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MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

IN RE THE MATTER OF:)) ORDER RE: TESTING FOR COVID) AT CCDC)))))	CAUSE NO. SB-2020-413
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Beginning on March 13, 2020, and continuing to today, this Court, the Montana Supreme Court, and the Governor of the State of Montana have issued orders to respond to the COVID-19 pandemic. All of these orders and directives were aimed at protecting public health and safety and doing as much as possible to prevent the spread of the dangerous virus. The situation has been so dire that the Governor declared a state of emergency and the Chief Justice directed courts to enforce physical distancing in courthouses, screen people entering courthouses, and provide extensive signage requiring adherence to recommended health practices from the CDC.

The Governor and public health agencies at the federal, state and local levels have repeatedly strongly encouraged masks because “masks can assist in stopping the transmission of the illness by an asymptomatic person.” See, for example, May 22, 2020, directive from Chief Justice McGrath. The fact that masks are

9

effective in preventing the spread of COVID-19 has been widely understood and publicized since the outbreak began in March 2020.

The Cascade County Detention Center (CCDC), which is run under the supervision of the Cascade County Sheriff, holds 400-450 pretrial detainees. It also holds State and Federal prisoners by contract with those entities. Pretrial detainees are presumed innocent, and are held on bail set by judges, based on, among other considerations, flight risk and danger to the community. Pretrial detainees are held against their will but are not convicted of the charges against them. The Court recently learned that the Sheriff did not distribute masks to pretrial detainees until August 21, 2020, when a symptomatic detainee was tested positive for COVID-19. Since that date, at least 150 pretrial detainees and 9 detention staff have tested positive.¹

Late last week, the Court learned that the CCDC does not test any person who “chooses” not to be tested. Thus, persons who may carry the COVID-19 virus may be housed with persons who are not infected. While some medical care is available at the CCDC, some of that care ultimately becomes the financial responsibility of the person receiving treatment. It should further be understood that people of limited financial means, persons living under the poverty line, are overrepresented in

¹ The numbers publicized by the Sheriff’s Office can be difficult to understand, because persons deemed “recovered,” and inmates released or transferred are subtracted from the list of positive results.

comparison to the population as a whole.

When the Government takes a person into custody and detains him or her against his or her will, the Government has a constitutional duty to be responsible for the inmate's safety and general well-being. See *Helling v. McKinney*, 509 U.S. 25, 32, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993).

Pretrial detainees are protected by the Fourteenth Amendment Due Process Clause², and prisoners (persons who have been convicted of a crime) are protected by the Cruel and Unusual Punishments Clause of the Eighth Amendment³. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). "[P]retrial detainees' rights under the Fourteenth Amendment are comparable to prisoners' rights under the Eighth Amendment..." Therefore, conditions of confinement is analyzed under Eighth Amendment precedent. *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998).

Taking a person into custody creates a special relationship, requiring the Government to take responsibility for a detainee's safety and well-being. *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012). Failure to provide for basic human needs, including medical care and reasonable safety, violates the Due Process Clause. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989). Inadequate health and safety measures at a jail cause cognizable harm to every

² See also, Art. II, §17, Mont. Const.

³ See also, Art. II, §22, Mont. Const.

inmate. See *Parsons v. Ryan*, 754 F.3d 657, 679 (9th Cir. 2014). It is "cruel and unusual punishment to hold convicted criminals in unsafe conditions." *Helling*, 509 U.S. at 33. The Eighth Amendment is violated when a detainee is put at substantial risk of suffering serious harm and the condition causes suffering inconsistent with contemporary standards of human decency. See *Smith v. Wash.*, 781 Fed. Appx. 595, 597-598 (9th Cir. 2019).⁴

The Government may not "ignore a condition of confinement that is sure or very likely to cause serious illness." *Helling*, 509 U.S. at 32. Moreover, it may not put a detainee into a dangerous situation, especially where the Government created the danger. See *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018).

