medicine, infectious disease and addiction medicine.

In her affidavit, Dr. Mayer (who did not testify at the motion hearing) stated her opinions as to the adequacy of the DOC protocols, relating to the protection and treatment of detained persons from the COVID-19 virus. The factual basis for her opinions was based upon her review of March 10-12, 2020 emails she reviewed.

Dr. Meyer described, in general terms, several identified alleged deficiencies in DOC's COVID-19 protocols, based upon her review of the March 10-12, 2020 emails provided her. Since the emails Dr. Meyer reviewed were not attached to the court motions in these cases the court has not been able to review them. Review of Dr. Meyer's affidavit shows the emails related to the COVID-19 policies and protocols the DOC was using with detained persons in its custody through some period up to March 12, 2020.

Dr. Meyer's affidavit identifies four broad areas where she opines DOC's response to COVID-19 is insufficient to address the epidemic.

First Dr. Meyer opines the facility screening protocols are inadequate. Among her stated concerns are that, based on the email information she had, the screening process consist solely of persons entering the facility self-reporting; that there is no indication new admitted detainees, staff, vendors or contractors are being screened; and that there are no plans to quarantine isolate individuals who screen positive.

Second, Dr. Meyer opines DOC lacks adequate prevention techniques. Among her stated concerns are that, based on the email information she had, there is in adequate soap, private sinks and clean water for handwashing or alcohol-based sanitizers; that high-touch surfaces are not being regularly disinfected with bleach; and that "social distancing" practices cannot be regularly practiced in crowded or communal conditions in the facility.

Third, Dr. Meyer opines DOC lacks the treatment capacity to handle detained persons who become ill with COVID-19. Among her stated concerns are that, based on the email information she had, was the lack of areas to isolate infected prisoners, lack of airborne infection isolation rooms; personal protective equipment to treat and manage infected detainees; and ability to identify people who may need more intensive medial care to be transported to area hospitals.

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[1] Formally the Defendants did not move to introduce the Meyer Affidavit into evidence the 3/20/20 hearing, and in at least in Mr. Lowery's case, moved on //20 to allow for its introduction. The court has considered Meyer Affidavit a it was used and referred to without objection during the 3/20/20 hearing, and the court's analysis of its impact on bail review motions will give more clarity to how the Meyer Affidavit issue may impact future bail review hearings before the undersigned judge as well as allow for quick appeals as to the court's analysis of the Affidavit in the bail review motion context.

Fourth, Dr. Meyers opines, based on the email information she had, that DOC has limited treatment capacity for people with other chronic health conditions, who are more at risk of infection and complications if exposed to COVID-19.

Dr. Meyers' affidavit describes general risks and alleged lack of adequate preparation by DOC. Dr. Meyers' affidavit lacks specific details as to the degree of risk, its immediacy, or the impact of additional protective steps DOC may take, or has taken, as compared to the conditions described in the emails that she reviewed. Her stated concerns relate to the ability or capacity of DOC to expand to the developing COVID-19 pandemic as it will impact detained persons. Dr. Meyer assumes the response plan is static, when in fact, as described below, it is under active revision. The concerns over the adequacy of the health care systems to adequately treat persons with serious COVID-19 symptoms, is a shared concern for all citizens (detained or not).

The States Attorney in each of these actions argues that the COVID-19 concerns expressed by Dr. Meyers are not relevant to considerations of setting bail conditions, but may be addressed in other forms of legal proceedings.

Subject to the State's relevancy objections, the court accepted evidence as to DOC's current (as of 3/20/20) COVID-19 protocols. Testimony by phone was provided by Al Cormier, the Facilities Executive for DOC, as well as a copy of the 3/19/20 DOC COVID-19 Guidelines.

