22-5853

NO. 21-2958

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN J. TRAPP - PETITIONER,
vs.

ERICA HUSS, ET AL - RESPONDENT.

On Petition for Writ of Certiorari to the
U.S. Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

BY: Steven J. Trapp* #770672
Petitioner in propria persona
Marquette Branch Prison
1960 U.S. Highway 41 South
Marquette, Michigan 49855

* NOTICE: This document was prepared with the assistance of a non-attorney prisoner assigned to the Legal Writer Program with the Michigan Department of Corrections.

QUESTION PRESENTED FOR REVIEW

I. Should this court grant this writ of certiorari where the sixth circuit court err in not overturning the district court's dismissal of petitioner's complaint, for failure to state a claim, when the facts stated within the complaint and grievances were enough for the complaint to continue?

II. Should this court grant this writ of certiorari where only after Petitioner was allowed to catch COVID-19 does Respondents decide to enforce a mandatory Departmental Office Memorandum, which went into effect on April 8, 2020, and does the constitutional violation no longer exist because Respondents decided to enforce the DOM after the violation?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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The August 24, 2021, order of the Michigan U.S. District Court denying Petitioner's *42 U.S.C. § 1983*, for failure to state a claim. (*Appendix, Michigan U.S. District Court's Dismissal for Failure to State a Claim, Dated August 24, 2021*). The May 5, 2022, U.S. Sixth Circuit Court of Appeals denial of Petitioner's appeal. (*Appendix B, U.S. Sixth Circuit Court of Appeals' Denial, Dated May 5, 2022*). Lastly, the July 14, 2022, U.S. Sixth Circuit Court of Appeals' Denial of a Request for Rehearing En Banc. (*Appendix C, U.S. Sixth Circuit Court of Appeals' Denial of a Request for Rehearing En Banc, Dated July 14, 2022*).

STATEMENT OF JURISDICTION

Petitioner seeks review of the July 14, 2022, opinion of the U.S. Sixth Circuit Court of Appeals' Denial of a Request for Rehearing En Banc. This Court has jurisdiction pursuant to *28 U.S.C. § 1254(1).*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. CONSTITUTIONAL PROVISIONS:

U.S. CONST. AMEND. VIII: EXCESSIVE BAIL, FINES, PUNISHMENTS.
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

TITLE 42, SECTION 1983, UNITED STATES CODE:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in much officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

I. STATEMENT OF THE CASE AND RELEVANT FACTS

Steven J. Trapp, (known hereafter as "Petitioner") *in propria persona*, states the following in support of his application.

The Petitioner is presently incarcerated within the Michigan Department of Corrections and is being housed at the Marquette Branch Prison, located at 1960 U.S. Highway 41 South, Marquette Michigan 49855.

On August 10, 2021, Petitioner filed suit against Respondent [known hereafter as "Respondent"] Erica Huss and Unknown Party #1, Health Care Unit Manager pursuant to *42 U.S.C. § 1983,* for violating Petitioner's *U.S. Constitutional Eighth Amendment* rights, by failing to take necessary steps to protect him from the COVID-19 deadly contagious disease.

On August 24, 2021, the Court dismissed the action with prejudice for failure to state a claim. Though, the court did determine that "Although the Court concludes that Petitioner's claims are properly dismissed, the Court does not conclude that any issue Petitioner might raise on appeal would be frivolous."

On November 19, 2021, Magistrate Judge, Maarten Vermaat, granted *in forma pauperis*, but ordered Petitioner to pay an initial partial filing fee dealing with his notice of appeal. Which Petitioner paid.

II. RELEVANT FACTS

On October 5, 2020, the entire Marquette Branch Prison (MBP) was placed on lockdown because, in the middle to end of September, prisoners from another prison were brought to MBP who were infected with COVID-19. (*Appendix D,*

Declaration of Steven Trapp, ¶ 6).

In August 27, 2020, Director's Office Memorandum (DOM) 2020-30R6, which has been superseded many of times since it first came out, directed the Respondent of the necessary procedures that were to be followed to protect staff and prisoners from COVID-19. This included isolation of all prisoners that tested positive for COVID-19 and those that were within close proximity, 6 feet to an infected person for more than 15 minutes.

