No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ERIC LLOYD HERMANSEN, Petitioner

v.

ANNA VALENTINE, Warden, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

APPENDIX

No. 21-5304

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 03, 2021
DEBORAH S. HUNT, Clerk

ERIC LLOYD HERMANSEN,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
ANNA VALENTINE, Warden,)
)
Respondent-Appellee.)

Before: McKEAGUE, Circuit Judge.

Eric Lloyd Hermansen, a pro se Kentucky prisoner, applies for a certificate of appealability ("COA") in his appeal from the district court's denial of his 28 U.S.C. § 2241 petition for a writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1)(A); *Greene v. Tenn. Dep't of Corr.*, 265 F.3d 369, 372 (6th Cir. 2001). Hermansen also moves to proceed in forma pauperis.

In 1997, a jury convicted Hermansen of murder, and the trial court sentenced him to life imprisonment. His murder conviction and sentence were affirmed on direct appeal. *See Hermansen v. Commonwealth*, No. 2012-SC-000297-MR, 2013 WL 2296309, at *1-2 (Ky. May 23, 2013).

In July 2020, Hermansen filed a § 2241 petition, seeking his immediate release from prison because he was allegedly being housed in unconstitutional conditions given the COVID-19 pandemic. He noted that staff and inmates at the prison had contracted the virus and that it was likely to spread in that environment, and he asserted that he was particularly susceptible to serious illness or death were he to contract COVID-19 given his age—he was fifty-eight at the time—and the fact that he has stage 4 hepatitis C and advanced cirrhosis. Hermansen also argued that his release was warranted given that state officials had released other prisoners over concerns about COVID-19. As for the constitutional basis for his petition, Hermansen stated that "no where under

APPENDIX - EX A

the U.S. Constitution or the 14th Amendment are Respondents authorized to subject him to a death sentence without due process of law – and – there is no process due that can legally be employed by Respondents to forcibly subject him to contracting COVID-19." The Commonwealth responded to his petition, arguing that, because it had taken reasonable precautions to protect inmates like Hermansen, he did not allege a colorable claim for cruel and unusual punishment under the Eighth Amendment. In reply, Hermansen asserted that he was not making a claim under the Eighth Amendment's Cruel and Unusual Punishments Clause but under the Fourteenth Amendment's Due Process Clause.

A magistrate judge recommended denying Hermansen's petition on the merits because he had provided "no medical evidence to support his claim that there is a substantial chance he might contract COVID-19 as a result of being incarcerated or that he might die as a result," and because he had not shown that he was similarly situated to those inmates who had been released. *Hermansen v. Valentine*, No. 3:20-CV-00515-RGJ-LLK, 2020 WL 9348266, at *2 (W.D. Ky. Aug. 31, 2020) (report and recommendation). The magistrate judge also recommended denying the petition because Hermansen failed to exhaust the available state remedies for his claims. *Id.* at *3. The district court adopted that recommendation over Hermansen's objections, holding that his petition failed on the merits, and declined to issue a COA. *Hermansen v. Valentine*, No. CR 3:20-CV-515, 2021 WL 916927 (W.D. Ky. Mar. 10, 2021). The district court noted that Hermansen seemed to misunderstand that the Due Process Clause protects pretrial detainees from inhumane conditions of confinement, while the Eighth Amendment protects convicted prisoners from the same. *Id.* at *3. The district court also held that, because his claims failed on the merits, it was unnecessary to determine whether Hermansen had failed to exhaust his administrative or state-court remedies, noting that he had provided some evidence that they were unavailable. *Id.* at *4.

In his COA application, Hermansen argues that the district court erred by: (1) dismissing his petition on exhaustion grounds; (2) holding that the Due Process Clause applies only to pretrial detainees; (3) finding that his claim was subject to the Eighth Amendment's deliberate-

indifference standard and not the Due Process Clause's atypical-and-significant-hardship standard; (4) rejecting his unrefuted medical evidence supporting his claim that he is at a high risk for complications if he contracts COVID-19; and (5) determining that it is constitutionally permissible to release non-violent felons who are at risk of serious illness from COVID-19 but not similarly at-risk violent felons. Hermansen also notes that he did contract COVID-19 in November 2020.

A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,'" *Welch v. United States*, 578 U.S. 120, ___, 136 S. Ct. 1257, 1263 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or when "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Section 2241 authorizes federal courts to grant habeas relief to a prisoner who is "in custody in violation of the Constitution and laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). A constitutional claim that seeks release from confinement as the only adequate remedy, as Hermansen's does, is properly brought in a habeas petition under § 2241. *See Wilson v. Williams*, 961 F.3d 829, 838 (6th Cir. 2020).

