No. 20-0259

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DONALD MILLER, *et al.*,

Petitioners,

v.

BETSY JIVIDEN, *et al.*,

Respondents.

RESPONDENTS' ANSWER AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

PATRICK MORRISEY
ATTORNEY GENERAL

Briana J. Marino, State Bar #11060
Assistant Attorney General
1900 Kanawha Blvd., East
Building 1, Suite W-400
Charleston, WV 25305

Assistant Attorney General Representing the West Virginia Division of Corrections and Rehabilitation and Department of Military Affairs and Public Safety

Keith D. Fisher, State Bar #11346
Assistant Attorney General
Office of the West Virginia Attorney General
812 Quarrier Street, Second Floor
Charleston, WV 25301

Assistant Attorney General Representing The West Virginia Parole Board

LEWIS GLASSER PLLC

Webster J. Arceneaux, III, State Bar #155
Richard L. Gottlieb, State Bar #1447
James C. Stebbins, State Bar #6674
Valerie H. Raupp, State Bar #10476
Post Office Box 1746
Charleston, WV 25326

Special Assistant Attorneys General

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. QUESTION PRESENTED

The Petitioners claim they are entitled to be released immediately due to the coronavirus pandemic (hereinafter "COVID-19"), because they are non-violent offenders and fall into one of five self-identified categories: (1) Petitioners eligible for release on personal recognizance; (2) Petitioners eligible for release on reduced bail; (3) Petitioners eligible for release on parole; (4) Petitioners eligible for compassionate release; and, (5) Petitioners who should be eligible for release due to extraordinary circumstances.

For the reasons stated herein, Respondents file this Answer and Motion to Dismiss, seeking to have the Petition summarily dismissed now, or upon oral argument after a complete discussion of the issues presented. As more fully discussed herein, not all of the Petitioners are non-violent offenders and the extremely limited summary information regarding the Petitioners that they have provided to the Court is largely inaccurate. Accordingly, the Petition does not provide an adequate basis for this Court to make a decision or grant the extraordinary relief of release from incarceration.

II. STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

This Petition arises in the context of COVID-19, and it seeks the immediate release of thirty-nine (39) inmates from West Virginia Regional Jails and Prisons. Petitioners spend approximately seventeen (17) pages of their Petition discussing COVID-19, declarations from other cases, and outdated statistical information regarding the Regional Jails and Prisons in West Virginia.

As the Respondents have previously advised the Court, they are laser focused on the COVID-19 pandemic and its impact on the Regional Jails and Prisons in West Virginia.

Respondent West Virginia Division of Corrections and Rehabilitation ("DCR") employs 2,800 correctional officers and civilians to maintain approximately 9,200 inmates in Regional Jails and Prisons. DCR has further contracted with PrimeCare Medical, Inc. to provide healthcare at nine (9) Regional Jails and Wexford Health Sources, Inc. to provide healthcare at the ten (10) Prisons and the combined facility at the Northern Correctional Facility. Respondent Commissioner Betsy Jividen has an experienced corrections leadership team working together to effectively address COVID-19 with contractors. She has and will continue to implement appropriate directives that meet national standards to address the pandemic.

As of this date, there are no known or confirmed employee or inmate cases of COVID-19 in either the Regional Jails or Prisons of West Virginia. Despite the lack of cases, DCR has been and continues to be proactive in its response to the COVID-19 pandemic. This lack of known or confirmed cases is due in large part to DCR's systemic efforts to address and take preemptive steps, formal and informal, even prior to the recent extraordinary measures involving the general public.

For instance, on March 11, 2020, DCR Commissioner Betsy Jividen sent the first formalized memorandum to all DCR employees regarding COVID-19. *See* Jividen affidavit at page 657, Supplemental Appendix (hereinafter "S.A."). In that memorandum, Commissioner Jividen notes that "we are mindful of the need to reduce the risk and protect the health and safety of our employees, populations, volunteers, contractors, and others who enter our facilities and do business with us." *Id.* at ¶ 3. The memorandum outlines certain "proactive guidelines and controls" based upon guidance from the Center for Disease Control and Prevention ("CDC") and certain West Virginia health agencies. *Id.* at ¶ 4. The memorandum provides background regarding COVID-19 and also sets forth policies regarding: 1) good health habits and sanitation; 2) frequent hand washing and/or sanitizing; 3) respiratory (coughing and sneezing) etiquette; 4) avoiding touching the face, eyes, nose and mouth; 5) increased emphasis on disinfection of "high touch"

areas; 6) screening of inmates, employees, contractors, volunteers, and others; 7) cancellation of "non-attorney" in-person visits; and 8) approval of the use of electronic visitation and telephone calls. *Id.* at ¶ 5. In addition, the memorandum directs that all job-related out-of-state and international travel for employees was cancelled until further notice. *Id.* at ¶ 6. Employees that were sick or showing flu-like symptoms were also instructed to stay home, contact their medical providers, and be tested. *Id.* at ¶ 7.

The memorandum also mandates that the health care administrators in each facility provide supervisors with the training needed to conduct daily screenings of employees reporting to work. *Id.* at ¶ 8. Employees under movement restriction were not to be permitted to return to work until the completion of an appropriate monitoring period. *Id.* The memorandum also contains:

- information and strategies designed to eliminate or minimize out-of-pocket expenses to employees related to testing for COVID-19 and insurance deductibles;
- information to employees regarding mental health support and a "hotline" for those suffering from fear or stress over the COVID-19 pandemic;
- instruction and policies related to the screening of contractors, vendors and volunteers; and
- instructions and policies regarding the use of respirator masks for medical personnel and WVDCR employees.

Id. at ¶¶ 9, 10, 11 and 12.

Thereafter, on March 20, 2020, Commissioner Jividen issued a second comprehensive Policy Directive entitled "COVID-19 Response Plan" (DCR Policy Directive 337.00) incorporating additional information, policies, instructions, and procedures based upon evolving guidance from multiple governmental and medical sources including the CDC. *Id.* at ¶ 14. The Policy Directive was initially deemed confidential for security and public safety reasons. *Id.* at ¶ 15. Ultimately, a redacted version of the Policy Directive was released by Commissioner Jividen to the public. *See* Redacted COVID-19 Response Plan at S. A. p. 606. The Policy Directive sets forth specific, comprehensive policies regarding administration and coordination, communication and education, preventative measures, policies regarding visitors, volunteers, contractors, and lawyers, employee/inmate screening, management and testing of respiratory illness victims,

personal protective equipment, transportation of inmates, isolation and cohorting of symptomatic persons, care for the sick, and quarantine. *Id.*

Even more recently, on March 26, 2020, Commissioner Jividen addressed a memorandum to all facility superintendents and directors discussing "Interim Guidance from the Centers for Disease Control and Prevention." *See* affidavit of Commissioner Jividen at ¶ 26, S. A. p. 657. The purpose of the memorandum was to disseminate and adopt updated guidelines from CDC entitled "*Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities.*" The March 26th cover memorandum and CDC Guidance documents are found at S.A. p. 635. As this Court can see, this CDC memorandum addresses, among other things, specific "guidance" to correctional and detention facilities related to COVID-19 and outlines certain "best practices" related to: 1) operational and communications preparations for COVID-19; 2) enhanced cleaning and disinfecting and hygiene practices; 3) social distancing strategies; 4) visitor policies; 5) infection control; 6) screening for inmates, staff and visitors; 7) medical isolation/cohorting; 8) healthcare for suspected cases; 9) clinical care; and 10) considerations for high risk persons. *Id.*

Commissioner Jividen has not only adopted and disseminated these major directives, she has also taken steps to ensure that the Regional Jails and Prisons are taking the necessary actions to implement these policies. They have, in fact, been implemented with great success. As the Court is aware, DCR has been defending against similar factual allegations in a separate lawsuit filed by Mountain State Justice styled *Baxley, et al. vs, Jividen et al.*, civil action no. 3:18cv 01526, in the United States District Court for the Southern District of West Virginia. On April 6, 2020 Judge Chambers held a hearing in *Baxley* on an "Emergency Motion for Preliminary Injunction Regarding Defendants' Prevention, Management, and Treatment of COVID-19" filed by Mountain State Justice on behalf of the Plaintiffs therein.

Significantly, the Motion for a Preliminary Injunction was denied by Judge Chambers after a "careful and searching examination of the record." *See* April 8, 2020 Memorandum Opinion and Order, 2020 U.S. Dist. LEXIS 24515 (S.D. W.Va. 2020). In denying the emergency motion, Judge Chambers noted that Defendants "have produced what appears to be a comprehensive plan addressing the spread of COVID-19 in the state jails and prisons" and that "[t]he plan addresses procedures to limit the entrance of COVID-19 into the corrections system as well as methods to limit intra-facility transmission and to transport infected individuals to hospitals for medical care." *Id.* at 14. Judge Chambers further noted that defendants "had already taken steps to implement the plan they had earlier provided to the Court." *Id.* at 9. Judge Chambers concluded that his review of the record demonstrated that "Defendants are implementing the plan developed by the very sources Plaintiffs themselves have relied on for guidance in their submissions and expert declarations- namely, VitalCore and the CDC." *Id.* at10.