It should be noted that though the Respondents were aware of the DOM, for it was e-mailed directly to their offices from the Director's Office in Lansing, Petitioner was not. This was because MBP was hit the hardest with COVID-19 during the months of October and November of 2020. NO access was given to the law library, and it took weeks before any type of legal material was starting to be passed out, but to get any legal materials a prisoner had to know the <u>exact</u> name of the legal authority and the complete citation or he would be denied anything. Petitioner did not know the DOM even existed at the time he wrote to Respondents or filed his grievances. The law library shut its doors on October 5, 2020 and did not re-open until December 21, 2020, thus Petitioner had no way of knowing the DOM existed. (*Appendix D, ¶¶ 10, 12-17*).

On October 26, 2020, Petitioner wrote to Respondents about being left in an open cell environment with COVID-19 positive prisoners, which these prisoners were left in their cell and never isolated. Because of Respondent's failure to protect Petitioner from a deadly contagious disease, as Policy Directives state must be done,

he then caught COVID-19, and instead of being isolated and treated for it, he was left in his open bar cell in pain and to suffer from the effects of COVID-19. (*Appendix D, ¶¶ 2, 8, 11*).

Petitioner filed the necessary grievances, with what little knowledge he retains about doing such things, and then filed his civil litigation on the Respondents' for violating his *Eighth Amendment* rights. Petitioner is not learned in either administrative or civil law, which can be seen by his complaint and grievances, though he did have a little help with the later from another prisoner who gave him information that should be included within the body of the grievance. (*Appendix D, ¶¶ 13, 18*).

III. SUMMARY OF ARGUMENT

Petitioner raises two arguments for this Court to consider: the district court erred in dismissing Petitioner's complaint for failure to state a claim when the facts stated within the complaint and grievances were enough for the complaint to continue forward and the Respondents to be served for violating his *United States Constitutional Eighth Amendment* rights.

Any additional facts are retained *infra*.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THIS WRIT OF CERTIORARI WHERE THE SIXTH CIRCUIT COURT ERRED IN NOT OVERTURNING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S COMPLAINT, FOR FAILURE TO STATE A CLAIM, WHEN THE FACTS STATED WITHIN THE COMPLAINT AND GRIEVANCES WERE ENOUGH FOR THE COMPLAINT TO CONTINUE.

A. ARGUMENT:

To avoid dismissal for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

A complaint may be dismissed for failure to state a claim if it fails "'to give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). While a complaint need not contain detailed factual allegations, a plaintiff's allegations must include more than labels and conclusions. *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678. The court must determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Although the plausibility standard is not equivalent to a "'probability requirement,' ... it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "[W]here

the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (quoting *Fed. R. Civ. P. 8(a)(2)*); see also *Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010) (holding that the *Twombly/Iqbal* plausibility standard applies to dismissals of prisoner cases on initial review under *28 U.S.C. §§ 1915A(b)(1)* and *1915(e)(2)(B)(i).*

Plaintiff alleges that Respondents have violated his rights under the *United States Constitution's Eighth Amendment* against cruel and unusual punishment and knowingly failed to protect him from a deadly contagious disease.

B. CONSTITUTIONAL RIGHT:

The *Eighth Amendment* imposes a constitutional limitation on the power of the states to punish those convicted of crimes. Punishment may not be "barbarous" nor may it contravene society's "evolving standards of decency." *Rhodes v. Chapman*, 452 U.S. 337, 345-46, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981). The Amendment, therefore, prohibits conduct by prison officials that involves the "unnecessary and wanton infliction of pain." *Ivey v. Wilson*,832 F.2d 950, 954 (6th Cir. 1987) (per curiam) (quoting *Rhodes*, 452 U.S. at 346). The deprivation alleged must result in the denial of the "minimal civilized measure of life's necessities." *Rhodes*, 452 U.S. at 347; *see also Wilson v. Yaklich*, 148 F.3d 596, 600-01 (6th Cir. 1998). The Eighth Amendment is only concerned with "deprivations of essential food, medical care, or sanitation" or "other conditions intolerable for prison confinement." *Rhodes*, 452 U.S. at 348 (citation omitted). Moreover, "[n]ot every

unpleasant experience a prisoner might endure while incarcerated constitutes cruel and unusual punishment within the meaning of the Eighth Amendment." *Ivey*, 832 F.2d at 954.

