

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

IN THE MATTER OF JOLEEN K. §
YOUNGERS § MISC NO.: _____
§
§

VERIFIED PETITION TO PERPETUATE TESTIMONY

I. Introduction

This is an action under FED. R. CIV. P. 27 to perpetuate testimony about Kesley Vial, a 23-year-old Brazilian man who died on or about August 24, 2022 following a fatal suicide attempt on August 17, 2022 while in federal immigration custody in New Mexico. Petitioner Joleen K. Youngers (hereinafter “Petitioner”), as the Personal Representative of the Wrongful Death Estate of Kesley Vial, hereby respectfully petitions this Court for an Order authorizing depositions to perpetuate testimony of the individuals identified herein for use in an anticipated civil action pursuant to FED. R. CIV. P. 27(a)(1). As good cause for this Petition, through undersigned counsel she states as follows:

II. Jurisdiction and Venue

1. This Court has federal-question jurisdiction over this Petition pursuant to 28 U.S.C. § 1331 and FED. R. CIV. P. 27(a)(1), subject-matter jurisdiction over Petitioner’s anticipated claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), 42 U.S.C. § 1983, 42 U.S.C. § 12131 *et seq.*, and/or the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. § 794, and supplemental jurisdiction over anticipated state claims under 28 U.S.C. § 1367.

2. Venue is proper in this Court because the acts or omissions that form the basis for Petitioner’s anticipated litigation occurred within this District. Most of the anticipated adverse

parties and/or their relevant agents reside within this District. Accordingly, this Court is the proper venue.

III. Rule 27 Allegations

A. Petitioner Expects to Be a Party to Federal Litigation¹

3. Petitioner Joleen K. Youngers is the Personal Representative of the Wrongful Death Estate of Kesley Vial. *See In re Appointment of Personal Representative of Wrongful Death Estate of Kelsey Vial, deceased*, D-101-CV-2022-01722 (1st Judicial District Court). She currently resides in Santa Fe, New Mexico.

4. Mr. Vial, a native and citizen of Brazil, was pronounced deceased on or about August 24, 2022 at University of New Mexico Hospital (UNMH) in Albuquerque, New Mexico.

5. According to U.S. Immigration and Customs Enforcement (ICE), Mr. Vial was in federal immigration custody at the time of his death.²

6. According to ICE, Mr. Vial was taken into custody on or about April 22, 2022 after entering the United States between ports of entry.³

7. Mr. Vial remained in the custody of U.S. Customs and Border Protection (CBP) for approximately seven days until April 29, 2022, when he was transferred to ICE custody in El Paso, Texas.⁴

8. Mr. Vial was then transferred to the Torrance County Detention Facility (TCDF) in Estancia, New Mexico, where he remained detained in ICE custody.⁵

¹ FED. R. CIV. P. 27(a)(1)(A).

² U.S. Imm. & Customs Enf., “Brazilian man in ICE custody passes away in New Mexico hospital” (Aug. 26, 2022), <https://www.ice.gov/news/releases/brazilian-man-ice-custody-passes-away-new-mexico-hospital>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

9. Torrance County (County) has contracted with the federal government to detain people on behalf of both ICE and the U.S. Marshals Service. The County in turn has contracted with CoreCivic to hold these federal detainees in the TCDF, which CoreCivic operates.

10. On June 13, 2022, an Immigration Judge affirmed the determination of an Asylum Officer, such that Mr. Vial was issued an administratively final removal order.

11. ICE was responsible for executing Mr. Vial's removal order.

12. On August 17, 2022, Mr. Vial attempted suicide while detained in the TCDF in ICE custody.

13. Upon information and belief, Mr. Vial was transported to UNMH on August 17, 2022.

14. On or about August 24, 2022, Mr. Vial was pronounced deceased at UNMH.⁶

15. ICE issued a public statement on August 26, 2022, confirming that Mr. Vial's death was an in-custody death.⁷

16. The New Mexico Office of the Medical Investigator (OMI) performed an autopsy on the body of Mr. Vial on or about August 29, 2022.