Part of the evidence offered by Mountain State Justice in support of its emergency motion were notes purportedly made by unidentified individuals during interviews with various inmates. However, Judge Chambers made a specific finding that these notes were "not enough to outweigh Defendants' evidence of ongoing implementation of their plan, including posted signs and notices across jail facilities." *Id.* The "signs and notices" that Judge Chambers was referring to in his Order were the numerous exhibits offered by DCR and admitted by the Court at the emergency hearing and which are now a part of the supplemental appendix in this case. S.A. pp. 546-605. As this Court can see, those exhibits provided Judge Chambers with ample evidence that DCR was appropriately communicating with the inmates about the risk and prevention of COVID-19 through extensive signage, posted informational memoranda, and through information provided

electronically to the inmates at kiosks or on tablets.[1] *Id.* Based upon all of the evidence, Judge Chambers aptly concluded that "at present, it is impossible to conclude that Defendants have acted with the sort of deliberate indifference that could give rise to a constitutional violation under the Eighth and Fourteenth Amendments" and further that "Plaintiffs have not demonstrated a substantial likelihood of success on the merits of their claims." *Baxley* at pp. 15-16.

Judge Chambers was correct. It is undisputed that DCR has adopted a comprehensive COVID-19 Response Plan that is based upon widely accepted CDC standards for correctional institutions. *See* March 20, 2020 Policy Directive (S.A. p. 606) and March 26, 2020 Commissioner memorandum with updated CDC guidelines (S.A. p. 635). These policies provide comprehensive guidance and strategies related to education of staff and inmates, screening, PPE, prevention, housing and quarantining, and dealing with the sick or exposed. *Id.*

There is also ample evidence that DCR appropriately and successfully implemented preventive measures and directives. In addition to the signage, inmate memoranda, and kiosk information described above, Respondents direct this Court's attention to the following additional proactive measures that have been undertaken to prevent the introduction and/or spread of COVID-19 within the prison and jail system:

- On March 11, 2020, an internal memorandum was issued by WVDCR indicating that "effective immediately, non-attorney visitation will be temporarily suspended due to the Coronavirus (COVID-19) as a precaution." (S.A. p. 668). The purpose of this policy was to prevent infiltration and spread of COVID-19 and to limit improper social distancing.

- On March 11, 2020, an email was sent out to all Superintendents mandating that a particular COVID-19 informational video was to play on the inmate television system to educate inmates about the risk and prevention of COVID-19. (S.A. p. 676).

- On March 17, 2020, Commissioner Jividen issued a notice in the West Virginia State Bar's "Bar Blast" indicating that she had suspended all "non-lawyer visitation" at all correctional facilities. (S.A. p. 669). The "Bar Blast" indicated that attorney visitation was still allowed "subject to a screening process" but also indicated that DCR would be accommodating requests

[1] Inmate kiosks are computers placed in the pods of the regional jails that are used as a tool for, among other things, communication with the inmates. Various screen shots from the kiosks are included within the *Baxley* exhibits in the supplemental appendix.

for client meetings via video. *Id.* The purpose of these policies was to prevent the infiltration and spread of COVID-19 and to limit improper social distancing.

- On March 18, 2020 an internal memorandum was issued to all DCR employees indicating that "due to Coronavirus (COVID-19) volunteers will not be permitted inside DCR facilities.". (S.A. p. 671). The same memorandum indicated that "facility movement of inmates is restricted with the exception of security or medically necessary transports and those movements must be approved by the Assistant Commissioner." *Id.* The same memorandum also indicated that each facility should "continue to utilize precautions and good hygiene such as washing of hands and not touching your eyes, nose and mouth." *Id.* The facilities were also directed to "practice good environmental cleaning and keep your work area sanitized." *Id.*

- On March 24, 2020, Commissioner Jividen implemented a written policy disseminated to all inmates temporarily suspending medical co-pays for inmates so that they would not be financially discouraged from reporting symptoms or seeking needed medical care. (S.A. p. 672)

- On March 25, 2020, Commissioner Jividen issued a written memorandum which suspended all rules regarding the "time frames involved in the administration of the inmate and resident disciplinary process." (S.A. p. 673). The purpose of this memorandum was to minimize contact between inmates and staff and to allow more focus to be given to implementation of the COVID-19 Response Plan.

- On April 1, 2020, an internal email was sent to all superintendents regarding cleaning and sanitization of the inmate electronic tablets as suggested by the manufacturer. *See* manufacturer recommendations. (S.A. p. 674).

- On April 8, 2020, Commissioner Jividen sent an internal email to all DCR staff recognizing that "the CDC has recommended the use of cloth face covering in public settings where social distancing is difficult." (S.A. p. 677) While the jails and prisons are not a "public setting," Commissioner Jividen directed that "we will be delivering cloth masks made by Prison Industries to all facilities for those of you who wish to wear one, and for distribution to inmates who wish to wear them as well." *Id.*

- The same April 8, 2020 email described above also acknowledged that a special project had been undertaken successfully for the "production of hand sanitizer that has been delivered to all your facilities." *Id.*

- On April 9, 2020, Commissioner Jividen authored a memorandum made available to all inmates indicating that "[o]n Friday, the CDC recommended that people in public settings, where other social distancing measures are difficult to maintain, should wear cloth coverings over their faces. Prison industries has been producing cloth masks, which meet the recommendations listed by the CDC, and they will be available this week for those of you who wish to wear one....The purpose of these coverings is to protect *others* from the spread of infection from your speaking, coughing, or sneezing. Hygiene and social distancing (to the extent possible) remain your best protection." (S.A. p. 679) (emphasis in original).

In addition, there are many other practices that DCR is currently implementing and have been implementing that are not necessarily set forth in a memorandum or written communication. For instance, following the adoption of the March 20, 2020 Policy Directive described above, Assistant Commissioner Marvin Plumley required each DCR facility to complete and return a worksheet providing facility specific information to ensure that the COVID-19 Response Plan was being uniformly adopted and followed in all facilities. *See* April 3, 2020 affidavit of Marvin Plumley, S.A. p. 662 at ¶ 2a. Furthermore, each facility was tasked with, and has in fact been, reporting daily on implementation of the DCR COVID-19 Response Plan. *Id.* at ¶ 2b. As noted by Mr. Plumley in his affidavit, he receives "daily reports from each facility in the morning from the Superintendents and/or other supervisory employees regarding COVID-19 plan implementation, compliance, situations, questions and equipment." *Id.* He also affirms that other staff members, such as Debbie Hissom, who is the Director of Correctional Healthcare, receive and provide daily updates to him from the medical contractors hired by DCR to provide medical services in the prisons and jails. *Id.* Mr. Plumley further affirms that Ms. Hissom and others provide him with information from other medical sources such as the CDC, the West Virginia state epidemiologist, the World Health Organization, DHHR, and others. *Id.*

Mr. Plumley further states in his sworn affidavit that DCR has staffing plans that are consistently and constantly being analyzed "in order to redistribute resources, including correctional officers, should any facility need additional officers to properly staff a facility." *Id.* at ¶ 2d. Mr. Plumley also notes that DCR has implemented the COVID-19 plan with respect to PPE and sanitation products and that items such as gloves, masks, soap, toilet tissue, hand sanitizer, germicides, and bleach are in stock or have been ordered in adequate quantities to comport with the DCR COVID-19 Response Plan. *Id.* at ¶ 2g. Regarding oversight, Mr. Plumley affirms that supervisory staff such as Superintendents, Majors, and Captains as well as Central Office Staff

(including himself) are regularly conducting site visits to audit facilities for compliance and to work through "individual facility needs." *Id.* at ¶ 2i.

Mr. Plumley also affirms in his affidavit that the following general protective measures are actively being undertaken system-wide regarding education, hygiene, and strategies to encourage inmate compliance:

> [i]nmates have been apprised through verbal announcements in housing sections by correctional officers, posters hung in conspicuous places in housing sections, policy information available on jail kiosks, ticker alerts on jail kiosks, and individual handouts in prisons and jails of some steps taken to combat the risks of COVID-19. For example, posters were hung in all housing units in jails and prisons announcing suspension of the medical co-pays for sick call visits and encouraging increased hygiene/handwashing by inmates; inmates at some prisons have been "rewarded" for extra cleaning efforts facility-wide through DCR placing additional funds in inmate trust accounts to allow for more "free" video calls for inmates to loved ones; and increased volume of cleaning supplies, including bleach, have been provided to inmates throughout DCR's systems.

Id. at ¶ 2i.

Furthermore, to ensure compliance with the COVID-19 Response Plan, Commissioner Jividen is monitoring compliance with the COVID-19 Response Plan. As indicated above, there are still no confirmed cases of COVID-19 in any jail or prison in West Virginia, an indication that DCR is acting vigilant at this time.

The success of the COVID-19 Response Plan to date is clear. DCR has and is undertaking careful and consistent efforts to reduce the inmate populations as quickly as possible. However, DCR cannot just open the doors to the jails and prisons and randomly release a predetermined number of inmates. Rather, it must consider on an individual basis the danger to the public that may be posed by each inmate as well as whether each inmate has proper shelter, financial support,

and medical care for a safe and successful reentry into society. These decisions require complex, case specific analysis that take time, even when efficiently undertaken.[2]

Respondents and other government officials and agencies have been working together to safely reduce the prison and jail populations and address the novel challenges of the COVID-19 pandemic. On March 27, 2020, this Court issued a Memorandum[3] addressed to all Circuit Court Judges and Magistrates directing them to contact the Prosecuting Attorney in each county and request that they "review the most recent list of pretrial detainees to identify any pre-trial individuals who do not constitute a public safety risk and may be appropriate candidates for PR or reduced bond." *See* Memorandum at Appendix pp. 104-05. This Court aptly concluded in that Memorandum that "as always, judicial officers must fully consider the safety of the public and victims when setting bond or ordering bond revisions in light of the COVID-19 concerns." *Id.* Judges and Magistrates across the State of West Virginia have been complying with this directive and new entries into the jail system have dramatically reduced.