Hermansen first argues that the district court erred in dismissing his petition for failure to exhaust his administrative or state-court remedies. But the district court held that it ultimately "need not decide [the exhaustion] question as Hermansen's petition fails on the merits." *Hermansen*, 2021 WL 916927, at *5.

Hermansen's main arguments in his COA application concern the alleged misunderstanding of his claim by the district court and the Commonwealth. Hermansen seemed to be claiming that his prison conditions were unconstitutional. Usually, that is a claim under the Eighth Amendment's Cruel and Unusual Punishments Clause. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994). But Hermansen repeatedly stated that he was not raising an Eighth Amendment claim and was instead asserting a claim under the Due Process Clause. A conditions-of-

confinement claim may be brought under the Due Process Clause, but only by pretrial detainees, because, unlike convicted prisoners who are incarcerated as "punishment," pretrial detainees have no rights under the Eighth Amendment. *See Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013). Consequently, the magistrate judge and the district court both believed that Hermansen had mistakenly raised a conditions-of-confinement claim under the Due Process Clause, which could not provide him—a convicted prisoner—relief.

Insofar as Hermansen raised a conditions-of-confinement claim under the Eighth Amendment, it is not adequate to deserve encouragement to proceed further. To prevail on an Eighth Amendment claim, Hermansen had to show that prison officials knew of but disregarded an excessive risk to inmate health and safety. *See Farmer*, 511 U.S. at 837. But, in response to Hermansen's § 2241 petition, the Commonwealth detailed the procedures that it had implemented at Hermansen's prison to protect him and other inmates from contracting COVID-19, noting that, at that time, none of the inmates in his dormitory had tested positive. In light of that evidence, Hermansen did not make a substantial showing that prison officials knew that he faced a serious risk to his health yet disregarded it "by failing to take reasonable measures to abate it." *Rhinehart v. Scutt*, 894 F.3d 721, 738 (6th Cir. 2018). Accordingly, no reasonable jurist could debate that he did not establish an Eighth Amendment violation.

Hermansen's petition and subsequent filings also could be seen to raise a procedural-due-process claim under the Fourteenth Amendment. "Procedural due process is traditionally viewed as the requirement that the government provide a 'fair procedure' when depriving someone of life, liberty, or property . . . ." *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 855 (6th Cir. 2012) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). Hermansen notes that, in his objections to the magistrate judge's report and recommendation, he cited *Wilkinson v. Austin*, 545 U.S. 209, 222-23 (2005), and *Sandin v. Conner*, 515 U.S. 472, 477-78 (1995), both of which provide that inmates may not be deprived of a liberty interest without due process. Prisoners have a liberty interest in "freedom from restraint which . . . imposes atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484 (citations omitted).

Hermansen argues that the pandemic, his health, and the circumstances at his prison combine to make his continued incarceration a violation of that liberty interest.

But even if Hermansen has some liberty interest in not being imprisoned in conditions in which he is allegedly likely to contract COVID-19, he has not made a substantial showing that he has been deprived of that liberty *without due process*. *See Harris v. Caruso*, 465 F. App'x 481, 484 (6th Cir. 2012) ("Where a liberty interest is shown, the due process claim 'is not complete unless and until the State fails to provide due process.'" (quoting *Zinermon v. Burch*, 494 U.S. 113, 126 (1990))). Hermansen does not cite the procedures that the Commonwealth has used or show that they were inadequate. He argues that state officials have erred in releasing non-violent offenders but not violent ones, like him, but he does not explain how that violates his due-process rights to procedural protections. Indeed, the fact that Commonwealth officials allegedly gave a reason for their decision tends to show that due-process requirements were met. *See, e.g.*, *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455 (1985) ("We hold that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits."). In short, Hermansen has not made a substantial showing that his rights under the Due Process Clause have been violated.

Hermansen also argues that the district court erred in rejecting his unrefuted medical evidence supporting his claim that he is at a high risk for serious illness were he to contract COVID-19. But the medical evidence was not unrefuted: as noted above, the Commonwealth cited CDC materials stating that liver disease was not known to create an increased risk of illness from COVID-19 but that it merely might do so. In any event, given that Hermansen's Eighth Amendment claim fails because he did not make a substantial showing that prison officials neglected to take reasonable steps to reduce the risk to his health from COVID-19, medical evidence would not save his claim. And the same holds true for his procedural-due-process claim: his medical evidence does not affect his failure to show that prison officials did not provide him adequate process.

In sum, Hermansen has not made a substantial showing that he was denied a constitutional right by not being released from prison during the COVID-19 pandemic. His claims do not deserve encouragement to proceed further.