In order for a prisoner to prevail on an *Eighth Amendment* claim, he must show that he faced a sufficiently serious risk to his health or safety and that the defendant official acted with "'deliberate indifference' to [his] health or safety." *Mingus v. Butler*, 591 F.3d 474, 479-80 (6th Cir. 2010) (citing *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (applying deliberate indifference standard to medical claims)).

In *Helling v. McKinney*, 509 U.S. 25, 33-34, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993), the Court held:

> We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year. In *Hutto* v. *Finney*, 437 U.S. 678, 682, 57 L. Ed. 2d 522, 98 S. Ct. 2565 (1978), we noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease. This was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed. . .. Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.
>
> The Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is "reasonable safety." *DeShaney*, *supra*, at 200. It is "cruel and unusual punishment to hold convicted criminals in unsafe conditions." *Youngberg* v. *Romeo*, 457 U.S. 307, 315-316, 73 L. Ed.

> 2d 28, 102 S. Ct. 2452 (1982). It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event. Two of them were cited with approval in *Rhodes* v. *Chapman*, 452 U.S. 337, 352, n. 17, 69 L. Ed. 2d 59, 101 S. Ct. 2392 (1981). *Gates* v. *Collier*, 501 F.2d 1291 (5th Cir. 1974), held that inmates were entitled to relief under the Eighth Amendment when they proved threats to personal safety from exposed electrical wiring, deficient firefighting measures, and the mingling of inmates with serious contagious diseases with other prison inmates.

Further, in *Hill v. Whitmer*, 471 F. Supp. 3d 803, 805-06 (W.D. Mich. July 9, 2020) (citing *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020)) the Court agreed with a prior Sixth Circuit's ruling dealing with exposure to COVID-19. The *Wilson v. Williams*, case seems to be the standard for rejecting such claims:

> [T]he Sixth Circuit addressed the issue of whether the Bureau of Prisons (BOP) violated the Eighth Amendment rights of medically vulnerable inmates at the Elkton Federal Correctional Institution by failing to adequately protect them from COVID-19 infection. In the opinion, the Sixth Circuit found that the plaintiffs ... had easily satisfied the objective component of an Eighth Amendment claim:
>
> > In assessing the objective prong, we ask whether petitioners have provided evidence that they are "incarcerated under conditions posing a substantial risk of serious harm." The COVID-19 virus creates a substantial risk of serious harm leading to pneumonia, respiratory failure, or death. The BOP acknowledges that "[t]he health risks posed by COIVD-19 are significant." The infection and fatality rates at Elkton have borne out the serious risk of COVID-19, despite the BOP's efforts. The transmissibility of the COVID-19 virus in conjunction with Elkton's dormitory-style housing—which places inmates within feet of each other—and the medically-vulnerable subclass's health risks, presents a substantial risk that petitioners at Elkton will be infected with COVID-19 and have serious health effects as a result, including, and

> up to, death. Petitioners have put forth sufficient evidence that they are "incarcerated under conditions posing a substantial risk of serious harm."

The Sixth Circuit went on to address the subjective prong of an Eighth Amendment claim, noting that the pertinent question was whether the BOP's actions demonstrated deliberate indifference to the serious risk of harm posed by COVID-19 in the prison.

There is no question that the BOP was aware of and understood the potential risk of serious harm to inmates at Elkton through exposure to the COVID-19 virus. As of April 22, fifty-nine inmates and forty-six staff members tested positive for COVID-19, and six inmates had died. "We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious." The BOP acknowledged the risk from COVID-19 and implemented a six-phase plan to mitigate the risk of COVID-19 spreading at Elkton.