Commissioner Jividen has also exercised her furlough authority under W.Va. Code § 15A-4-2 as a means of reducing inmate population. That provision provides that the Commissioner "may establish a furlough program for inmates committed to his or her custody for a felony offense" and states that such a program "may provide that selected inmates be permitted to reside outside an institution." Pursuant to this authority and in direct response to the COVID-19 crisis, on April 10, 2020, Commissioner Jividen issued Policy Directive 505.07 which has the stated

---

[2] A myriad of factors, including the nature of the offense and the likelihood that another offense may be committed must be considered for bond. Judge Matish recently considered whether a defendant should be released due to COVID-19 and rejected that request finding no evidence to support the claim of risk and the defendant had a lengthy criminal history.
https://www.wvnews.com/news/wvnews/asked-to-lower-bond-for-reckless-fleeing-suspect-harrison-wv-judge-raises-it-significantly/article_221de63d-97fa-51b9-b003-653e17ac9314.html

[3] This directive also involved the West Virginia Department of Military Affairs and Public Safety (DMAPS) which had "agreed to periodically provide additional information relating to current correctional facility populations" on a county by county basis so that informed release decisions could be made. *Id.*

purpose "[t]o create a furlough program using the Commissioner's statutory authority."[4] (S.A. p. 690). The Policy Directive sets forth certain guidelines regarding what inmates are eligible for the furlough program and has certain restrictions designed to protect the public such as restrictions for those inmates serving time for DUI or domestic violence offenses and those inmates that have "any prior conviction for a violent felony offense." *Id.* Inmates granted furlough are required to remain in West Virginia and are subject to supervision by parole services and possible electronic monitoring. *Id.*

To expand and further the use of this new furlough program, on April 15, 2020, Commissioner Jividen issued additional "Commissioner's Instruction" regarding Policy Directive 505.07 in a new memorandum. (S.A. p. 693). In that April 15, 2020 memorandum, Commissioner Jividen provided procedures and forms to be used to carry out Policy Directive 505.07. *Id.* Upon "notification that a particular inmate or group of inmates are potentially eligible for a furlough," designated staff in each facility are to have the inmates complete a "Proposed Furlough Plan" using the form attached thereto. *Id.* Various mechanisms designed to protect the public are included in the "Commissioner's Instruction" including a "Furlough Eligibility Notification" form designed to give notice of the proposed release to the affected Parole Officers, Prosecuting Attorneys, and law enforcement and also to give them the opportunity to comment. *Id.* The "Commissioner's Instruction" also has detailed criteria designed to ensure a careful review of whether each inmate under consideration is suitable for furlough. *Id.*

As indicated above, granting furlough to reduce inmate populations must be undertaken carefully with due consideration given to whether it is safe for both the public and the inmate. To do this safely will generally require some time but DCR is actively engaging in the above process now. Commissioner Jividen has already furloughed 115 inmates that were already eligible for

[4] Policy Directive 505.07 acknowledges that "furlough is not a right under West Virginia law and no liberty interest on behalf of inmates is created by virtue of a policy existing. Furlough is a discretionary power and authority of the Commissioner." *Id.*

weekend furloughs without making them go through the above process insofar as earlier screening made it safer to release those inmates without additional review. There are over one hundred additional inmates that are eligible for furlough under the new program and they are in the screening process now. Many of those inmates are expected to be released as soon as it has been determined that DCR can safely release them.

This Court should also note that the efforts to reduce inmate populations have already been quite successful without judicial intervention and both prison and jail populations have decreased significantly during the COVID-19 crisis. Between March 13, 2020 and April 20, 2020, total jail populations in West Virginia were reduced from 5187 inmates to 4108 inmates representing a total reduction of 1,079 inmates. (S.A. p. 666). This represents almost a 21% decrease in the jail populations over approximately a one-month period during the acute phase of the COVID-19 crisis in West Virginia.

In fact, this Court needs to look no further than the thirty-nine (39) Petitioners in this case to see the fruits of these efforts and policies. As described in more detail, *infra*, twelve (12) of the Petitioners have already been released. In total, sixteen (16) of the Petitioners have been released, some prior to the filing of the Petition, or are eligible and/or are anticipated to be imminently released subject to completion of applicable documentation. This is clear evidence that the processes initiated by this Court, and judicial personnel across the State of West Virginia, alongside DCR's ongoing efforts to responsibly reduce inmate populations, are working to safely, efficiently, and mindfully reduce the population of incarcerated individuals in West Virginia.

B. FACTUAL BACKGROUND REGARDING THE THIRTY-NINE PETITIONERS.

As noted above, twelve Petitioners, approximately thirty percent (30%), have already been released. The twelve were released for a variety of reasons including in the due course of bond/bail modification proceedings as a result of this Court's March 2020 Memorandum and/or retaken by

states based upon active fugitive warrants.[5] Further, as a result of bond/bail modification proceedings initiated as a result of this Court's March 2020 Memorandum, an additional four Petitioners are anticipated to be released imminently should the applicable judge(s) approve the agreed orders jointly submitted by Prosecutors and Defense Counsel in the respective criminal actions.[6] Finally, an additional Petitioner, Jeremy Kiser, was offered release on home confinement and he declined because he had no residence to be released to. That is, in total, approximately forty-three percent (43%) or seventeen (17) Petitioners that have been or are eligible/anticipated to be imminently released subject to completion of applicable documentation for release. This is a clear and present demonstration that processes initiated by this Court, and judicial personnel across the State of West Virginia, alongside Respondents' ongoing efforts, are working to safely and mindfully reduce the population of incarcerated individuals in West Virginia.

Petitioners seek the release of inmates from regional jail or prison facilities operated by DCR based upon the following general categories: Petitioners eligible for release on personal recognizance; Petitioners eligible for release on reduced bail; Petitioners eligible for compassionate release; and, Petitioners who should be eligible for release due to extraordinary circumstances. *See* Petitioner's Petition, ¶¶ 1-3 and 10-39. The arguments identified by Petitioners as the basis for their individual releases herein, represents an uninformed over-simplification of what truly must be examined by a judicial officer, Parole Board members, or DCR Commissioner when determining whether an individual is fit to be released or furloughed from custody in some manner.

---

[5] The twelve inmates from the Petition that have been released are: Donald Miller, Eric Wayne Robinson, Nelson Cortes, Dalton Cain, Ashley Parrish, Albert Matthew Moore, Brianna Blankenship, Melanie Blake, John Miller, Larry Joseph, Crystal Aston and Charles Miller.

[6] The four inmates from the Petition that are anticipated to be released imminently are: Christopher Burdette, Samantha Sexton, Steve Randall Gooslin, and Scotty Sowards. The State of Kentucky has advised DCR that it does not wish to retake Petitioner Sowards for charges based upon his fugitive from justice warrant at this time.

As this Court is aware, determining whether a defendant/inmate should be released on bond/bail, home confinement, parole, probation, furlough etc., must be based upon a highly-individualized examination of not only Petitioner's current charges but also his/her (1) past criminal history, (2) potential to reoffend while released/furloughed, (3) behavior exhibited while incarcerated, (4) likelihood to abide by the terms of release/furlough, (4) degree of rehabilitation, (5) remaining length of sentence (if applicable), and (6) circumstances awaiting them if released (such as housing, medical care, food, clothing, exposure to minor children, etc.) among other factors.

In practical terms, judicial officers- magistrates, circuit court judges, and prosecutors, the Parole Board, and Commissioner know the most about the offenders before them and, therefore, are the most knowledgeable and occupy the best position to make these decisions and protect the public from violent, sexual, and recidivist offenders. While COVID-19 presents a novel challenge for both the justice system as well as society-at-large, the novelty of the situation only re-enforces the need to strengthen our faith in the expertise and discretion of those who are closest to the challenge.

Respondents offer the following for consideration by the Court based upon the "categories" identified as applicable to the Petitioners in their initial filing:

Petitioners Eligible for Release on Personal Recognizance

Petitioners identified as being "fit" for release on their own personal recognizance are Donald Miller, Eric Wayne Robinson and Christopher Burdette. Of those three, only Christopher Burdette remains in the custody of DCR and, given the scope of the current charges and Petitioner Burdette's criminal history the lower courts have determined as recently as last Friday that a personal recognizance bond would be inappropriate. Specific information for each of these Petitioners is included in the Supplemental Appendix at pp. 1-545.

Petitioners Eligible for Release on Parole

Contrary to Petitioners' representations that six Petitioners are eligible for release on parole, only two Petitioners are eligible, one of whom was released on April 1, 2020. Those two Petitioners are Levi Arnold, who is scheduled for a parole hearing in May 2020 and Nelson Cortes, who was released from incarceration on April 1, 2020, prior to the initiation of this action pursuant to an Agreed Order. The remainder of the Petitioners identified as being "parole eligible" have not served a sufficient period of incarceration to qualify for parole. These Petitioners are: Kevin Johnson, Kenneth Lee Cyrus, Roy Lee Ailiff, III; and Benny Lee Horn. Individualized details regarding each of these Petitioners is included in the Supplemental Appendix.