Accordingly, Hermansen's COA application is **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

ERIC LLOYD HERMANSEN — Petitioner

v. — Criminal Action No. 3:20-CV-515

ANNA VALENTINE, WARDEN
ANDY BESHEAR, GOVERNOR — Respondents

* * * * *

MEMORANDUM OPINION & ORDER

Petitioner, Eric Lloyd Hermansen ("Hermansen") objects to the Magistrate Judge's Report and Recommendation ("R&R") [DE 17], denying his motion for default judgment ("Motion for Default Judgment"), motion for sanctions ("Motion for Sanctions"), motion to strike response ("Motion to Strike") and petition for habeas relief ("Petition"). The Respondents did not respond to Hermansen's objections [DE 18] ("Objections"), and the time for doing so has passed. For the reasons below, Hermansen's Objections are **OVERRULED**.

I. BACKGROUND

Hermansen was convicted of murder and sentenced to life imprisonment in 1997. *Hermansen v. Com.*, No. 2012-SC-000297-MR, 2013 WL 2296309, at *1 (Ky. May 23, 2013). He is in custody at the Kentucky State Reformatory ("KSR"), which is in Oldham County, in the Western District of Kentucky.

Hermansen filed a Petition for habeas relief under 28 U.S.C. § 2241 asserting that health issues coupled with his age put him a higher risk of severe illness if he contracts COVID-19. [DE

APPENDIX-EX B

1].[1] As grounds for his Petition, Hermansen states that he has been "diagnosed with Hepatitis C and treated with interferon with ribovarium [ribavirin] after confirmation of Stage 4 HCV [hepatitis C virus]." [DE 1 at 7]. Hermansen attaches a report from a 2003 liver needle biopsy. [DE 1-6]. Hermansen was born in 1962. [DE 1 at 4, 6].

Hermansen claims that "no where [sic] under the U.S. Constitution or the 14th Amendment are Respondents authorized to subject [Petitioner] to a death sentence without due process of law -- and -- there is no process due that can legally be employed by Respondents to forcibly subject him to contracting COVID-19." [DN 1 at 10]. He also argues that the Due Process Clause of the Fifth Amendment as incorporated against the states by the Fourteenth Amendment makes it "illegal for Respondents and the Commonwealth of Kentucky to require further execution of his sentence by forcibly subjecting him to become infected with COVID-19 and potential death due to his liver disease." [DN 14 at 1]. Additionally, Hermansen claims that Due Process requires his immediate release "equally as those currently having been released under the Respondents' and Governor Beshear's concession of the same by ordering the release of other prisoners." [DN 14 at 12-13].

Hermansen's Petition was referred to Magistrate Judge King, who issued a Report and Recommendation. [DE 5]. The Magistrate Judge recommended that the Court deny Hermansen's Petition because it lacks merit and because Hermansen's claims are subject to dismissal for failure to exhaust available state court remedies. [DE 17]. The Magistrate Judge recommended

[1] The Sixth Circuit's opinion in *Taylor v. Owens*, No. 20-5648 (6th Cir. March 9, 2021), came out as of the time of this Order. There, the Sixth Circuit held: "Section 2255(e) limits district courts' subject-matter jurisdiction. A district court has no jurisdiction over an application for habeas under section 2241 if the petitioner could seek relief under section 2255, and either has not done so or has done so unsuccessfully. The only escape route is the saving clause." Based upon the information before the Court, *Taylor* appears to be inapplicable.

Hermansen's remaining motions be denied. *Id.* Hermansen objects to the Magistrate Judge's recommendations. [DE 18].

II. STANDARD

a. Standard of Review for the Report and Recommendation

A district court may refer a motion to a magistrate judge to prepare a report and recommendation. 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b)(1). "A magistrate judge must promptly conduct the required proceedings . . . [and] enter a recommended disposition, including, if appropriate, proposed findings of fact." Fed. R. Civ. P. 72(b)(1). This Court must "determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). The Court need not review under a *de novo* or any other standard those aspects of the report and recommendation to which party makes no specific objection and may adopt the findings and rulings of the magistrate judge to which no specific objection is filed. *Thomas v. Arn,* 474 U.S. 140, 149–50, 155 (1985).