The key inquiry is whether the BOP "responded reasonably to th[is] risk." The BOP contends that it has acted "assiduously to protect inmates from the risks of COVID-19, to the extent possible." These actions include implement[ing] measures to screen inmates for the virus; isolat[ing] and quarantin[ing] inmates who may have contracted the virus; limit[ing] inmates' movement from their residential areas and otherwise limit[ing] group gatherings; conduct[ing] testing in accordance with CDC guidance; limit[ing]staff and visitors and subject[ing] them to enhanced screening; clean[ing]common areas and giv[ing] inmates disinfectant to clean their cells; provid[ing] inmates continuous access to sinks, water, and soap; educat[ing]staff and inmates about ways to avoid contracting and transmitting the virus; and provid[ing] masks to inmates and various other personal protective equipment to staff. The BOP argues that these actions show it has responded reasonably to the risk posed by COVID-19 and that the conditions at Elkton cannot be found to violate the Eighth Amendment. We agree.

Here, while the harm imposed by COVID-19 on inmates at Elkton "ultimately [is] not averted," the BOP has "responded reasonably to the risk" and therefore has not been deliberately indifferent to the inmates' Eighth Amendment rights. The BOP implemented a six-phase action plan to reduce the risk of COVID-19 spread at Elkton. Before the district court granted the preliminary

> injunction at issue, the BOP took preventative measures, including screening for symptoms, educating staff and inmates about COVID-19, cancelling visitation, quarantining new inmates, implementing regular cleaning, providing disinfectant supplies, and providing masks. The BOP initially struggled to scale up its testing capacity just before the district court issued the preliminary injunction, but even there the BOP represented that it was on the cusp of expanding testing. The BOP's efforts to expand testing demonstrate the opposite of a disregard of a serious health risk. (*internal citations omitted*).

The *Eighth Amendment*'s deliberate indifference framework includes both an objective and subjective prong. *Farmer*, 511 U.S. at 834. To satisfy the objective prong, an inmate must show "that he is incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834. Under the subjective prong, an official must "know[] of and disregard[] an excessive risk to inmate health or safety." *Id.* at 837. "[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842. "It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Id.* at 836. "[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* at 844. They failed to responded reasonably in Petitioner's case.

1. OBJECTIVE PRONG:

There is no question that Respondent was aware of and understood the potential risk of serious harm to Petitioner and other inmates at MBP through exposure to the COVID-19 virus.

Petitioner is being held in an open cell environment. There are 3 levels in each Housing Unit, "Base", "First" and "Second" galleries. There is approximately 6 to 8 inches between one cell to the next on each gallery, with only cell bars in the front of the cell. There is a catwalk on First and Second galleries, that is approximately 4-foot-wide with a hand rail on it to prevent a person from falling off the galleries. Otherwise, it is open air in front of the cells for around 30 foot to the wall. If someone coughs, sneezes, or yells out of the cell bars at the front of his cell, any surrounding prisoners are exposed to those germs. Those prisoners that lock underneath Second, on First and Base, are exposed to everyone's germs that are above them and to the sides of them. Because MBP houses mentally ill prisoners [around 80%], the vast majority of prisoners stand at their cell bars yelling to each other, for they are confined in their cells for around 22 hours a day, with nothing else to do but yell to one another to pass time, for MBP is a punishment only facility, in the Level 5 facility section. (*Appendix D, ¶ 2*).

Therefore, "he is incarcerated under conditions posing a substantial risk of serious harm" *Farmer*, 511 U.S. at 834, due to exposure to other prisoners' germs containing COVID-19.

2. SUBJECTIVE PRONG:

Petitioner does not dispute that the MDOC created a procedure to try and prevent the spread of COVID-19, but, that Respondents refused to abide/enforce the procedures which lead to Petitioner and other prisoners at MBP becoming infected with COVID-19. (*Appendix D, ¶¶ 9, 19*).

Heidi Washington, the Director of the Michigan Department of Corrections, came out with a Director's Office Memorandum (DOM) 2020-30R6, in August 27, 2020, which has been superseded many of times since the MBP outbreak in 2020. It directed the Respondents of the necessary procedures that are to be followed to protect staff and prisoners from COVID-19. (*See Appendix E, DOM 2020-30R6*).