The testimony shows that DOC, like many agencies of state government, has recently undertaken an ongoing, fast paced, and intensive review and development of its practices and protocols. In the time period between the issuance of the March 10-12, 2020 email reviewed by Dr. Meyer, and the issuance of the 3/19/20 DOC COVID-19 Guidelines, public health agencies and governmental agencies have rapidly reviewed and adopted new policies as more information about the COVIC-19 health emergency has emerged. Across government, responses and policies underwent dramatic refinement between March 12 and March 20, 2020

The DOC 3/19/20 DOC COVID-19 Guidelines were developed with considerable planning and input and remain subject to revisions as new information or public health conditions arise. The Guidelines were developed using input, guidelines and information from the Center of Disease Control ("CDC") and Vermont Department of Health, the State COVID-19 task force, and using communications correctional facility operators in other states (and joint calls from organizations such as the American Correctional Association). Input has been received from groups such as the American Civil Liberty Union, the Prisoners Rights Office of the Vermont Defender General, Vermonters for Criminal Justice Reform, and Vermont Interfaith Action as to the Guidelines and suggestions for changes to them. The Guidelines have been disseminated to, and apply to, all of the DOC facilities. A DOC COVID-19 incident command system team is set up to provide ongoing planning, logistical and operational support to carry out the Guidelines and the safety and treatment protocols. DOC staff are included in the State emergency planning teams the Governor has established to continue to respond and react to the COVID-19 health emergency. Mr. Cormier receives daily reports from each facility as to COVID-19 related matters (illness, employee sick call ins and other information).

The Guidelines describe general preventive measures to be implemented where possible – avoiding close contact and touching ones face, frequent hand washing with soap for at least 20 seconds, frequent cleaning of "high touch" surfaces, social distancing, and the need for employees to stay home if they are sick. Information on environmental cleaning protocols and cleaning reagents are set out. The general preventative measures are specifically re-referenced during several staff/ detained person interactions described in the other portions of the protocols.

To reduce risk of infection from persons entering the facilities, visitors and volunteers are no longer admitted to facilities. Community based detainees work crews have been discontinued. Employees who have certain symptoms or learn they should impose a voluntary quarantine are told not to report to work. COVID-19 related leave policies allow employees who should not come to work due to COVID-19 like symptoms or screening protocols to receive pay for two weeks. Information is tracked as to employees who have been sick or at home quarantined.

All staff and persons entering the facilities are screened as to risk factors and required to leave the facility if they report. Temperature scans are used and all persons with a temperature in excess of 100.4 degrees F. are not allowed to remain.

New admittees are also screened, by gloved officers in a sally port area. Screening includes a verbal screening and the admittee completing a written form setting out the screening questions. Personal protective equipment (PPE") is used if the screening results in a positive response. Those persons are placed in a screening cell for further medical screening with PPE protections for persons having contact with the person during the screening. The Guidelines provide information as to the PPE equipment to be used and instructions on their use.

The Guidelines include substantial quarantine policies to physically separate persons who have been exposed to COVID-19 for 14 days to assess whether they develop viral symptoms. Protocols as to PPE use, room entrance and exit, disinfectant cleaning, quarantined detainee health screening, and other measures, are described. Quarantine rooms are identified with signs containing warnings as to PPE and other measures to be used before entering the room.

The Guidelines have a detailed section on COVID-19 specific transport protocols if ill persons needs to be transported from the facility. They include the use of PPE, cleaning of the vehicle, and maximizing air ventilation in the vehicle during transport, and advance communication to area hospitals if a person is being transported for off site treatment.

The Guidelines contain protocols for isolation, or the physical separation of ill persons from persons who are not ill. Entrance/ exit protocols, use of PPE, dedicated isolation room equipment, cleaning and disinfection policies are set out for the isolation areas. Isolation rooms are identified with signs containing warnings as to PPE and other measures to be used before entering the room. The DOC facilities each have identified isolation areas and two of the facilities have negative pressure rooms with a capacity of 10 persons. One facility (Northeast) is available as a secondary isolation unit with up to 100 or so additional beds. If detained persons need to be transported to local hospitals for treatment, the health facilities are contacted in

advance as to the expected arrival of the detained person (pretrial detainee or inmate) and his or her symptoms.