A specific objection "explain[s] and cite[s] specific portions of the report which [counsel] deem[s] problematic." *Robert v. Tesson,* 507 F.3d 981, 994 (6th Cir. 2007) (alterations in original) (citation omitted). The court does not permit a general objection that fails to identify specific factual or legal issues from the R&R as it duplicates the magistrate judge's efforts and wastes judicial resources. *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). After reviewing the evidence, the Court is free to accept, reject, or modify the magistrate judge's proposed findings or recommendations. 28 U.S.C. § 636(b)(1)(C).

b. Standard for Relief under 28 U.S.C. § 2241

A petition under § 2241 is appropriate when a prisoner is challenging the execution of his sentence. *See Montez v. McKinna,* 208 F.3d 862, 864-865 (10th Cir. 2000) (since the state prisoner

is attacking the execution of his sentence the petition should be filed under § 2241 not § 2254); *see also United States v. Jalili*, 925 F.2d 889, 893-94 (6th Cir. 1991) (if a federal prisoner seeks to attack the execution of his sentence, he should file a 2241 petition rather than a 2255 motion); *Cohen v. United States*, 593 F.2d 766, 770-71 (6th Cir. 1979); *Wright v. United States Bd. of Parole*, 557 F.2d 74, 76-77 (6th Cir. 1997). But a § 2241 petition is properly filed in the district where the prisoner is confined, not the district where he was convicted. *Montez*, 209 F.3d at 865; *Jalili*, 925 F.2d at 893-94.

The Supreme Court has long recognized that the government has a constitutional obligation to "provide humane conditions of confinement." *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L.Ed.2d 811 (1994) (citations omitted). As part of this duty, officials must "take reasonable measures to guarantee the safety of the inmates." *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–527, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984)). For prisoners incarcerated following a conviction, the government's obligation arises out of the Eighth Amendment's prohibition on cruel and unusual punishment. *See Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013). For pretrial detainees, the obligation arises out of the Due Process Clause of the Fifth or Fourteenth Amendment. *See id.*

Courts assess conditions-of-confinement claims under the "deliberate indifference" framework. *See id.* This framework requires plaintiffs to meet two requirements. The first is "objective[ ]," and it requires the inmate to "show that he is incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 833, 114 S. Ct. 1970 (citing *Helling v. McKinney*, 509 U.S. 25, 35, 113 S. Ct. 2475, 125 L.Ed.2d 22 (1993)). The second is "subjective," and it requires the inmate to "show that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and then

disregarded that risk." *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir. 2001) (citing *Farmer*, 511 U.S. at 837, 114 S. Ct. 1970). The official must have a subjective "state of mind more blameworthy than negligence," like criminal recklessness. *Farmer*, 511 U.S. at 835, 839–40, 114 S. Ct. 1970.

III. DISCUSSION

6-11-2020

Hermansen objects to the Magistrate Judge's citation to *Cameron v. Bouchard*, No. 20-1469, 2020 WL 3867393 (6th Cir. 2020). Hermansen argues *Cameron* does not apply to his Petition because he is not making an eighth Amendment claim. [DE 18 at 168]. In citing *Cameron*, the Magistrate was pointing out that the government's obligation to prove humane conditions of confinement after conviction fall under the Eighth Amendment, not the Due Process Clause as Hermansen insists. The Due Process Clause applies to conditions of confinement *pretrial*. The Magistrate was making this point because Hermansen argued in his briefing that he is not making a claim under the Eighth Amendment, as made in *Blackburn v. Noble*, No. 3:20-CV-00046-GFVT, 2020 WL 4758358, at *4 (E.D. Ky. Aug. 17, 2020) (citing 28 U.S.C. § 2254(b)(1)). Instead, Hermansen insists his claim is under the Due Process Clause. The Magistrate was pointing out that Hermansen tries to use the standard for pretrial detainees as opposed to prisoners incarcerated after conviction, because that standard might be easier as it may not require Hermansen to prove the second subjective prong of the deliberate indifference test. But this standard does not apply. The Magistrate Judge is correct, because Hermansen is a convicted prisoner, the test applicable to Hermansen's claim is under the Eighth Amendment, not the Due Process Clause. *Cameron v. Bouchard*, 815 F. App'x 978, 984 (6th Cir. 2020). Hermansen's objection on this point is overruled.

Hermansen objects to what he claims is the Magistrate Judge's "minimalization of [Hermansen's] evidence . . ." and argues that Respondents did not present evidence that he does not have cirrhosis of the liver, is not at risk for liver cancer, or that there are no high mortality rates because of COVID among those with cirrhosis of the liver. [DE 18 at 165]. Hermansen claims under *Yates v. Mammoth Cave Nat'l Park Assn.*, 55 S.W.2d 348, 349 (Ky, 1932) "exhibits for which a pleading is premised are controlling" and thus "Exhibits F through H regarding to [sic] Hermansen's HCV, cirrhosis and potential for cancer of the liver are controlling in these proceedings and must be taken to mean as they purport to." [DE 18 at 165]. *Yates* involved a civil action to collect a sum allegedly due under a written contract. *Id.* at 348. The complaint was dismissed because of language in the written contract, an exhibit to the complaint. *Id.* at 348-49. The *Yates* court noted that "[i]t is also a well-settled rule in this state that the exhibit upon which an action is based is controlling." *Id.* at 349. The Magistrate Judge stated that Hermansen "provides no medical evidence to support his claim that . . . he might die as a result [of being incarcerated]." [DE 17 at 161]. The Magistrate Judge was not minimizing the exhibits that Hermansen attached to his petition relating to his hepatis C or liver biopsy. These exhibits are limited. The biopsy exhibit is 17 years old and revealed "focal early changes of micronodular cirrhosis (grated 3-4)." The other record revealed that Hermansen asked to be evaluated for cirrhosis but does not include a diagnosis. Even assuming Hermansen has liver cirrhosis, the Magistrate Judge was pointing out that Hermansen did not present medical evidence that would support the first prong the deliberate indifference standard that Hermansen "is incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 833. Nor were the Respondents required to produce evidence showing that Hermansen does not have cirrhosis of the liver. This objection is overruled.