Petitioners Who Could Secure Release with a Reduced Bond

These are Petitioners that the ACLU and Public Defender Service has identified as being deserving of reduced bond. However, many of these individuals have already been released from incarceration on bond, previously been granted reduction of bond/bail, and/or are not eligible for bond based upon their convicted status and crimes. These Petitioners include: Crystal Aston, Joseph Ayers, Melanie Blake, Destiny Lindsay, Joshua Noland, Skylar Shipley, John Sprouse, Dalton Wayne Cain, April Rogers, Ashley Parrish, John Miller, Matthew Nunn, Adrian Pennington, Jack Williams, Scotty Sowards, Larry Joseph, Samantha Sexton, Steve Randall Gooslin, Ida Kay Castle, Weston Daniel Rollyson, Albert Matthew Moore, and Brianna Blankenship. The specific details related to these individuals is included in the Supplemental Appendix.

Petitioners Eligible for Compassionate Release

The ACLU and Public Defender Service have identified certain Petitioners as being deserving of "compassionate release." However, no legal authority has been identified that empowers Respondents to effectuate their release from incarceration. Moreover, as discussed in greater detail below, Respondent DCR has no authority to "release" any inmate absent three general circumstances: (1) a valid court order directing an inmate's release from custody; (2)

Parole Board releasing an inmate to parole; and (3) an inmate discharges the entirety of his/her sentence of incarceration. Likewise, Respondent Parole Board's authority to release individual inmates to parole is limited by long-standing statutory, constitutional, and regulatory requirements which dictate eligibility and grant of parole. These Petitioners include: Jeremy Kiser, Lorenzo Thomas, Dakota Sayer, Raymond Cochran, Doug Lee Queen, and Charles Mills. Specific details with regard to the Petitioners alleged to be eligible for "compassionate release" are provided in the Supplemental Appendix.

Petitioners Otherwise Worthy of Consideration for Release

The remaining Petitioners are alleged to be otherwise worthy of consideration for release, include Casey Joe Matthews and Misty Jane Pritt. These two Petitioners have a significant history of criminal activity involving substantial charges, the details of which are provided in the Supplemental Appendix, would weigh heavily against a release.

III. SUMMARY OF THE ARGUMENT

This Petition should be dismissed for several reasons. First, with regard to the ten inmates who have already been released, it should be dismissed as moot. Second, the Petition should be dismissed under Rule 2, Rules Governing Post-Conviction Habeas Corpus Proceedings because that Rule requires the Petition to include a "summary of the facts supporting each of the grounds specified" and in this case, an inadequate and factually inaccurate summary has been provided by the Petitioners. Third, Petitioners failed to comply with W.Va. Code § 53-4A-2, which requires that "[a]ffidavits, exhibits, records or other documentary evidence supporting the allegations of the petition shall [to] be attached to the petition unless there is a recital therein as to why they are not attached." There is no documentary evidence in the Appendix regarding each Petitioner that supports their claim for relief, and on that basis, this Court should dismiss the Petition.

Fourth, the Petitioners failed to show they complied with the West Virginia Prisoner Litigation Reform Act, W.Va. Code § 25-1A-1, *et seq.* None of the Petitioners have proven he/she

has filed a grievance challenging their medical treatment or conditions of confinement due to the COVID-19 and exhausted his/her administrative remedies as required by W.Va. Code § 25-1A-2. W.Va. Code § 25-1A-1(a) clearly applies to extraordinary writs such as habeas corpus and this Court should dismiss the Petition upon this ground.

Fifth, in order to prevail for their claims under the Eighth and Fourteenth Amendments, the Petitioners must show that the Respondents have acted with deliberate indifference with regard to their conditions of confinement. As more fully discussed herein, the Respondents have adopted and implemented timely and proper policies to address COVID-19 in the Regional Jails and Prisons, and the Petitioners' claims for relief should be denied. Sixth, Pretrial Defendants cannot establish the requisite deliberate indifference with regard to their conditions of confinement. Likewise, they cannot establish that the confinement constitutes a "punishment." Therefore, Pretrial Petitioners' constitutional claims must be denied.

Seventh, Petitioners have failed to show that they are eligible for parole under current West Virginia law, *see* W. Va. Code § 62-12-13, or by way of new legislation slated to take effect in the future, see W. Va. Senate Bill 620 (effective May 19, 2020). Further, Petitioners have set forth no factual or legal basis upon which this Court may, in a writ of habeas corpus, order the Parole Board to release them to parole. Finally, the Petition seeks the appointment of a Special Master to handle executive functions regarding the administration of inmates and their release. This Court should recognize that addressing COVID-19 within the four-walls of a penal institution is an executive function, not a judicial function, and this Court should not interfere with Commissioner Jividen's exercise of discretion in addressing that pandemic. For that reason, this Court should deny the Petitioners' request for the appointment of a Special Master.

IV. STATEMENT REGARDING ORAL ARGUMENT

The Respondents disagree with the Petitioners' statement that this case merits no oral argument under Rule 18, West Virginia Rules of Appellate Procedure and a memorandum decision

should be issued. First, the Respondents contend that the case should be summarily dismissed for the reasons set forth herein. But, if a full examination of the case is needed, then oral argument is necessary under Rule 20, West Virginia Rules of Appellate Procedure, because (1) this case involves issues of first impression regarding COVID-19; (2) this case involves issues of fundamental public importance related to COVID-19 and the safety of inmates and the public; and, (3) this case involves substantial constitutional questions under the Eighth and Fourteenth Amendments regarding the conditions of confinement and the treatment of inmates in West Virginia Regional Jails and Prisons and it warrants the full consideration of the Court, unless a summary dismissal of the case is warranted.

V. ARGUMENT

A. THE PETITION FOR HABEAS CORPUS SHOULD BE DISMISSED AS A MATTER OF LAW

1). The Petition should be dismissed on mootness grounds for thirteen Petitioners.

Sixteen Petitioners, Christopher Burdette, Steve Gooslin, Samantha Sexton, Melanie Blake, Scotty Sowards, Ashley Parrish, Albert Matthew Moore, Crystal Ashton, Charles Mills, Donald Miller, Eric Wayne Robinson, Nelson Cortes, Dalton Cain, Briana Blankenship, John Miller, and Larry Joseph, just over forty percent, have already been released or are due to be released imminently. These sixteen Petitioners were/are to be released for a variety of reasons including in the due course of bond/bail modification proceedings as a result of this Court's March 2020 Memorandum. Further, one Petitioner, Jeremy Kiser, was offered release on home confinement and he declined because he had no residence to be released to. The claims of these sixteen Petitioners who have already been released or are due to be released, should have their claims dismissed as moot.

In *Kemp v. State*, 203 W. Va. 1, 2, 506 S.E.2d 38, 39 (1997), this Court recognized that a habeas corpus petition would become moot upon the release of an inmate:

> We find that because the appellant has already been released, his request for a writ of habeas corpus is moot. As we have previously noted:
>
> > Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or the property, are not properly cognizable by a court.
>
> Syllabus Point 1, *State ex rel. Lilly v. Carter*, 63 W. Va. 684, 60 S.E. 873 (1908). *In accord*, Syllabus Point 5, *West Virginia Educ. Ass'n. v. Consolidated Public Retirement Bd.*, 194 W. Va. 501, 460 S.E.2d 747 (1995); Syllabus Point 1, *State ex rel. Durkin v. Neely*, 166 W. Va. 553, 276 S.E.2d 311 (1981); Syllabus Point 3, *State ex rel. Capitol Business Equipment, Inc. v. Gates*, 155 W. Va. 64, 180 S.E.2d 865 (1971); Syllabus Point 1, *State ex rel. West Virginia Secondary School Activities Commission v. Oakley*, 152 W. Va. 533, 164 S.E.2d 775 (1968); Syllabus Point 1, *Swartz v. Public Service Comm'n*, 136 W. Va. 782, 68 S.E.2d 493 (1952).

More recently in *Cline v. Mirandy*, 234 W. Va. 427, 765 S.E.2d 583 (2014), this Court addressed whether an inmate's habeas corpus petition should be deemed moot because he was released and on parole. Relying upon *Kemp* and other decisions, this Court concluded that it was deemed moot. For the same reasons, this Court should enter an Order dismissing the claims of Christopher Burdette, Steve Gooslin, Samantha Sexton, Melanie Blake, Scotty Sowards, Ashley Parrish, Albert Matthew Moore, Crystal Ashton, Charles Mills, Donald Miller, Eric Wayne Robinson, Nelson Cortes, Dalton Cain, Briana Blankenship, John Miller, and Larry Joseph, Jeremy Kiser as moot, since they have all been released or are due to be released.

2). The Petition should be dismissed under Rule 2, Rules Governing Post-Conviction Habeas Corpus Proceedings, and W.Va. Code § 53-4A-1, *et seq.* for failure to provide adequate information and documentation regarding the Petitioners.

Scant and inaccurate details regarding the Petitioners were provided to the Court leaving it without an adequate foundation to make any decision on the Petitioners' requested relief. As demonstrated in the Supplemental Appendix, much of the information provided by the Petitioners is incorrect or incomplete, as set forth herein. It is clear that Rule 2, Rules Governing Post-

Conviction Habeas Corpus Proceedings applies to this Petition. That Rule requires a "summary of the facts supporting each of the grounds specified" must be included in the Petition. Rule 2 has not been met with regard to the Petition because the summaries provided by the Petitioners are inadequate and factually inaccurate for each of the remaining twenty-three Petitioners. Respondents now move to dismiss the Petition under Rule 2.