The Guidelines have policies for staff monitoring and twice daily questioning of detained persons, and to encourage detained persons to report symptoms, and follow up use of masks and medical screening. The Guidelines include simple, illustrated CDC instructional guides on the proper use and handling of PPE.

The DOC has recently increased its supplies of soaps and disinfectants and PPE, and is keeping an inventory of PPE items to better anticipate needs. It has medical staff on site at the locations. They have been trained on the COVID-19 protocols.

Due to the number of detained persons and the facility size limitations, the DOC is not able to have detained persons maintain a six foot isolation zone from others, especially at times like meal times. The DOC is adopting modified outdoor recreational time, detainee day room times, and meal time schedules to lessen the number of persons in those areas at any one time.

As of the 3/20/20 hearing, there are no known detained persons or DOC facility staff with COVID-19 symptoms. DOC is not transporting Vermont detainees to or from the contracted Mississippi facility where some Vermont inmates are housed. DOC remains in communication with that facility and it has no reported inmates with COVID-19 symptoms.

As to the defendants filing these bail review motions, none of them claim current symptoms, or that they are being deprived reasonably needed treatment for COVID-19 symptoms. Defendants in essence contend the correctional facility operations and environment places them at risk for future illness, of constitutional proportions, that should mandate that they be released from detention.

The State contends that these alleged constitutional deprivation concerns are not properly part of the bail review process, and in any event, the grounds for relief for such alleged constitutional deprivations have not been met. The court agrees, subject to the other observations later expressed in this opinion.

The Defendants here are held pre-trial detainees, with impending criminal charges and alleged violations of probation pending. The Eighth Amendment applies to sentenced inmates serving their sentence and not to detained persons. See, *Ingraham v. Wright*, 430 U.S. 651, 671-672 n. 40 (1977); *Kingsley v. Henricksen*, 135 S.Ct. 2466, 2475 (2015)(noting inapplicability of the Eight Amendment's Cruel and Unusual Punishment clause to pretrial detainees, because "most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all").

In *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) the Supreme Court stated that the Due Process Clause, implicating protection against deprivation of liberty without due process of law, applies to pre-trial detainees and the proper inquiry as to the constitutionality of conditions or restrictions of pretrial detention is whether those conditions "amount to punishment of the detainee".

The process for pretrial detainees (and inmates serving sentences) to seek relief for alleged unconstitutional conditions of confinement is to bring a civil rights claim under 42 U.S.C. § 1983. These claims include cases challenging prison conditions alleged to violate constitutional constraints. See example, *Butler v. Fletcher*, 465 F.3d 340 (8th Cir. 2006)(§ 1983 action for alleged constitutional violations of prison by failing to adopt and implement adequate safeguards protecting inmates from tuberculosis infection).

Section 1983 actions are the appropriate forum to determine such claims against governmental officers, actors and States for several reasons. Section 1983 actions allow for civil discovery, as well as expedited processes where appropriate. Actions may be brought for injunctive relief. Such prison condition claims and review directly involve the state correctional facilities as parties and allow for court intervention, when constitutional violations are shown. Courts declaring prison conditions to be unconstitutional often order the states to devise a plan to eliminate the conditions, and only after noncompliance do the courts order more drastic remedies such as the release of prisoners or closing of prisons. See example, *Madrid v. Gomez*, 889 F.Supp. 1146, 1282-83 (N.D.Cal. 1995)(action challenging the constitutionality of conditions at the State of California Pelican Bay Prison and resulting in injunctive relief); *Grubbs v. Bradley*, 552 F. Supp. 1052, 1055, 1131-32 (M.D. Tenn. 1982)(action challenging the constitutionality of conditions at twelve Tennessee adult penal institutions and resulting in injunctive relief).

Defendants cite no authority for the proposition that the claimed constitutionally deficiencies in DOC's COVID-19 policies may be asserted in a bail review proceeding instead of the well recognized manner to obtain redress – a civil claim under Section 1983.