17. Based on evidence gathered to date, Petitioner anticipates she may bring claims against the United States of America under the FTCA. At a minimum, her FTCA claims would sound in New Mexico state law of wrongful death and survival actions for negligence, intentional infliction of emotional distress, and/or negligent infliction of emotional distress. Petitioner also anticipates bringing claims against the United States of America under the Rehabilitation Act.

18. Based on evidence gathered to date, Petitioner anticipates she may bring claims against CoreCivic and/or Torrance County and employees and/or agents of CoreCivic and/or Torrance

⁶ *Id.*

⁷ *Id.*

County under 42 U.S.C. § 1983 for violations of the Fourteenth Amendment. Petitioner may also bring claims against CoreCivic and/or Torrance County for violations of the Americans with Disabilities Act (42 U.S.C. § 12131 *et seq.*) and/or the Rehabilitation Act (29 U.S.C. § 794). These claims include suit against individual employees and/or agents of these entities who were responsible for Mr. Vial's custody and medical care while in the TCDF.

19. Based on evidence gathered to date, Petitioner anticipates bringing claims against Torrance County under the New Mexico Civil Rights Act (NMSA 1978 § 41-4A-1 *et seq.*) for violations of N.M. Const. Art. II, Sec. 18.

20. Based on evidence gathered to date, Petitioner also anticipates bringing claims against CoreCivic for wrongful death and survival actions based on negligence.

B. Petitioner Cannot Presently Bring the Anticipated Litigation⁸

21. Several practical, legal, and prudential factors prevent Petitioner from bringing the anticipated litigation at this time.

22. Upon information and belief, UNMH's medical records department currently takes up to thirty calendar days to process and fulfill requests for medical records. Obtaining Mr. Vial's complete medical records and seeking independent expert consultation regarding their significance is an essential pre-filing step in a case of this nature.

23. Detention and medical records from ICE are essential to Petitioner's pre-suit investigation of this matter. These records may be obtained through the Freedom of Information Act (FOIA) once a detainee death review is completed and released. *See* 5 U.S.C. § 552(b)(7)(A). Congress has mandated the completion and release of such detainee death reviews within thirty days, which

⁸ FED. R. CIV. P. 27(a)(1)(A).

would be September 23, 2022.⁹ Even if ICE meets its Congressional deadline in this case, the FOIA affords agencies up to thirty additional business days to fulfill requests. Consequently, the soonest Petitioner expects to receive these records would be November 7, 2022.

24. Institutional and other records from the TCDF are likewise essential to Petitioner's pre-suit investigation of this matter. These records may be obtained through the Inspection of Public Records Act (IPRA) (NMSA 1978 § 14-2-1 *et seq.*). It will take, at a minimum, fifteen days after the public bodies receive a request. NMSA 1978 § 14-2-8(D). These could take much longer if the public bodies deny Petitioner access to those records or ask for additional time to fulfill the requests.

25. Once Petitioner assembles and obtains independent consulting expert review of these essential records, the FTCA requires her to provide notice to the federal government and wait six months before filing an action in federal court. 28 U.S.C. § 2675(a).

26. Thus, Petitioner will realistically not be able to institute an action arising out of the death of Kesley Vial until September 2023, at the absolute earliest.

C. Subject Matter of the Expected Action and Petitioner's Interest¹⁰

27. The subject matter of the expected action will be the acts and omissions of federal officials employed by ICE while Mr. Vial was in federal custody, and the acts and omissions of employees and agents of CoreCivic and Torrance County.

⁹ See U.S. Imm. & Customs Enf., *ICE Directive 11003.5: Notification, Review, and Reporting Requirements for Detainee Deaths* at 7 (Oct. 25, 2021), <https://www.ice.gov/doclib/detention/directive11003-5.pdf>.

¹⁰ FED. R. CIV. P. 27(a)(1)(B).

28. With respect to establishing liability, the lived experiences of Mr. Vial in detention, and the specific actions taken or omitted by federal officials and employees and agents of CoreCivic and Torrance County, will be critical.

29. With respect to proving damages, the nature and extent of in-custody, pre-death suffering by Mr. Vial as a result of these acts and omissions will be central – particularly because Petitioner may bring a survival claim.