Rule 2 was addressed by the Circuit Court of Jackson County in denying a petition for habeas corpus and affirmed by this Court in a memorandum decision in *Jarrell v. Ballard*, 2013 W. Va. LEXIS 367, at *9 (W.Va. 2013) as follows:

> Petitioner's present counsel believes that this is a sufficient allegation to the effect that trial counsel was ineffective. The court believes otherwise. Rule 2(a)(2) of the Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia requires that a Petition for relief state:
>
> > (2) a summary of the facts supporting each of the grounds specified; ....
>
> Not only did the 2002 Amended Petition fail to allege trial counsel was ineffective, no facts were provided supporting any claim whatsoever of ineffective assistance of counsel.

This Court should likewise examine the summaries for each Petitioner as set forth in the Petition, in light of the errors and inaccuracies provided herein, and determine as a matter of law they are inadequate under Rule 2, Rules Governing Post-Conviction Habeas Corpus Proceedings and the remaining Petitioners claims should be dismissed.

Petitioners state that they are filing their Petition under W.Va. Code § 53-4A-1. Petition at p. 28 However, it is questionable whether this Petition, which relates to conditions of confinement and not the underlying conviction, may invoke that statutory provision at all.[7] To the extent that

[7] In footnote 2 of *Mitchem v Melton*, 167 W. Va. 21, 277 S.E.2d 895 (1981), Justice Miller observed "While the order awarding the writ treated it as proceeding under W. Va. Code, 53-4A-1, *et seq.*, it appears the appellant was not actually seeking to attack his conviction but was using habeas corpus to challenge the conditions of his confinement." The United States Supreme Court has left open the question of whether a conditions of confinement claim may be brought in the form of a petition for a writ of habeas corpus. *See Bell v. Wolfish*, 441 U.S. 520, 526 n.6, (1979) ("Thus,

code section does apply, W.Va. Code § 53-4A-2 requires "[a]ffidavits, exhibits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition unless there is a recital therein as to why they are not attached." This is a requirement for specific and detailed information that is not present in the Petition. Respondents contend that W.Va. Code § 53-4A-2 has not been met in this instance because, while an appendix was attached by Petitioners, no affidavits, exhibits, records or other documentary evidence has been provided for a single Petitioner despite carrying the evidentiary burden. Rather only "stock" declarations from the ACLU, that have been filed in multiple cases around the country seeking the release of inmates from various other state and federal penal institutions, have been provided proclaiming the dangers of COVID-19 to those confined in correctional institutions. Petitioners have wholly failed to carry their evidentiary burden.

W.Va. Code § 53-4A-2 was addressed by Judge Wilkes from the Circuit Court of Berkeley County in denying a habeas corpus and affirmed by this Court in a memorandum decision in *Grimes v. Plumley*, 2013 W. Va. LEXIS 1257, at *20 (W.Va. 2013) as follows:

> Furthermore, specificity is required in habeas pleadings, thus a mere recitation of a ground for relief without detailed factual support will not justify the issuance of a writ or the holding of a hearing. W. Va. Code § 53-4A-2; *Losh v. McKenzie*, 166 W. Va. 762, 771, 277 S.E.2d 606 (1981). "When a circuit court, in its discretion, chooses to dismiss a habeas corpus allegation because the petition does not provide adequate facts to allow the circuit court to make a 'fair adjuctiation [sic] of the matter,' the dismissal is without prejudice." *Markley v. Coleman*, 215 W. Va. 729, 734, 601 S.E.2d 49 (2004), see R. Hab. Corp. 4(c).

This Court should likewise examine the summaries for each Petitioner as set forth in the Petition, and the information provided in the Appendix, in light of the errors and inaccuracies provided

---

we leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself.").

herein, and determine as a matter of law that the Petitioners' allegations are inadequate under W.Va. Code § 53-4A-2 and the remaining Petitioners' claims should be dismissed.

3). The Petitioners failed to exhaust their administrative remedies.

Under the West Virginia Prisoner Litigation Reform Act ("WVPLRA"), West Virginia Code, § 25-1A-1 *et seq.*, an inmate must exhaust available administrative remedies provided by Corrections **prior** to initiating a petition for habeas corpus. *State ex rel. Fields v. McBride*, 216 W.Va. 623, 609 S.E.2d 884 (2004) (emphasis added). The WVPLRA provides that "[a]n inmate may not bring a civil action regarding an ordinary administrative remedy until the procedures promulgated by the agency have been exhausted." W.Va. Code, § 25-1A-2. Ordinary administrative remedies cover complaints about any general or particular aspect of prison life which does not involve violence, sexual assault or sexual abuse against an inmate, and include the petitioner's complaints about conditions of his confinement – food, medical care and the grievance process itself. W.Va. Code, § 25-1A-2(a). Moreover, the WVPLRA is jurisdictional in nature; compliance with this requirement is mandatory for the maintenance of an action.

Exhaustion of administrative remedies requires that the inmate comply with the duly promulgated rules and regulations, including a final appeal to the Commissioner. W.Va. Code, § 25-1A-2(d). Exhaustion of administrative remedies "'means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).'" *Woodford v. Ngo*, 548 U.S. 81, 90, 126 S. Ct. 2378, 2385 (2006) (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002). (Emphasis in the original). Exhaustion of administrative remedies contemplates that the agency be given the opportunity to address the grievance at all required administrative levels prior to a civil action being brought. "Because exhaustion requirements are designed to deal with parties who do not want to exhaust, administrative law creates an incentive for these parties to do what they would otherwise prefer not to do, namely, to give the agency **a**

fair and full opportunity to adjudicate their claims." *Woodford*, 548 U.S. at 90, 126 S. Ct. at 2385 (emphasis added).

W.Va. Code § 25-1A-1(a) clearly applies to extraordinary writs such as habeas corpus and this Court has upheld the Circuit Court's dismissal of a habeas corpus petition for failure to exhaust administrative remedies for issues related to medical treatment in *Goodman v Rubenstein,* 2017 W. Va. LEXIS 803 (W.Va. 2017)(Memorandum decision), s*ee also, Waybright v. Ballard,* 2014 W. Va. LEXIS 206 (W.Va. 2014)(Memorandum decision). Based upon the foregoing discussion, the Respondents contend that the Petitioners had a duty as a matter of law to first raise issues regarding COVID-19 through the grievance process and their failure to do so in this instance, requires this Court to dismiss the remaining Petitioners claims.

B. THE SIX PETITIONERS ARGUING FOR RELEASE ON PAROLE ARE NOT ENTITLED TO THAT RELEASE AS A MATTER OF LAW.

Petitioners allege, at Section III. B. of the Petition, that six of them are currently eligible for parole. (Petition at pp. 20-21.) They have provided little factual information beyond their names and criminal case numbers. *Id.* They have provided no documentary evidence in support of their allegations. *See* Petition. For these reasons alone, the Petition should be denied, as noted above. Nevertheless, Respondents respond to the bald assertion that six of the Petitioners are eligible for and should be released to parole.

W. Va. Code § 62-12-1, *et seq.*, and the rules promulgated thereunder, set forth the framework by which an inmate is determined to be eligible for parole. The precise date on which an inmate becomes parole eligible is commonly called the Parole Eligibility Date, or "PED." Once this date is attained, and all other requirements are met, the inmate is scheduled for an interview with the West Virginia Parole Board, an agency of the executive branch charged with deciding whether an inmate should be released to parole supervision. W. Va. Code §§ 62-12-12, 62-12-12a, 62-12-13.

At a threshold level, an "inmate of a state correctional institution is eligible for parole if he or she[] has served the minimum term of his or her indeterminate sentence or has served one fourth of his or her definite term sentence, as the case may be[.]" W. Va. Code § 62-12-13(b)(1)(A). Further, the inmate must "not [be] in punitive segregation or administrative segregation as a result of disciplinary action" and must have "prepared and submitted to the Parole Board a written parole release plan setting forth proposed plans for his or her place of residence, employment and, if appropriate, his or her plans regarding education and post-release counseling and treatment." W. Va. Code § 62-12-13(b)(2)-(3).

The West Virginia Code and the Rules of the Parole Board set forth additional criteria for determining the PEDs for inmates convicted of certain crimes, for those convicted of multiple crimes, and for those serving a sentence of life with mercy. *See* W. Va. Code §§ 62-12-13(b)(1)(C), 62-12-13(c); W. Va. Code R. § 92-1-4. For example, "[i]f an inmate is serving consecutive sentences, the time of parole eligibility shall be computed by adding together the minimum terms of the sentences." W. Va. Code R. § 92-1-4.1.a.10.

Beyond blithely stating they are "eligible for parole," the six Petitioners do not explain how or why they are parole eligible or when they became parole eligible. They have failed to carry their burden of proof in this matter. *See Stanley v. Dale*, 171 W. Va. 192, 194, 298 S.E.2d 225, 227-28 (1982) ("In habeas corpus proceedings, . . . the petitioner has the burden of proof; the degree of proof is by a preponderance of the evidence.") Furthermore, investigation has revealed that their assertions are, for the most part, incorrect. Respondents submit information in the Supplemental Appendix for Kevin Johnson, Kenneth Cyrus, Levi Arnold, Roy Ailiff, and Benny Horn in the Supplemental Appendix, minus Mr. Cortes, whose claim is moot. Quite the opposite of what is said in the Petition, four of these five Petitioners are <u>not</u> currently eligible for parole. The remaining one, Levi Arnold, is on the schedule to be seen when the Parole Board conducts interviews at his facility in May 2020.