The court concludes the constitutional challenges asserted here are not relevant to bail review motions but may be pursued in separate 42 U.S.C. §1983 action. However, in the event this decision is appealed, the court makes alternative findings as to why the evidence presented is insufficient to support such claims.

In discussing the application of the Due Process Clause to pretrial detainees, the *Bell* Court explained the principles that provide consideration of the interests of the detained individuals and the government. Pretrial detainees, like defendants, have had a judicial probable cause determination and bail hearing as to the charges on which they are being held. For such an individual, "under such circumstances, the Government concededly may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution." 441 U.S. at 536-537. As the *Bell* Court further explained:

> Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's

> understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into "punishment."
>
> *Bell,* 420 U.S. at 537.

Citing its prior decision in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), the *Bell* Court stated principles to determine whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word:

> A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Kennedy v. Mendoza-Martinez,* 372 U.S., at 168-169, 83 S.Ct., at 567-568; Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal-if it is arbitrary or purposeless-a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

Bell, 420 U.S. at 538-539 (certain citations omitted); See also *Block v. Rutherford*, 468 U.S. 576, 583-84 (1984); *Kingsley, supra* (reiterating the Due Process violation test to require a showing the prison officials actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that purpose.")

In identifying the government's legitimate purposes as to constitutional challenges to the conditions of confinement for detainees the *Bell* Court made an important distinction. It stated that although insuring the detainee's presence at trial is the governmental objective that justified the original detention decision, the *Bell* Court rejected the argument that the Government's interest in ensuring a detainee's presence at trial is the *only* objective that may justify restraints and conditions once the decision is lawfully made to confine a person. The legitimate operational concerns, to manage the facility where the individual is held "may require administrative measures that go beyond those that are, strictly speaking, necessary to ensure that the detainee shows up at trial." 420 U.S. at 540.

The adoption and use of the COVID-19 DOC practices are not those adopted for "punishment" under the Due Process Clause. The DOC's efforts to develop COVID-19 protocols are incident to its legitimate governmental purpose to house persons subject to detention. DOC, like all branches of government, has needed to quickly respond to develop new protocols to ensure safety of citizens who may be impacted by its actions by the quickly developing COVID-19 health emergency. The DOC has not acted in a cavalier or arbitrary manner. It has developed a comprehensive COVID-19 policy and organizational structure to carry it out to help protect

detained persons against the risk of COVID-19 infection. It has utilized core CDC and Vermont Department of Health recommended procedures to limit the number of persons coming in and out of its facilities. DOC uses screening and isolation procedures for persons entering the facility and present there. It is using personal protective equipment where appropriate and has procedures and some capacity of the quarantining and isolation and treatment of persons with COVID-19 exposure risk, or illness and symptoms. The DOC has developed and disseminated protocols, that will continue to be updated, and provides training and supervision to carry out those practices, including training and monitoring of inmates. The DOC has ongoing planning, logistical and operational review of its policies, maintains contacts with public health and local COVID-19 tasks forces, and other correctional facility operators in the United States.

The fact that the current protocol does not allow for maximizing protective strategies, such as social distancing (that is a detained person's ability to maintain a six foot distance from others), does not make a showing of a constitutional violation. There are certain inherent incidents to confinement. Moreover, at present there are no known COVID-19 infected persons present in the DOC facilities. If and when infections might occur, DOC can continue to change and adapt its COVID-19 practices. Changes to DOC furlough or other correctional policies that may allow for the release of additional persons now held in custody, may provide other tools to respond to COVID-19 prison conditions.

The court mindful that other branches of government possess emergency powers to respond to fast-emerging crises in a very nimble manner. The Governor's emergency powers include emergency evacuation of persons. 20 V.S.A. section 9(9). The Vermont Department of Health may coordinate with state and federal agencies to develop and implement emergency management medical programs. 20 V.S.A section 28. The legislature may enact emergency legislation to modify existing laws. Courts' powers (and obligations) are to enforce existing laws and constitutional provisions that may apply. Barring conditions that transgress constitutional limits, only the Legislature has the power under our state constitution to suspend execution of our laws[2]. Lastly, absent conditions of constitutionally deficient magnitude, the *Bell* Court noted the courts' role is not to seek to impose changes in the conditions or practices under judges' own personal views: "Courts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." 420 U.S. at 539.