Hermansen objects to the Magistrate Judge's statement that "there is no authority for [Hermansen's] claim that Due Process is offended by the fact that there is a substantial chance he might contract COVID-19 as a result of being incarcerated and that he might die as a result." Hermansen argues that he cited *People ex rel. Stoughton v. Brann*, 67 Misc. 3d 629, 122 N.Y.S.3d 866 (N.Y. Sup. Ct. 2020) in support. In that case, a New York state trial court[2] held that prison officials failed to take reasonable care to mitigate risk of the pandemic and that temporary release was appropriate from some detainees with conditions making them more vulnerable to COVID. *Id.* at 869-72. The court also held that release was not appropriate for detainees whose age alone or medical conditions did not place them at greater risk. *Id.* But *Stoughton* involved a petition filed by *pretrial detainees* that argued that confinement during the pandemic violated due process, not post-conviction prisoners. And at least one other New York court declined to follow this case. *People ex rel. Lineberger v. Brann*, 68 Misc. 3d 986, 998, 129 N.Y.S.3d 283, 291 (N.Y. Sup. Ct. 2020) ("To the extent that the court in *People ex rel. Stoughton (Jeffrey, et al.) v. Brann et al.*, 67 Misc.3d 629, 122 N.Y.S.3d 866 (Sup. Ct. N.Y. County, Dwyer, J.) found the City's efforts insufficient to avoid a due process violation, at least as to some petitioners, this court respectfully disagrees with that finding and declines to follow it."). Hermansen's objection on this point is overruled.

Hermansen objects to the statement "the Court finds no authority for . . . the fact that other prisoners have been released due to COVID-19 concerns." [DE 18 at 168]. Hermansen argues this Court should take judicial notice that "hundreds if not a thousands of prisoners since April 2020" that have been released because of COVID and that "there has already been the release of vast

[2]The State of New York calls its trial courts "Supreme Courts," the intermediate courts "Appellate Divisions" of the Supreme Courts, each constituting a "Department," and its highest court the New York Court of Appeals. The case cited by Hermansen is from one of New York State's trial courts of general jurisdiction, the equivalent to Kentucky's circuit courts.

number [sic] of similarly situated prisoners." [DE 18 at 168-69]. But even though the Magistrate Judge found no support for Hermansen's statement that other prisoners have been released for COVID concerns, the Magistrate Judge addressed Hermansen's argument. Hermansen states in his petition that he wrote the governor "expressing his concerns about only considering low level felons with higher recidivism rates, rather than aging prisoners with lower recidivism rates, for communication of sentence in light of COVID-19." [DE 1 at 3]. The Magistrate Judge adequately addressed Hermansen's argument, stating, "the fact that [Hermansen] was convicted of murder (a Class A felony), whereas the released prisoners were what Petitioner characterizes as 'low level [Class C and D] felons," and reasoned that this "provides a rational basis for any disparate treatment." [DE 17 at 161. Hermansen also put forth no proof that similarly situated prisoners had been released. Hermansen's objection is overruled.

Hermansen objects to the Magistrate Judge's determination that Hermansen failed to exhaust available state court remedies. [DE 18 at 171]. He claims that he did not have to exhaust his administrative remedies per *Jones v. Bock*, 549 U.S. 199, 211-21 (2007). The Supreme Court held in *Jones* that: (1) an inmate's failure to exhaust under Prison Litigation Reform Act ("PLRA") is affirmative defense and thus an inmate need not specially plead or show exhaustion in his complaint; (2) that inmates' § 1983 actions were not automatically rendered noncompliant with the PLRA exhaustion requirement because not all defendants named in complaints had been named in previous administrative grievances; and (3) the inmate's compliance with the PLRA exhaustion requirement as to only some claims does not warrant dismissal of entire action. *Id.* at 211-21. Hermansen argues that under *Jones* he "need not plead or prove exhaustion of remedies." [DE 18 at 171]. Hermansen is incorrect. *Jones* held that an inmate's failure to exhaust under the PLRA is

affirmative defense and thus an inmate need not specially plead or show exhaustion *in his complaint.* Thus, even under Jones exhaustion is mandatory. This objection is overruled.