As part of the DOM, it states:

> The MDOC is taking many steps to protect staff and prisoners from the spread of COVID-19, including developing isolation areas to place and treat prisoners who have tested positive for COVID-19 or who are under investigation for having COVID-19, as well as those who have had close contact with a known-positive COVID-19 individual. This DOM outlines the precautions staff shall take to help prevent COVID-19 from spreading. (*Appendix E, pg. 1, ¶ 1*).

Further, all prisoners and staff alike were to be screened before being allowed to enter MBP. (*Appendix E, pg. 2*).

Prisoners that tested positive shall be placed into isolation areas, (*Appendix E, pg. 2*), along with any prisoners under investigation for COVID-19, because of close contact. (*Appendix E, pg. 3*).

Any prisoner shall have his property withheld because of the virus may be lying dormant. (*Appendix E, pg. 3-4*).

Further, a system was already in effect, and had been since May 1, 2015, on how to handle and control communicable diseases. See *Policy Directive (PD) 03.04.110 "Control of Communicable Diseases"*. (*Appendix F, Policy Directive 03.04.110 Control of Communicable Diseases*).

Under *PD 03.04.110 ¶ H* states:

> Control measures which should be considered include isolation of prisoner cases, immunization programs, elimination of nonemergency prisoner transfers, reassignment of pregnant or other "at risk" staff, partner notification and follow up, and notification of staff, visitors and prisoners. . ..

Being that "[i]t is an elemental principal of administrative law that agencies are bound to follow their own regulations," *Wilson v. Comm'r of Social Security*, 378 F3d 541, 545 (6th Cir. 2004), and per *PD 01.04.110 "Administrative Rules, Policies and Procedures" ¶ U*, which states:

> The Manager of the Policy Section shall ensure that all new or revised Department administrative rules, policy directives, DOMs, variances, and operating procedures issued by the Director are promptly entered onto DAS. The Manager of the Policy Section also shall ensure that notice of each new or revised rule, policy directive, DOM, or operating procedure issued by the Director is sent to Department employees with Department e-mail. All Department employees are responsible for reviewing updated administrative rules, policy directives, operating procedures, and DOMs. Wardens and other administrators shall confirm that their employees have reviewed all new and revised administrative rules, policy directives, variances, DOMs, and operating procedures by having them complete the read and sign in Attachment A. Notice shall also be sent to appropriate collective bargaining units, and, for non-exempt policy directives and operating procedures, to courts and other governmental agencies requesting notification.

(*See Appendix G, Policy Directive 01.04.110 "Administrative Rules, Policies and Procedures"*).

Therefore, the Respondents cannot say they were unaware of the DOM or PD mandating what was required of them in how to deal with COVID-19, they just chose not to do it.

In the middle of September 2020, an incident took place at Kinross

Correctional Facility (KCF), located in Kincheloe Michigan. Around 103 prisoners were transferred to MBP from KCF, and housed within C-unit. At least 2 prisoners were known to have COVID-19. (*Appendix D, ¶ 3*).

These prisoners were given all their property and were taken into another Unit, D-Unit, to take their showers around other prisoners that they should not have been in contact with or allowed to breath out the virus into the air for the non-infected prisoner to breath in and become exposed. These prisoners were also given general population yard, where they would intermix with the correction officers that worked the yard area, whom in turn, worked with the rest of the prisoners at MBP. The prisoners that were exposed in D-Unit, were moved to either G or B Units when released from D-Unit, which in turn, spread the virus to both of those units. These action were in direct violation of *DOM 2020-30R6*, where no property was supposed to have been given to the prisoners, they were supposed to have been isolated, and though they were to be allowed yard, it should not have been with staff members that would in turn intermix with the rest of the general population at MBP. (*Appendix D, ¶ 4*).