A constitutional deprivation is shown where prison officials act with "deliberate indifference." *Wilson*, 501 U.S. at 303. Deliberate indifference occurs if, "the official knows of and disregards an excessive risk to inmate health and safety" where he is aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he draws the inference. *Farmer*, 511 U.S. at 837. Such a risk is one that poses a serious, unavoidable threat to the safety of inmates. See *Osolinski v. Kane*, 92 F.3d 934, 938 (9th Cir. 1996). The Supreme

⁴ See also, *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir. 2006) (citation omitted). Conditions of confinement are evaluated objectively and subjectively. See *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). An objectively serious deprivation is a denial of "the minimal civilized measures of life's necessities." *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996) (citation omitted).

Court has stated that it has "... great difficulty agreeing that prison authorities may ...ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Helling*, 509 U.S. at 33.

In *Helling v. McKinney*, 509 U.S. 25 (1993) the U.S. Supreme Court found that exposure to secondhand smoke, which presents a possible future and present harm to health, may constitute cruel and unusual punishment. The question is whether society considers the risk to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. If the risk is one society does not tolerate, it constitutes cruel and unusual punishment. *Helling*, 509 U.S. at 36.

The same rule has been applied to asbestos exposure. In *Wallis v. Baldwin*, 70 F.3d 1074, 1076 (9th Cir. 1995), the court recognized that it is, "uncontroverted that asbestos poses a serious risk to human health," and exposure was "medically serious." The Eighth Amendment protects against imminent dangers and future harm, as well as existing pain and suffering. *Helling*, 509 U.S. at 33. Where prisoners are crowded into cells in which some of them have infectious illnesses, "... the Eighth Amendment requires a remedy....even though the possible infection might not affect all of those exposed." *Helling*, 509 U.S. at 33.

Like the Eighth Amendment, the Due Process Clause prohibits the

Government from exposing an inmate to a danger to which he would not have otherwise been exposed. See *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006) (citation omitted). The Due Process clause and the Eighth Amendment are violated where a condition of confinement puts inmates at substantial risk of serious harm, such as the harm caused by a pandemic. See *Smith v. Wash.*, 781 Fed. Appx. 595, 598 (9th Cir. 2019). The protection applies even if the effects of exposure might not be manifested immediately. *Helling*, 509 U.S. at 34.

Here, the CCDC does not test every inmate, and gives them a “choice” about whether to be tested for COVID-19, so the Sheriff cannot state with certainty who at his facility has been infected with COVID-19. The science is well established — infected, asymptomatic carriers of the coronavirus are highly contagious. Inmates at CCDC are confined in overcrowded conditions in which it is impossible to socially distance.

The Montana and U.S. Constitutions also protect against baseless searches and seizures. The Montana Constitution provides, “[n]o warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person to be seized, or without probable cause, supported by oath or affirmation reduced to writing.” Mont. Const. Art. II, §11. The Fourth Amendment to the United States Constitution contains similar protections. See *State v. Bar-*

Jonah, 2004 MT 344, ¶ 63, 324 Mont. 278, 102 P.3d 1229. Montanans also have a fundamental constitutional right to privacy. Art. II, § 10, Mont. Const.

In *State v. Hardaway*, 2001 MT 252, ¶¶57-58, 307 Mont. 139, 36 P. 3d 900, the Montana Supreme Court required balancing of the purpose of the search with the reasonable expectation of privacy, where a search is performed to collect evidence (there, the State swabbed a defendant's hands without a warrant to collect evidence). Here, to the extent oral or nasal swabbing is an invasion of privacy, the purpose would be to protect the inmate himself, the inmates he is housed with, jail staff, and the public.

Testing for COVID-19 is, surely, invasive to some extent. Under ordinary circumstances, requiring mandatory testing which involves insertion of an oral or nasal swab to collect a sample, to obtain evidence for a criminal investigation, could ordinarily not be performed without a warrant based on probable cause. Here, however, the testing is not based on probable cause that a crime has been committed, nor is it an attempt to obtain evidence against the inmate. Rather, it is an attempt to protect the inmate and others in the Government's custody from a deadly disease.