Hermansen also objects to the Magistrate Judge's finding that he had to exhaust administrative remedies, arguing that there is no requirement that state court remedies be exhausted before seeking relief under 28 U.S.C. 2241. [DE 18 at 174]. The Sixth Circuit has expressly held that the exhaustion doctrine applies to 2241 petitions. *Little v. Hopkins*, 638 F.2d 953, 954 (6th Cir. 1982). This objection is overruled.

Hermansen also objects to the Magistrate Judge's finding that he failed to exhaust his state court remedies because he claims administrative remedies are unavailable. [DE 18 at 174]. Hermansen raises this argument for the first time in his objections. Hermansen attaches two affidavits in support. [DE 18-1]. If it were in fact true that that Hermansen cannot exhaust his state court remedies, the Court could arguably consider Hermansen's unexhausted claims under the "exceptional" circumstances exception. *O'Guinn v. Dutton*, 88 F.3d 1409, 1412 (6th Cir. 1996). While the Court lacks sufficient information to make that determination, the Court need not decide that question as Hermansen's petition fails on the merits.

IV. CERTIFICATE OF APPEALABILITY[3]

A COA may issue only if the applicant has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). "Where a district court has rejected the constitutional claims on the merits . . . [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. When, however, "the district

[3] The Sixth Circuit has held "that the language of § 2253(c)(1)(A) requires certificates of appealability for all state-prisoner habeas appeals, whether seeking pretrial relief under § 2241 or post-conviction relief under § 2254." *Winburn v. Nagy*, 956 F.3d 909, 912 (6th Cir. 2020).

court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* In such a case, no appeal is warranted. *Id.*

Here, the Court and the Magistrate Judge denied Hermansen's claims on the merits and the Court finds that Hermansen has not "demonstrate[]d that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Hermansen's claims were denied in the alternative on a procedural ground, but Hermansen has not shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Thus, a COA is not warranted.

V. CONCLUSION

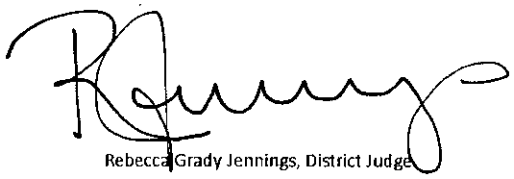
For the reasons set forth above, **IT IS ORDERED** as follows:

1. Petitioner's Objections [DE 18] are **OVERRULED**.

2. The Magistrate Judge's Findings of Fact, Conclusions of Law, and Recommendation [DE 17] is **ADOPTED**.

3. The remaining motions [DE 11; DE 12; DE 13] are **DENIED** as moot;

4. The Court will issue separate judgment.



Rebecca Grady Jennings, District Judge

United States District Court

March 10, 2021

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CIVIL ACTION NO. 3:20-CV-00515-RGJ-LLK

ERIC LLOYD HERMANSEN **PETITTIONER**

v.

ANNA VALENTINE, Warden **RESPONDENTS**
ANDY BESHEAR, Governor

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

This matter is before the Court on the pro-se Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, to which Respondents responded in opposition, and Petitioner replied. [DN 1, 9, 14]. Additionally, Petitioner filed motions for default judgment, for Rule 11 sanctions, and to strike Respondents' response. [DN 11, 12, 13]. The Court noted that "this matter should be addressed promptly" and referred it to the undersigned Magistrate Judge "pursuant to 28 U.S.C. § 636(b)(1)(A) & (B) for rulings on all non-dispositive motions; for appropriate hearings, if necessary; and for findings of fact, conclusions of law, and recommendations on any dispositive matter." [DN 5].

Because Petitioner's claims are without merit and he failed to exhaust an available state court remedy, the RECOMMENDATION will be that the Court DENY Petitioner's petition, [DN 1], and DENY Petitioner's remaining motions, [DN 11, 12, 13], as moot.

Background facts

In July 1997, Petitioner was convicted of murder and sentenced to life imprisonment. *Hermansen v. Com.*, No. 2012-SC-000297-MR, 2013 WL 2296309, at *1 (Ky. May 23, 2013). He is presently in custody at the Kentucky State Reformatory ("KSR"), which is in Oldham County, in the Western District of Kentucky.