The Court recognizes there are some decisions that have concluded that the minimum standard for providing medical care to a pre-trial detainee under the Due Process Clause of the Fourteenth Amendment can incorporate the minimum standard required by the Eighth Amendment for a convicted prisoner. See example *Andujar v. Rodriguez*, 486 F.3d 1199, 1202 fn. 3 (11th Cir. 2007). Assuming Eighth Amendment principles may serve as alternative grounds for a Due Process violation, the court considers the Eighth Amendment principles derived from the Cruel and Unusual Punishment Clause. Such Eighth Amendment claims involve the

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[2] "The power of suspending laws, or the execution of laws, ought never to be exercised but by the Legislature, or by authority derived from it, to be exercised in such particular cases, as this constitution, or the Legislature shall provide for." Vt. Cons. Chapter I, Article 15.

existence of sufficiently egregious conditions and determinations whether there was deliberative indifference to such conditions.

To the extent Defendants' claims are viewed as deliberate indifference to serious medical needs of prisoners, such claims should involve '"unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Serious medical needs may involve "an objectively serious medical condition" (*Wilson v. Adams*, 901 F.3d 816 (7th Cir. 2018), quoting *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016)) or medical conditions with a condition of urgency that may result in degeneration or extreme pain. See *Davis McCready*, 283 F. Supp.3d 108, 119 - 102 (S.D.N.Y. 2017)(citing *Chance v. Armstrong*, 143 F.3d 698, 702 (2nd Cir. 1998), and *Sulahuddin v. Goord*, 467 F.3d 263, 279 (2d Cir. 2006).

The current situation does not fall within the lack of adequate medical care cases. These defendants at present have no imminent need for medical care. None of them require any medical attention for present symptoms or illness. None of them have any indication that they may develop COVID-19 symptoms in the near future form any exposure to contagious individuals. As the Supreme Court noted in one case, "[b]ecause society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious'". *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). Defendants have no present medical needs that are "serious".

To the extent the Defendants' may frame their Eighth Amendment Claims for inadequate conditions of confinement, the claimant must show the "deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets." (*Wilson v. Seiter*, 501 U.S. 294, 304 (1991)) or the breach of a duty to "provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates" (*Farmer v. Brennan*, 511 U.S. 825, 833 (1994), citing ," *Hudson v. Palme*r, 468 U.S. 517, 526–527(1984)).

Given the comprehensive and fast paced response of the DOC, in the development of the 3/19/20 COVID-19 policies and supporting planning, outreach, and training to continue to develop improved protocols, and especially with the present lack of any inmate not receiving quarantine, isolation or medical treatment for COVID-19 exposure or symptoms, the court cannot find that these standards have been shown.

Due Process claims that apply Eighth Amendment standards applicable to "deliberate indifference " claims, whether for claims of inadequate medical treatment or injurious conditions of confinement also include a second element – the *mens res* inquiry to show that the state actor(s) have shown deliberate indifference to the medical or correctional conditions.

In *Kingsley, supra*, the Supreme Court, referencing back to the *Bell v. Wolfish* analysis that under substantive Due Process impermissible "punishment" for detainees could mean force deployed with a subjective, "expressed intent to punish," it also could mean force that, as an objective matter, is "not rationally related to a legitimate governmental" purpose or is "excessive

in relation to that purpose" (135 S.Ct. 2473-74). The *Kingsley* Court concluded that to show a claim for excessive force a pretrial detainee in the Fourteenth Amendment context "must show only that the force purposely or knowingly used against him was objectively unreasonable").