At the end of September of 2020, two prisoners in G-Unit had COVID-19. One locked in the area of Second gallery cell 1, and the other locked in the area of First gallery cell 34. These prisoners were left in their cells for almost 2 days, even after it was known they had COVID-19. When they were taken out and isolated, all the prisoners that locked around them were never isolated, which every prisoner around them was exposed to the virus and ended up being the first large groups of

prisoners that tested positive for COVID-19 and spread the virus to the rest of the prison population. (*Appendix D, ¶ 5*).

Prisoners are fed within their cells on plastic trays that are passed out by other prisoners that are assigned as Kitchen Porters. These same kitchen porters were allowed to continue to pass out prisoners' meal trays up until MBP was finally locked down because of the wide spread outbreak of COVID-19. This took place around October 5, 2020. Yet, even after this time frame, grounds workers and unit porters were still allowed to come out and work, which spread the virus around to other prisoners. (*Appendix D, ¶ 7*).

On October 8, 2020, because of Respondents' refusing to enforce and follow the DOM and PD, and immediately isolate any positive COVID-19 prisoners and isolate anyone that had close contact with them, Petitioner tested positive for COVID-19 and was subject to painful headaches; body aches; muscle pain and cramps; breathing problems, shortness of breath which exists to this date; elevated heart rate; no taste or smell, which has not fully come back; the loss of weight, because of loss of appetite; and high fevers. The pain and suffering, which did not become permanent, lasted for around 2 to 3 weeks. (*Appendix D, ¶¶ 8, 11, 18*).

Petitioner has stated a *U.S. Constitutional Eighth Amendment* violation of deliberate indifference by the Respondents which allowed Petitioner to be subjected to cruel and unusual punishment where he was allowed, by the Respondent's intentional inactions to fallow the procedures and policies, to be subjected to the exposure of COVID-19. "[I]t is enough that the official acted or failed to act despite

his knowledge of a substantial risk of serious harm." *Farmer*, 511 U.S. at 842.

II. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI WHERE ONLY AFTER PETITIONER WAS ALLOWED TO CATCH COVID-19 DOES RESPONDENTS DECIDE TO ENFORCE A MANDATORY DEPARTMENTAL OFFICE MEMORANDUM, WHICH WENT INTO EFFECT ON APRIL 8, 2020, DOESN'T NULLIFY THE CONSTITUTIONAL VIOLATION BECAUSE RESPONDENTS DECIDED TO ENFORCE THE DOM AFTER THE VIOLATION.

A. ARGUMENT:

In *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993), the Court held:

> We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year. In *Hutto* v. *Finney*, 437 U.S. 678, 682, 57 L. Ed. 2d 522, 98 S. Ct. 2565 (1978), we noted that inmates in punitive isolation were crowded into cells and that some of them had infectious maladies such as hepatitis and venereal disease. This was one of the prison conditions for which the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed. . .. Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.

On April 8, 2020 a DOM dealing with COVID-19 come out making it mandatory for the Respondents to enforce criteria within it to ensure the protection of prisoners and staff alike at all prisons in Michigan. The DOMs are sent directly to the warden, Respondent Huss, to enforce them and ensure that her staff abide by the DOM. *PD 01.04.110 "Administrative Rules, Policies and Procedures" ¶ U*, states:

> The Manager of the Policy Section shall ensure that all new or revised Department administrative rules, policy directives,

> DOMs, variances, and operating procedures issued by the Director are promptly entered onto DAS. The Manager of the Policy Section also shall ensure that notice of each new or revised rule, policy directive, DOM, or operating procedure issued by the Director is sent to Department employees with Department e-mail. All Department employees are responsible for reviewing updated administrative rules, policy directives, operating procedures, and DOMs. Wardens and other administrators shall confirm that their employees have reviewed all new and revised administrative rules, policy directives, variances, DOMs, and operating procedures by having them complete the read and sign in Attachment A. Notice shall also be sent to appropriate collective bargaining units, and, for non-exempt policy directives and operating procedures, to courts and other governmental agencies requesting notification. (*Appendix G*)

In *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020), the U.S. Sixth Circuit found that after prisoners were subject to COVID-19 and then the BOP came out with preventive measures to protect prisoners and staff alike, defendants were not deliberately indifferent to the plaintiff's wellbeing and no constitutional violation transpired.