Perhaps realizing that current West Virginia law is of no help to them, they instead reference only recently-enacted legislation, W. Va. Senate Bill 620, which takes effect on May 19, 2020. Petition at pp. 17-18. This legislation authorizes the Commissioner of WVDCR to establish a "nonviolent offense parole program" under a new code section, W. Va. Code § 62-12-13c. Without delineating who among them, Petitioners vaguely assert that "many [of them] would qualify for release in mere weeks or months once Senate Bill 620 . . . go[es] into effect[.]" Petition at p. 18. These assertions are extremely misleading and based upon misrepresentations of both fact and law.

First, while W. Va. Code § 62-12-13c takes effect on May 19, 2020, it specifically states that the new program created thereby does not "commence" until July 1, 2021. *Id.* at subsection (a). Thus, Petitioners are not just asking this Court to move up the effective date of the legislation by six weeks, they are also asking this Court to move up the commencement date for the program established by the legislation by more than a year. The implementation of this program will require infrastructure, personnel, and equipment deployment across the State of West Virginia that is not currently in place. Second, even if this new code section were in effect today and the "nonviolent offense parole program" had already commenced, it would only apply to a Petitioner who "has served at least the minimum term of his or her sentence and is eligible for parole as determined by the parole board[.]" W. Va. Code § 62-12-13c(b)(1). Only one of the five remaining Petitioners in this category is currently eligible for parole (Levi Arnold). The new legislation is essentially irrelevant and certainly not a basis upon which a writ of habeas corpus may issue in this case.

Lastly, Petitioners do not set forth any factual or legal basis upon which this Court may order the Parole Board to release them to parole. Determining whether a particular inmate has met eligibility requirements and would "not constitute a danger to the community," if released, is an executive function of the Parole Board. W. Va. Code § 62-12-13. The Parole Board's decision to grant or deny parole is a discretionary evaluation based on its expertise and a prisoner's record.

The information to be considered in connection with an inmate's parole interview is outlined in the West Virginia Code and the Rules of the Parole Board and includes, *inter alia*, the inmate's criminal record, disciplinary record, industrial record, and treatment record. W. Va. Code § 62-12-13(l); W. Va. Code R. § 92-1-6.1.a-l. The Parole Board is also required to address "the concerns of crime victims and the public" and to "reduc[e] the potential of future victimization" in rendering its decisions. W. Va. Code R. § 92-1-3.1.b.1; *see also* W. Va. Code R. § 92-1-6.2. Simply because an inmate has reached his PED does not mean that he will automatically be granted parole and released from custody. *See* W. Va. Code § 62-12-13a; *State v. Eilola*, 226 W. Va. 698, 703, 704 S.E.2d 698, 703 (2010).

While a habeas corpus proceeding is available to examine a decision of the Parole Board for abuse of discretion, *see, e.g., Tasker v. Mohn*, 165 W. Va. 55, 267 S.E.2d 183 (1980), the Petitioners cite to no case where this Court (or any other) effectively ordered the Parole Board to release an inmate to parole supervision before he or she was parole eligible and had been interviewed. What Petitioners are requesting is completely contrary to the parole eligibility and parole interview process set forth in West Virginia law and, further, would be a violation of this Court's precedent, *see Southern v. Burgess*, 198 W. Va. 518, 522 n.5, 482 S.E.2d 135, 139 n.5 (citing *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977)) ("[T]he Parole Board is obligated to follow its own rules and regulations."), and the Separation of Powers clause, W. Va. Const. Art. V, § 1. There is simply no merit to what these six Petitioners are claiming, and their request for relief should be denied in full.

C. THE PETITIONERS CANNOT SHOW A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS IN THIS CASE UNDER THE APPLICABLE DELIBERATE INDIFFERENCE STANDARD.

A search through the online database of Lexis Advance for cases related to COVID-19 and prisons or jails reveals that there are now over 250 cases reported since March. Given the novel nature of COVID-19, that is not a surprise. But this Court should note that over ninety percent of

the reported cases relate to federal district court cases arising in the context of (1) federal inmates seeking bond or sentence reduction due to COVID-19 or (2) Immigration and Customs Enforcement ("ICE") detainees in high risk categories seeking release due to COVID-19. Very few of the federal district court decisions relate to state prisons or jails and even fewer cases have been decided in state courts under habeas corpus or other proceedings related to COVID-19. The Montana Supreme Court has had two decisions, *Smith v. Department of Corrections*, 2002 Mont. LEXIS 954 (Mont. 2020) denying habeas relief and *Disability Rights Montana v. Montana Judicial Districts 1-22, et al.,* OP 20-0189 (April 14, 2020) (S.A.at pp. 680-89) denying a Writ of Mandamus, both related to COVID-19. The Ohio Supreme Court likewise summarily denied a Writ of Mandamus and Habeas Corpus on April 16, 2020, in *State ex rel. Lichtenwalter v DeWine,* 2020-Ohio 1465, 2020 Ohio LEXIS 951 (Oh. 2020) on COVID-19 related issues.

The Petition cites to very few COVID-19 decisions. At footnotes 45 and 46, they reference that Dr. Marc Stern and Dr. Robert Greifinger's declarations filed in the Appendix were originally filed in *Dawson v Asher,* (No. 2:20-CV-409-JLR-MAT) (Mar. 16, 2020), without also discussing that the motion for a Temporary Restraining Order ("TRO") filed by the ACLU was denied. The District Court in *Asher,* 2020 U.S. Dist. LEXIS 47891 (W.D. Wash. 2020) upon consideration of these declarations, denied the TRO after finding that there was insufficient evidence to support a finding of "irreparable harm" for the claims of the ICE detainees in that case.[8] At footnote 60, Petitioners cite to *Thakker v. Doll*, 2020 U.S. Dist. LEXIS 59459 (M.D. Pa. 2020), wherein a TRO was granted ordering the immediate release of approximately 13 ICE detainees due to the COVID-19 pandemic. It is respectfully submitted that the law pertaining to ICE detainees is not remotely similar to West Virginia habeas corpus law and the issues presented in this case. Further, as the

[8] It should be noted that the District Court in *Asher* denied a second motion for TRO with regard to ICE detainees. 2020 U.S. Dist. LEXIS 62019 (W.D. Wash. 2020). The Court again found that there had not been a showing of irreparable harm and, significantly, the Court refused to consider evidence regarding COVID-19, finding that there were no cases at the facility at issue and further, that the Defendants were following the advice of public health officials and the CDC. A similar conclusion should be made in this case.

District Court recognized in the second TRO in *Asher,* courts should not extrapolate the evidence related to the COVID-19 pandemic from one facility to another. Each case has unique facts that need to be examined by the Court on an individual basis. *See e.g. Verma v. Doll*, 2020 U. S. Dist. LEXIS 62429 (M.D. Pa. 2020)(Memorandum Opinion)(denying the petition of an ICE detainee and emphasizing the need for specific information regarding facilities at issue and a demonstration of individualized harm).

The Petitioners have also relied upon Orders in New Jersey, App. 78 and Hawaii, App. 106. In New Jersey, the parties mediated their dispute through a retired Judge. In the Hawaii Order, the Supreme Court noted that "[a]t this time, this court declines to enter a blanket order releasing large numbers of inmates." The parties did however agree to enter into the appointment of a Special Master with certain specified duties enumerated by the parties. No such agreement has been entered in this case and, as more fully discussed herein, the Respondents oppose the appointment of a Special Master in this case.

"Habeas corpus lies to secure relief from conditions of imprisonment which constitute cruel and unusual punishment in violation of the provisions of Article III, Section 5, of the Constitution of West Virginia and of the Eighth Amendment to the Constitution of the United States." Syl. Pt. 1, *State ex rel. Pingley v. Coiner*, 155 W.Va. 591, 186 S.E.2d 220 (1972). Where there is no violation of the Eighth Amendment or Article III, Section 5 of the West Virginia Constitution, a Writ of Habeas Corpus cannot be issued.

Although an inmate is plainly entitled to receive adequate medical and mental health care while incarcerated, no inmate is entitled to receive nor may he insist that the State of West Virginia provide him with, the most sophisticated care that money can buy. *United States v. DeCologero*, 821 F.2d 39, 42 (1st Cir.1987). Rather the constitution only requires at prisons, such as the facility Petitioner is housed in, meet certain minimum standards of medical and mental health treatment, "not that they cater to the individual preference of each inmate." *Chase v. Quick*, 596 F. Supp. 33,

35 (D.R.I. 1984). Deliberate indifference to a serious medical or mental health need of an inmate, including psychiatric care, can constitute unnecessary and wanton infliction of pain prohibited by the Eighth Amendment. *Nobles v. Duncil*, 202 W.Va. 523, 505 S.E.2d 442 (1998); *Estelle v. Gamble*, 429 U.S. 97 (1976).

To adequately plead and prove an Eighth Amendment claim of deliberate indifference to the mental health needs of an inmate, the Petitioner must satisfy a two-part test comprised of both objective and subjective components. First, the Petitioner must prove that the alleged deprivation of mental health treatment was "objectively, 'sufficiently serious.'" *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (*quoting Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). "To establish that a health care provider's actions constitute deliberate indifference to a prison inmate's serious medical need, the treatment, or lack thereof, must be so grossly incompetent, inadequate, or excessive as to shock the conscience or be intolerable to fundamental fairness." Syl. Pt. 5, *Nobles, supra.*

Second, the Petitioners must demonstrate by competent, reasonable, and admissible evidence that the prison official had "a sufficiently culpable state of mind." *Wilson*, 501 U.S. at 302-3. This subjective prong of the test requires Petitioners to prove that the Respondents have actual knowledge of and disregard for the "excessive risk to inmate health." *Farmer*, 511 U.S. at 837. Only when the official is "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he [draws] the inference[]" does the requisite degree of culpability exist to satisfy the second element of the inquiry. *Id.* Neither negligence nor medical malpractice in diagnosis or treatment of an inmate's medical/mental health condition may give rise to an Eighth Amendment deliberate indifference claim.