Petitioner states that has been "diagnosed with Hepatitis C and treated with interferon with ribovarim [ribavirin] after confirmation of Stage 4 HCV [hepatitis C virus]." [DN 1 at 7]. The only medical

evidence in this case (besides Petitioner's raw allegations) is a September 2003 liver needle biopsy, which revealed:

> Chronic hepatitis C with moderate portal inflammation with focal necrosis (grade 3 inflammation) with prominent periportal and septal fibrosis with architectural distortion and focal early changes of micronodular cirrhosis (grade 3-4 fibrosis); moderate microvesicular fatty change; no increased stainable iron demonstrated.

[DN 1-6].

On July 13, 2020 (shortly before the present petition was filed on July 20, 2020), Warden Valentine "informed the KSR prisoner population that 47 prisoners and 5 staff have been infected with COVID-19 and there had been 1 prisoner death." [DN 1 at 6].

Petitioner has tested negative for COVID-19. [DN 14 at 3, 8]. However, according to Petitioner, KSR is an "incubator and amplifier" of COVID-19, and "there is a real imminent threat" that COVID-19 will be introduced into dorm where he resides. *Id.* at 4, 6.

Petitioner, who was born in January 1962, [DN 1-6], describes himself as "aging," "medically compromised," and at "high risk" of contracting and dying from COVID-19. [DN 1 at 4, 6]. He seeks "immediate release" as the remedy to the "unconstitutional conditions" that cause him to live in "fear" and pose a threat to his "wellbeing." *Id.* at 4, 8, 10-11.

Petitioner's Claims

While it appeared Petitioner initially brought an Eighth Amendment claim, his reply clarifies he claims a Due Process violation.

In their response, Respondents construed Petitioner's claim as a claim pursuant to the Eighth Amendment, which prohibits deliberate indifference to serious medical needs. [DN 9]. The Eastern District of Kentucky recently considered a similar claim, which the court articulated as follows: "[I]n light of [the petitioner's] individual vulnerabilities and exceptional risks posed to [him] by the current COVID-19 pandemic and an emerging COVID-19 outbreak at [KSR], [Petitioner's] continued incarceration at [KSR] (where [he is] unable to practice isolation and social distancing) constitutes deliberate indifference to a

substantial risk of serious harm" in violation of the Eighth Amendment prohibition against cruel and unusual punishment. *Blackburn v. Noble*, No. 3:20-CV-00046-GFVT, 2020 WL 4758358, at *1 (E.D. Ky. Aug. 17, 2020). Although Respondents' response pre-dated the *Blackburn* decision, Petitioner alleges that Respondents rely on an affidavit similar to the one relied on by the respondents in *Blackburn*. [DN 14 at 1-3].

In his reply, Petitioner repeatedly insists that he is **not** raising a deliberate indifference claim (similar to the one considered and rejected in *Blackburn*), and, in fact, is not making **any** type of Eighth Amendment claim. [DN 14 at 1, 2, 6].

Petitioner's petition contains a single sentence referencing a particular constitutional provision: "[N]o where under the U.S. Constitution or the 14th Amendment are Respondents authorized to subject [Petitioner] to a death sentence without due process of law -- and -- there is no process due that can legally be employed by Respondents to forcibly subject him to contracting COVID-19." [DN 1 at 10]. In his reply, Petitioner clarifies that his claim is that the Due Process Clause of the Fifth Amendment as incorporated against the states by the Fourteenth Amendment makes it "illegal for Respondents and the Commonwealth of Kentucky to require further execution of his sentence by forcibly subjecting him to become infected with COVID-19 and potential death due to his liver disease." [DN 14 at 1]. Additionally, Petitioner claims that Due Process requires his immediate release "equally as those currently having been released under the Respondents' and Governor Beshear's concession of the same by ordering the release of other prisoners." [DN 14 at 12-13].

In summary, this report construes Petitioner's claims as being that Petitioner is entitled to immediate release pursuant to 28 U.S.C. § 2241[1] because Due Process is offended by the facts that: 1)

[1] More typically, habeas corpus petitions are brought pursuant to 28 U.S.C. § 2254 and challenge the state court's prior adjudication of the merits of constitutional claims affecting the legitimacy of conviction. Petitioner does not allege that his murder conviction was unconstitutional. Nevertheless, the Supreme Court has explained that constitutional challenges to the fact or duration of confinement (resulting in a demand for immediately release) are the proper subjects of habeas corpus. *Blackburn v. Noble*, No. 3:20-CV-00046-GFVT, 2020 WL 4758358, at *3 (E.D.

there is a substantial chance Petitioner might contract COVID-19 as a result of being incarcerated and that he might die as a result; and 2) other prisoners have been released due to COVID-19 concerns.

Petitioner's claims are without merit.