If the defendants would have been told, in advance, to enforce the necessary measures to protect the prisoners and refused to do so, would the U.S. Sixth Circuit Court still have ruled in the defendants' favor, or found an Eighth Amendment violation in the petitioner's favor? That is the question Petitioner is presenting to this Court.

In *Hewitt v. Helms*, 459 U.S. 460, 471-472, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983), dealing with a correctional facility when "[i]t has used language of an unmistakable mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed."

In Petitioner's case, the preventive measures were already in place, the warden was personally given notice of what she "MUST" *Id.* at 471-472, do months in advance, yet, Respondent Huss refused to implement the mandatory procedures until after Respondent Huss allowed the virus to spread throughout the prison system. Only then did Respondent Huss start to pass out face masks, additional cleaning supplies, soaps, etc. She was well aware of the virus being at the facility in September 14, 2020, from when the infected prisoners were transferred in from another facility. If Respondent Huss would have been enforcing the DOM from the time she was told to do so, in April of 2020, then the prisoners that were transferred to Marquette Branch Prison would have been isolated from any other prisoners and staff, and Petitioner would not have been forced to live inches away from a known infected prisoner who was allowed to infect Petitioner with the virus.

> The Amendment, as we have said, requires that inmates be furnished with the basic human needs, one of which is "reasonable safety." *DeShaney, supra*, at 200. It is "cruel and unusual punishment to hold convicted criminals in unsafe conditions." *Youngberg* v. *Romeo*, 457 U.S. 307, 315-316, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982). It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event. Two of them were cited with approval in *Rhodes* v. *Chapman*, 452 U.S. 337, 352, n. 17, 69 L. Ed. 2d 59, 101 S. Ct. 2392 (1981). *Gates* v. *Collier*, 501 F.2d 1291 (5th Cir. 1974), held that inmates were entitled to relief under the Eighth Amendment when they proved threats to personal safety from exposed electrical wiring, deficient firefighting measures, and the mingling of inmates with serious contagious diseases with other prison inmates.

Helling, 509 U.S. at 34.

The fact is, when Respondents started enforcing the mandatory language of the DOM, after the Respondents allowed the virus to spread and infect prisoners and staff alike, it did not cure the constitutional violation that Respondents allowed to transpire. Thus, enforcing the safety precaution after the fact does not cure intentionally allowing "inmates with serious contagious diseases with other prison inmates." *Id.* Thus, as indicated within the body of the above claim, Petitioner did state an Eighth Amendment claim.

Reading the grievance and the complaint in the light most favorable to Petitioner, he did state a claim which relief could have been granted upon. Though an untrained prisoner used the word "negligent" in his grievance, the arguments show that the issue and violation were of a constitutional nature, and should have been viewed as such. For if law was so easy that anyone understood the twists and turns of it, then there would be no use for law schools or attorneys. A person would be able to just walk into the courtroom and argue common sense and it would be enough. But, that is not the judiciary system. Attorneys train for years to get a basic grasp of the law and how to properly argue something. This is why a *pro se* plaintiff is held to a lessor standard than an attorney. *Haines v. Kerner*, 404 U.S. 519, 520-521, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972).

As for the "respondent-superior theory," Respondent Huss is the person that must be held accountable for her actions when Respondent Huss was directly told how to handle COVID-19 in mandatory language, *Hewitt*, 459 U.S. at 471-472, and then chose to not do it. She is the direct Respondent in this matter, and not under a

"respondent-superior theory."

CONCLUSION

Petitioner, Steven J. Trapp, respectfully requests that this Court grant this petition for a writ of certiorari and any other relief that it deems is just and proper in this case.

Respectfully submitted,

Executed on: 8-31-22

Steven J. Trapp #770672
In propria persona
Marquette Branch Prison
1960 U.S. Highway 41 South
Marquette, Michigan 49855

DECLARATION

I, Steven J. Trapp, Petitioner swears, with his signature below, that the forgoing is true and accurate pursuant to *28 U.S.C. § 1746.*

Executed on: 8-31-22

Steven J. Trapp
In propria persona