Judge Chambers followed this same deliberate indifference standard related to the COVID-19 conditions at West Virginia Regional Jails and Prisons in the *Baxley* case, at pp. 13-14, and he recently found that the inmates in that case could not meet that standard:

> As an initial matter, the Court recognizes that "the Eighth Amendment's proscription of cruel and unusual punishments is violated by deliberate indifference to serious medical needs of prisoners." Deliberate indifference, in turn, "is a very high standard [and] a showing of mere negligence will not meet it." *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999). ...It is this high bar that makes it unlikely that Plaintiffs could succeed on the merits of their claims.
>
> This is true for several reasons. First, the evidence before the Court suggests that Defendants have been anything but unresponsive to the threat posed by COVID-19. Although "[f]ailure to respond to an inmate's known medical needs raises an inference [of] deliberate indifference to those needs," *Miltier v. Beorn*, 896 F.2d 848, 853 (4th Cir. 1990), no such failure is apparent here. In fact, Defendants have produced what appears to be a comprehensive plan addressing the spread of COVID-19 in state jails and prisons. The plan addresses procedures to limit the entrance of COVID-19 into the corrections system, as well as methods to limit intra-facility transmission and to transport infected individuals to hospitals for medical care. *Policy Directive*, at 2–3. Of course, a legal education is not a medical education and the Court is cognizant of its own limitations in reviewing the Defendants' proffered plan. Yet Plaintiffs' medical expert was provided an opportunity to review Defendants' plan and comment upon it, and Defendants have provided what the Court considers adequate responses to each alleged shortcoming. The existence and ongoing implementation of Defendants' COVID-19 response plan makes it impossible to conclude that Defendants "actually knew of and disregarded a substantial risk of serious injury to the detainee." *Young*, 238 F.3d at 575–76. In fact, the opposite seems to be the case: Defendants have demonstrated actual knowledge of the risk of COVID-19, and regard it with the seriousness it deserves.

Judge Chambers' decision is well-reasoned and should be considered persuasive authority. This Court has often followed federal decisions on similar issues when it considered those decisions persuasive. *See e.g. Ratliff v. Norfolk S. Ry. Co.,* 224 W. Va. 13, 19 n.17, 680 S.E.2d 28, 34 (2009) and *State v. Collins*, 174 W. Va. 767, 769, 329 S.E.2d 839, 841 (1984). Judge Chambers addressed many of the same issues before this Court with regard to the COVID-19 pandemic and DCR's response plan and procedures. This Court should thoroughly review his decision and see if it should be deferred to by this Court.

Likewise, the Montana Supreme Court made findings in *Smith, supra,* at pp. 3-4, that the deliberate indifference standard was not met regarding an inmate filing a habeas corpus due to COVID-19:

> Here, Smith has made a sufficient threshold showing that the COVID-19 virus pandemic generally poses a substantial risk of serious harm to the health and safety of incarcerated inmates in a prison facility. However, aside from cursory assertion and citation to the Chief Justice's recent memorandum to lower courts regarding local detention center prisoner population management in response to the virus threat, Smith has made no evidentiary showing that the Department of Corrections is not taking reasonable measures under the circumstances to protect him and other inmates from the COVID-19 risk.

This Court should also examine the facts and law related to the deliberate indifference standard and conclude as a matter of law that there is no violation of any of the Petitioners' rights under the Eighth and Fourteenth Amendments. This Court should recognize that the Respondents are taking the necessary and proper steps to meet the best practices, consistent with the CDC's guidance to address the COVID-19 pandemic.

D. CONFINEMENT OF PRETRIAL DETAINEES IN THIS CASE DOES NOT CONSTITUTE PUNISHMENT

Pretrial Petitioners assert a separate argument that their claims are entitled to heightened scrutiny due to their pretrial status and that COVID-19 should change the analysis for their detention, essentially seeking a new adjudication regarding the balance between their due process rights and the government's interest in their pretrial confinement. Petitioners provide no individualized assessment, and, instead offer conclusory, speculative and general statements with no support in the record as to any specific facts to balance against the government's individualized, established interest in their pretrial confinement. This is plainly insufficient to overturn the Magistrate and Circuit Courts' individualized decisions with regard to the Pretrial Petitioners as these decisions were appropriately supported by specific facts establishing the legitimate

government interest in pretrial confinement.[9] *See* Syl. Pts.1 and 2, *State ex rel. Ghiz v. Johnson,* 155 W. Va. 186, 183 S.E.2d 703 (1971)(discussing the exercise of discretion in bail decisions, the interests behind requiring bail and that no absolute rule or policy should be adopted, but that all facts and circumstances of each case should be considered).

The existence of COVID-19 alone is insufficient to rebut these individualized, fact-specific decisions for Pretrial Petitioners, particularly in light of the practices and procedures put in place by DCR to monitor and protect the population of the correctional facilities that have been effective to date. *See* discussion, *supra.* Moreover, this Court has already issued a directive for pretrial detainment matters, where appropriate, be reconsidered in its March 27, 2020 memorandum. *See* discussion *supra.* Accordingly, where such a reconsideration is appropriate under the specific circumstances, the individual, factual analysis has been undertaken by individual prosecutors and courts with knowledge of the specific circumstances. *See* Appendix at 104-05. Therefore, this argument is moot.

Should the Court consider this issue further, to the extent that Pretrial Detainees attempt to allege that COVID-19 changes the analysis required for their pretrial confinement, this is simply not accurate. It is well-settled that pretrial detention alone does not constitute punishment. *See e.g. e.g. Bell v. Wolfish,* 441 U.S. 520, 534-537 (1979)(discussing ability to detain a person prior to a formal adjudication of guilt and the government may subject him to the restrictions and conditions of the corrections facility as long as the restrictions and restrictions do not amount to punishment); *State ex. rel. Riley v. Rudloff,* 212 W. Va. 767, 575 S.E.2d 377 (2002)("'[i]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper

[9] Pretrial detainees can dispute the "amount of bail or the discretionary denial of bail at any stage of the proceedings may be reviewed by summary petition first to the lower appellate court, if any, and thereafter by summary petition to the Supreme Court of Appeals or any judge thereof." W. Va. Code § 62-1C-1(c). This would be the appropriate, individualized mechanism to deal with any alleged change in the balance of interests regarding detainment.

inquiry is whether those conditions amount to punishment of the detainee..."' (quoting *Bell, supra)*). Accordingly, this Court has held that a constitutional challenge raised by a pretrial detainee is classified as either an attack upon a "condition of confinement" or an "episodic act or omission." *State ex rel. Riley, supra,* 212 W. Va. at 774; 575 S.E.2d at 384. A condition of confinement in pretrial detention that is reasonably related to a legitimate governmental objective does not, without more, amount to punishment. *Id.* at 774-775, 384-385(quoting and applying *Bell, supra*). Only if a condition is not reasonably related to a legitimate goal and is "arbitrary or purposeless," may it be considered a punishment.[10] *Id.* at 775; 385 (quoting *Bell, supra*).

West Virginia, like the Fourth Circuit, has held that the standard for pretrial detainees in evaluating conditions of confinement is the same, despite arising under different Constitutional Amendments. *See Hickson v. Kellison*, 170 W. Va. 732, 734; 296 S.E. 2d 855, 856 (W.Va. 1982), (citing *Bell v. Wolfish, supra*, and holding that rights of pretrial detainees arise under the Due Process Clause of the Fifth Amendment and that "[d]espite this difference in the particular constitutional right afforded between the sentenced inmate and the pretrial detainee, it does not appear from a practical standpoint that the end result differs substantially."). This Court has held that "where conditions of confinement are at issue, it would seem of little moment as to how the inmate's confinement has occurred. Whether it is a result of a sentence imposed after adjudication of guilt or by confinement resulting from an arrest and the inability to make bail, the focus is still on the environment surrounding the incarceration." *Id. See also Hill v. Nicodemus*, 979 F.2d 987, 991 (4th Cir. 1992)(holding that the deliberate indifference standard was appropriate in conditions of confinement cases of pretrial detainees).

[10] The Fourth Circuit has held to show punishment, a pretrial detainee must show "either 1) an 'expressed intent' to punish or 2) a lack of a reasonable relationship 'to a legitimate nonpunitive governmental objective, from which a punitive intent may be inferred.'" *Hill v. Nicodemus,* 979 F.2d 987, 991 (4th Cir. 1992) (quoting *Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988)). Neither an expressed nor inferred intent to punish can be found in this case because deliberate indifference cannot be established.

Each individual Pretrial Petitioner's detention had a specific basis and was not arbitrary or purposeless. *See* S.A. at pp. 1-19. The government's stated, previously adjudicated interests continue to justify pretrial detention on the original basis for each of the Pretrial Petitioners. As discussed at length above, there is no deliberate indifference with regard to the prevention and treatment of COVID-19 within correctional facilities that changes this analysis. Accordingly, pretrial detention during the COVID-19 pandemic does not constitute "punishment," either expressly or impliedly, and does not change the individualized analysis that has already been undertaken for each Pretrial Petitioner. As such, they cannot establish that there has been a violation of their Constitutional rights with regard to the conditions of confinement on the basis of Respondents' response to COVID-19.