This has led to confusion whether the *mens res* test, when applied to Eighth Amendment deliberate indifference claim principles applied in to Due Process claims of detainees for inadequate medical care or inadequate conditions of confinement. should apply a subjective or often more liberal objective test as to the decisionmaker's actions. Compare *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017) (holding that the "subjective prong" of a claim of deliberate indifference to conditions of confinement under the Fourteenth Amendment must be "defined objectively" in light of *Kingsley*) and *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc), *cert. denied sub nom. Los Angeles Cty. v. Castro*, —— U.S. ——, 137 S.Ct. 831, 197 L.Ed.2d 69 (2017) (interpreting *Kingsley* to mean that a failure-to-protect claim brought by a pretrial detainee under the Fourteenth Amendment does not include a subjective intent element), with *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017) (finding that because the Fifth Circuit continued "to apply a subjective standard [in failure-to-protect claims] post-*Kingsley,* this panel is bound by our rule of orderliness").

As to Defendants' challenges the court finds even the less stringent objective standard not met. The facts previously found and stated as to the DOC's initiatives, actions and plans for follow through in protecting, managing and treating inmates as to COVID-19 exposure (including follow up quarantining, isolation, and onsite and offsite treatment) are not objectively unreasonable in light of the current COVID-19 situation.

Independent of the constitutional challenges above, Defendants argue that the court must consider the COVID-19 risks as part of the bail review process, which position the State opposes. In *State v. Toomey*, 126 Vt. 123, 125 (1966), the Court, citing an Am. Jur. Section on bail, (8 Am.Jur.2d Bail and Recognizance s 71, p. 824) in a case arising before enactment of 13 V.S.A. section 7554, noted the "health of the defendant" as a factor the court may consider in setting bail. The health of the defendant is not included in the current bail statute as a listed consideration in determining bail and conditions of release.

The court agrees with the State, at least to the extent that any inclusion and consideration of the Defendant's health in establishing conditions of release under 13 V.S.A section 7554(b) does not include review of the general DOC policies in providing medical care of detainees and inmates, or at least an independent review of the adequacy of the overall DOC policies and practices to respond to *future possible medical needs* of the Defendant. Any deeper inquiry as to the DOC's COVID-19 practices readiness is especially appropriate to be resolved in the wider context of a 42 U.S.C. Section 1983 action.

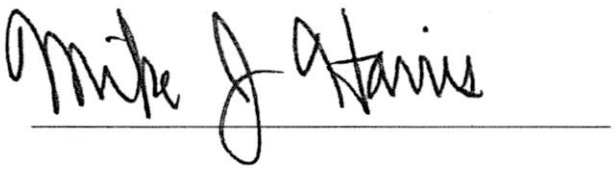
Despite the forgoing, the court is well aware of the present uncertain ultimate reach and magnitude of the COVID-19 pandemic. The pandemic is impacting the daily lives and practices of individuals, families, businesses, institutions, and government on a national and global scale. The court believes it may be appropriate for the court, in appropriate cases, to use its discretion to apply general COVID-19-pandemic-cognizance in making individualized bail decisions. For

instance, setting conditions of release as to curfews or release to the "custody of a designated person" now may involve considerations as to whether the such persons with whom Defendant may live, or be under their custodial supervision, may be under required or voluntary COVD-19 self quarantine impacting such placement or supervision. Emerging emergency orders or directives specifically impacting the courts or DOC's overall operations may necessarily impact or require COVID-19 concerns to be included in making some criminal division case decisions.

Case-by-Case Bail Review Determinations (Based on the Arguments and Facts presented)

These determinations will issue as described in this opinion. The States Attorney needs to provide information about its position as to the proposed Fournier curfew location, and Mr. Fournier's counsel can then inform the court if given such position if a continued hearing is needed. Later today the court plans to conduct the continued Mayberry hearing, which may be complicated by counsel conflict scheduling issues under present review.

Electronically signed on March 23, 2020 at 08:54 AM pursuant to V.R.E.F. 7(d).



Michael J. Harris
Superior Court Judge