Petitioner cites and the Court finds no authority for Petitioner's claim that Due Process is offended by the fact that there is a substantial chance he might contract COVID-19 as a result of being incarcerated and that he might die as a result; or the fact that other prisoners have been released due to COVID-19 concerns. The claim is so broad that, if accepted, it would create precedent for release of vast numbers of similarly situated prisoners. Petitioner provides no medical evidence to support his claim that there is a substantial chance he might contract COVID-19 as a result of being incarcerated or that he might die as a result. The fact that Petitioner was convicted of murder (a Class A felony), whereas the released prisoners were what Petitioner characterizes as "low level [Class C and D] felons" [DN 1 at 3], provides a rational basis for any disparate treatment. Therefore, Petitioner's claims are without merit.[2]

Petitioner's claims are subject to dismissal for failure to exhaust available state court remedies.

Even if Petitioner's claims had merit, except in unusual circumstances, this Court would be unable to grant habeas relief because Petitioner has neither alleged nor shown that he exhausted all available state court remedies. *Blackburn v. Noble*, No. 3:20-CV-00046-GFVT, 2020 WL 4758358, at *4 (E.D. Ky. Aug. 17, 2020) (citing 28 U.S.C. § 2254(b)(1)). The Sixth Circuit has expressly held that the exhaustion

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Ky. Aug. 17, 2020) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973)). Because Petitioner's position is that no set of conditions would be constitutionally sufficient except for release, his claims challenge the fact of the confinement. *Id.* (citing *Wilson v. Williams*, 961 F.3d 829, 838 (6th Cir. 2020)).

[2] Petitioner's Due Process claim might have some colorable merit if he were a pretrial detainee as opposed to a prisoner incarcerated following conviction. The government's obligation to provide humane conditions of confinement for convicted persons arises out of the Eighth Amendment, and the obligation for pretrial detainees arises out of the Due Process Clause. *Cameron v. Bouchard*, No. 20-1469, 2020 WL 3867393, at *4 (6th Cir. July 9, 2020). Due Process arguably incorporates the objective but not the subjective component of the deliberate indifference framework. *Id.* at *5. Even for pretrial detainees, however, the objective component requires proof of "something akin to reckless disregard." *Id.*

doctrine applies to § 2241 petitions. *Id.* (citing *Little v. Hopkins*, 638 F.2d 953, 954 (6th Cir. 1981)). The Supreme Court has provided that the exhaustion requirement may only be waived "in rare cases where exceptional circumstances of peculiar urgency are shown to exist." *Id.* (quoting *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982)).

Kentucky Revised Statutes (KRS) § 202A.141, state habeas corpus, provides an appropriate state court remedy for Kentucky prisoners alleging they are being held in custody in violation of the Constitution. *Id.* Therefore, Petitioner failed to exhaust an available state court remedy.

If Petitioner's claim had been premised on the Eighth Amendment, this Court arguably could have considered the circumstances to be sufficiently unusual to reach the merits notwithstanding Petitioner's failure to exhaust. "As other Courts have observed, the current pandemic is an unusual or exceptional circumstance that could allow a federal court to consider the [Eighth Amendment] matter at hand." *Id.* (citing *Cameron v. Bouchard*, No. CV 20-10949, 2020 WL 2569868, at *15 (E.D. Mich. May 21, 2020), vacated on other grounds, 2020 WL 3867393 (6th Cir. July 9, 2020); *but see Dye v. Rewerts*, No. 1:20-CV-746, 2020 WL 4877553 (W.D. Mich. Aug. 20, 2020) (dismissing Petitioner's Section 2241 / COVID-19 / Eighth Amendment claim due to failure to exhaust available Michigan state court remedies).

In any event, Petitioner's insistence (in his reply, DN 14) that his claims are **not** premised on the Eighth amendment removes any Eighth Amendment urgency that might have warranted this Court's excusing the exhaustion requirement. Accordingly, the petition is subject to dismissal for failure to exhaust an available state court remedy.

RECOMMENDATION

Therefore, because Petitioner's claims are without merit and he failed to exhaust an available state court remedy, the Magistrate Judge RECOMMENDS that the Court DENY Petitioner's petition, [DN 1], and DENY Petitioner's remaining motions, [DN 11, 12, 13], as moot.

August 31, 2020

Lanny King, Magistrate Judge
United States District Court

NOTICE

Under the provisions of 28 U.S.C. §§ 636(b)(1)(B) and (C) and Fed. R. Civ. P. 72(b), the Magistrate Judge files these findings and recommendations with the Court and a copy shall forthwith be electronically transmitted or mailed to all parties. Within fourteen (14) days after being served with a copy, any party may serve and file written objections to such findings and recommendations as provided by the Court. If a party has objections, such objections must be timely filed or further appeal is waived. *Thomas v. Arn*, 728 F.2d 813 (6th Cir. 1984).

August 31, 2020

Lanny King, Magistrate Judge
United States District Court