E. THE REQUEST FOR THE UNILATERAL APPOINTMENT OF A SPECIAL MASTER IS NOT WARRANTED IN THIS CASE AND SHOULD BE DENIED BY THIS COURT.

The Petitioners have requested that this Court expeditiously appoint a Special Master. They have suggested that this Court should unilaterally appoint a Special Master with similar authority as agreed to in Hawaii.[11] The Respondents strenuously object to this proposal for several reasons. First, it is one thing for all parties to negotiate and agree to the appointment of a Special Master, with specified and agreed authority, as was done in Hawaii. It is entirely different to request the Court to take this action on a unilateral basis. It is respectfully submitted that this Court does not have that authority to unilaterally appoint a Special Master, under the Separation of Powers clause, to interfere on a daily basis in an executive function, such as the running of the Regional Jails and Prisons. In *State ex rel. Berry v. McBride*, 218 W. Va. 579, 586 n.6, 625 S.E.2d

[11] The Petitioners have requested the Special Master have the following authority: (1) Ensure that appropriate agencies consult and coordinate with relevant public defense agencies, defense counsel, as well as counsel for Petitioners to represent all interests in this matter; (2) Enlist, as appropriate or necessary, subject matter experts, to act as a panel and advise and consult with the special master in facilitating the process; (3) Report to this Court every 48 hours on progress, including the numbers of individuals released; (4) Report immediately to this court any recalcitrant or unreasonable conduct by any participant in the process.

341, 348 (2005), this Court recognized: "Of course it is true that prison officials, who operate with enormous responsibilities and clearly inadequate resources under strongly competing and conflicting pressures, must have large amounts of discretion in controlling many aspects of inmates' lives – for the soundest of reasons." This Court should recognize that addressing COVID-19 within a penal institution is an executive function, not a judicial function, and this Court should not interfere with Commissioner Jividen's exercise of discretion in addressing that pandemic.

Article V, Section 1 of the West Virginia Constitution provides, "The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time[.]" *See also, State ex rel. Canterbury v. County Court of Wayne County*, 151 W.Va. 1013, 158 S.E.2d 151 (1967). As this Court stated in Syllabus Point 1 of *State ex rel. Barker v. Manchin*, "Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." 167 W.Va. 155, 279 S.E.2d 622 (1981). *See also, State ex rel. State Building Commission v. Bailey*, 151 W.Va. 79, 84, 150 S.E.2d 449, 452 (1966) ("plain language [of Article V, section 1] calls not for construction but only for obedience."); *State v. Huber*, 129 W.Va. 198, 209, 40 S.E.2d 11 (1946). Therefore, as a general rule arising out of such a clear and unambiguous mandate, "unless otherwise expressly provided or incidental to the powers conferred...the judiciary cannot exercise either executive or legislative power." *State Building Commission*, 151 W.Va. at 85, 150 S.E.2d at 453.

DCR recognizes that the separation of powers doctrine sometimes requires branches of government to overlap in functionality to safeguard the rights and privileges of its citizenry. However, even those overlapping spheres are subject to natural, constitutional, and statutory boundaries that keep each branch of government functioning within its specified limits.

Administration and maintenance of correctional facilities has long been recognized as being primarily executive in nature and one "with which the judicial branch of government ordinarily will not interfere." *State ex rel. Pingley v. Coiner*, 155 W.Va. 591, 611, 186 S.E.2d 220, 232 (1972)(internal citations omitted). *See also, Drake v. Airhart,* 162 W.Va. 98, 101-2, 245 S.E.2d 853, 856 (1978) ("The maintenance of discipline in a jail or prison is essential to the effective and proper operation of a penal system. This is an executive function with which courts ordinarily will not interfere." (citations omitted).) As this Court explained in State ex rel. Anstey v. Davis,

> [t]he primary responsibility for ensuring the orderly and effective maintenance of our penal system rests with prison administrators. These administrators are the ones responsible for developing and implementing the policies and procedures which are designed to guarantee that the various goals of incarceration are realized. This Court has recognized that prison administrators have broad discretion in the management of correctional facilities.

203 W.Va. 538, 544, 509 S.E.2d 579 585 (1998). *See also, Pingley, supra* ("Generally the administrative responsibility of correctional institutions rests peculiarly within the province of the officials themselves, without attempted intrusion or intervention on the part of the courts. *Jordan v Fitzharris*, 257 F.Supp. 674 (N.D. Cal. 1966). Even when reviewing cases that examine the rights of inmates versus scope of authority of correctional administrators to manage facilities, this Court noted that a court "must be careful not to usurp the authority of prison administrators, yet [] must be vigilant in not relinquishing this Court's role as guardian as fundamental commitments." *Antsey,* 203 W.Va. at 544, 509 S.E.2d 585. *See also, Drake, supra* ("Prison officials are vested with wide discretion in disciplining prisons committed to their custody and unless there is a clear abuse of that discretion, resulting in infringement of basic constitutional rights, their actions will not be disturbed.")

Second, while this Court has authority under Rule 16(l), West Virginia Rules of Appellate Procedure, to appoint a Special Master, this Court has historically used Special Masters primarily in a quasi-judicial capacity as fact finders, to make a record and report back to the Court

recommendations for a judicial decision.[12] *See e.g. State ex rel. Berry v. McBride, supra,* wherein Judge Swope from Mercer County, West Virginia served as a Special Master and he issued a recommended decision for the Court to review. This is in keeping with the role of a Special Master to serving a judicial and not a legislative function. *See also, State ex rel. Regional Jail & Correctional Facility Authority v. County Commission of Cabell County,* 222 W. Va. 1, 5-6, 657 S.E.2d 176, 180-81 (2007)(Referral of Rule to Show Cause under former Rule 14(f) to the Circuit Court of Cabell County).[13]

Finally, Judge Chambers in the *Baxley* case properly declined to appoint a Special Master concluding at footnote 16 of his opinion that there were "problems inherent in making case-by-case determinations regarding the furlough or release of inmates." So too in this case, when one examines the myriad of categories that the Petitioners fall into and are requesting relief, not only from the DCR, but also from the Parole Board, this Court should recognize that a Special Master would not have the expertise to address such matters. On this basis, this Court should enter an Order denying relief of the appointment of a Special Master as requested by the Petitioners.

VI. CONCLUSION

WHEREFORE, for each and all of the foregoing reasons, Respondents request that the Court dismiss the Petition as set forth herein, that the relief as requested in the Petition be denied,

---

[12] Rule 16(l), provides: "In an original jurisdiction proceeding, the Supreme Court, on its own motion or upon written motion of the parties, may determine that because of the complexity of the factual issues involved, the proceeding should be referred to a special master or commissioner ***for the purpose of supervising the taking of depositions and to make such findings of fact as the Supreme Court may direct. Any such findings of fact made by the special master or commissioner shall be in writing and the parties shall have the right to file written objections thereto before the findings are considered by the Supreme Court.***" (Emphasis added).

[13] It is noted that in *Crain v. Bordenkircher,* 176 W. Va. 338, 342 S.E.2d 422 (1986) and its progeny, this Court appointed a Special Master to oversee legal issues related to the old West Virginia Penitentiary in Moundsville, West Virginia, that had more duties than a traditional finder of fact. It should be noted however that the parties agreed in that case to the appointment of the Special Master as a part of a Consent Decree.

including the claim for the appointment of a Special Master, and for such other relief as this Court deems just and proper.

Respectfully submitted on behalf of all Respondents by:

PATRICK MORRISEY
ATTORNEY GENERAL

Briana J. Marino

Briana J. Marino, State Bar #11060
Assistant Attorney General
1900 Kanawha Blvd., East
Building 1, Suite W-400
Charleston, WV 25305
Telephone: (304) 558-6593
Facsimile: (304) 558-4509
Email: Briana.J.Marino@wvago.gov
Assistant Attorney General Representing the West Virginia Division of Corrections and Rehabilitation And Department of Military Affairs and Public Safety

/s/ Keith D. Fisher

Keith D. Fisher, State Bar #11346
Assistant Attorney General
Office of the West Virginia Attorney General
812 Quarrier Street, Second Floor
Charleston, WV 25301
Telephone: (304) 558-8989
Facsimile: (304) 558-4509
Email: Keith.D.Fisher@wvago.gov
Assistant Attorney General Representing The West Virginia Parole Board

LEWIS GLASSER PLLC

/s/ Webster J. Arceneaux, III

Webster J. Arceneaux, III, State Bar #155
Richard L. Gottlieb, State Bar #1447
James C. Stebbins, State Bar #6674
Valerie H. Raupp, State Bar #10476
Post Office Box 1746
Charleston, WV 25326
Telephone: (304) 345-2000
Facsimile: (304) 343-7999
Email: wjarceneaux@lewisglasser.com
Special Assistant Attorneys General

No. 20-0259

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DONALD MILLER, *et al.*,

Petitioners,

v.

BETSY JIVIDEN, *et al.*,

Respondents.

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that on April 21, 2020, I caused the foregoing RESPONDENTS' ANSWER AND MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS and SUPPLEMENTAL APPENDIX to be served on the following by online share site a true copy thereof to the following:

Loree Stark, Esq.
ACLU of West Virginia Foundation
Post Office Box 3952
Charleston, West Virginia 25339-3952

Lora Greer Walker, Esq.
Public Defender Services
Habeas Corpus Division
One Player's Club Drive, Suite 301
Charleston, West Virginia 25311

Briana J. Marino

Briana J. Marino
Assistant Attorney General