The Court further understands that insertion of a nasal or oral swab invades personal privacy of the person being tested. The right to privacy, however, must be balanced against a compelling State interest for the invasion. Here, testing is necessary to protect inmates, jail staff and the public from the spread of a deadly and

disabling virus. *State v. Rose*, 192 Mont. 341, 628 P. 2d 662 (1981). The privacy violation must be balanced against the Government's duty to protect persons in its care. The circumstances are exigent. Time is of the essence. Inmates who are not tested remain in the general jail population. If they are infected, they will infect other persons and put their lives at risk.

The Government cannot be deliberately indifferent to inmates' potential exposure to a serious, communicable disease on the ground that they are not, now, infected or showing current symptoms. See *Helling*, 509 U.S. at 32. The number of confirmed COVID-19 cases in the United States has already exceeded the number of confirmed cases in every other country on this planet. All thoughtful experts and political leaders agree that the number of confirmed cases in the United States will only increase in the days and weeks ahead. The number of cases in the United States has yet to peak. In the CCDC, the numbers of infected inmates and jail staff continues to exponentially increase. Death and permanent disabling cardiovascular, neurological, and other conditions are known risks of COVID-19.

Inmates are not always at least 6 feet apart from others. Until August 21, 2020, they were not offered masks. They must touch surfaces touched by other detainees, such as common sinks, toilets and showers. They do not have soap unless they buy it themselves from the jail commissary. The risk of infection in jails is particularly high if an asymptomatic guard, or other employee, enters a facility. The

rotation of guards and other staff continues.

All Montanans have the fundamental rights to health and safety.

Section 3. INALIENABLE RIGHTS. All persons are born free and have certain in- alienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and *seeking their safety, health* and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

Violation of a legal duty is negligence.⁵ The CCDC has a duty of reasonable care, a community standard of conduct demanded by the community for the “protection of others against unreasonable risk.” The question, for legal responsibility, is whether harm caused was **foreseeable**. *Newman v. Lichfield*, 2012 MT 47, ¶ 32, 364 Mont. 243, 272 P.3d 625. (emphasis added).⁶

Under federal and Montana law, the Sheriff and the CCDC have clear legal duties to protect inmates in their care from the known risks posed by COVID-19. It is not reasonable, nor is it consistent with the constitutional duties requiring Due Process and prohibiting cruel and unusual punishment, to allow inmates to “choose”

⁵ In *Fisher v. Swift Transp. Co.*, the Montana Supreme Court stated that the question is “...whether [the responsible person] acted as a reasonable and prudent person would have under the same circumstances.” 2008 MT 105, ¶ 32, 342 Mont. 335, 181 P.3d 601 (emphasis added).

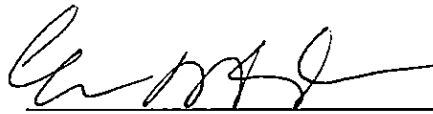
⁶ The Restatement provides: The care required is always reasonable care. This standard never varies, but the care which it is reasonable to require of the actor varies with the danger involved in his act, and is proportionate to it. Restatement (Second) Torts § 298 cmt. b (1965) (emphasis added). Montana’s pattern instruction provides:

The defendant is liable if his negligence was a cause of plaintiff’s injury. The defendant’s conduct is a cause of the plaintiff’s injury if it is a substantial factor in bringing it about. MPI2d 2.08 (2003); see also *Busta v. Columbus Hospital*, 276 Mont. 342, 916 P.2d 122 (1996).

whether to be tested. All inmates must be tested in order to protect all persons in the custody of CCDC.

For the above reasons, the Court hereby ORDERS that CCDC test all inmates for COVID-19, with the regularity recommended by public health officials and infectious disease experts, using tests which are minimally invasive but effective. Tests used should return results within a maximum of 72 hours.

DATED this 14th day of September, 2020.

A handwritten signature in black ink, appearing to read 'Elizabeth A. Best', written over a horizontal line.

ELIZABETH A. BEST
CASCADE COUNTY DISTRICT JUDGE