30. Petitioner's interest in the expected action arises from her status as the Personal Representative of the Wrongful Death Estate of Kesley Vial. As the Personal Representative, Petitioner is the holder of the wrongful death claims under New Mexico state law. NMSA 1978 § 41-2-1 *et seq.* As the Personal Representative, she is also the holder of the estate's survival claims pursuant to New Mexico state law. The substantive elements of these state law claims supply the substantive basis for potential tort claims brought against federal actors under the FTCA. Similarly, Petitioner, as the Personal Representative of Mr. Vial's wrongful death estate in New Mexico, holds an interest in claims brought pursuant to 42 U.S.C. § 1983 against CoreCivic, Torrance County, and/or their individual employees and/or agents acting in the course and scope of their employment. Finally, for the same reason, Petitioner holds an interest in common law claims brought against CoreCivic. As the holder of these claims, Petitioner holds an interest in being able to bring them in federal court.

D. Facts Petitioner Seeks to Establish¹¹

31. Petitioner seeks through this action and the proposed testimony she will elicit to establish the following facts:

¹¹ FED. R. CIV. P. 27(a)(1)(C).

- a. Mr. Vial's physical appearance, psychological condition, and behavioral manner on each day of his detention from about April 22, 2022 through August 17, 2022, including any indicators of mental health issues, inclination to self-harm, suicidal ideation, or mental or physical suffering observed by those in detention with him;
- b. Written and verbal communications made by Mr. Vial to fellow detained individuals, facility staff, and government officials which may or may not have been recorded and memorialized by facility staff or government officials in their records;
- c. Actions taken by and communications made by facility staff and government officials in relation to Mr. Vial's administratively final removal order, as described from the perspective of detained individuals who observed such actions and communications;
- d. Mental health services provided to individuals detained in the TCDF;
- e. Conditions of Mr. Vial's confinement during his detention from about April 22, 2022 through August 17, 2022; and
- f. Actions taken by facility and/or government officials regarding the provision of care to persons detained in the TCDF before and after Mr. Vial's fatal suicide.

E. Reasons to Perpetuate Testimony¹²

32. As a result of federal immigration law and policy and the nature of civil immigration detention for individuals who are detained in ICE custody, Petitioner cannot reasonably expect to maintain contact with the people with whom Mr. Vial was confined who would offer the

¹² FED. R. CIV. P. 27(a)(1)(C).

anticipated, essential testimony set forth in Paragraphs 31a–f by the time she is able to institute her federal action in September 2023.

33. Indeed, Petitioner expects that the federal government, Torrance County, and CoreCivic (or their employees or agents) will move to dismiss her claims, as they have done in nearly all suits arising out of detention conditions, and that they will seek and receive a stay of discovery until jurisdictional challenges raised in their motions are resolved. It could, therefore, be over a year after the filing of the complaint before these non-governmental third-party witnesses who could testify regarding Mr. Vial’s experiences will have the opportunity to do so.

34. By that time, it is highly likely that almost none of those witnesses will be available for deposition within this District, if at all. The vast majority will, based on current government statistics, have already been deported to their countries of origin.¹³ At that point, locating these witnesses will be extraordinarily difficult or impossible. If they are located, their recollections regarding Mr. Vial’s experiences could have eroded or become stale over time.

35. Those individuals who are not removed from the United States by the time Petitioner is able to bring her claims will likely have dispersed across the United States.

36. Petitioner lists those persons who she has been able to identify who were present with Mr. Vial in the TCDF, *infra*, Sec. II(G). As of the date of filing of the instant Petition, four of these individuals remain detained in the TCDF and six have been released from ICE custody and have already dispersed across the United States. Nine of these individuals are in removal proceedings, such that they are scheduled for upcoming hearings and are in the process of presenting claims in Immigration Court for relief from removal. If they are unsuccessful, as most are, they may be

¹³ See TRAC Reports, “Outcomes of Deportation Proceedings in Immigration Court,” https://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php (last visited Sept. 20, 2022).

ordered removed from the United States before Petitioner is able to bring her claims. Indeed, one of the below-listed individuals has already been ordered removed from the United States.

37. If these individuals are deported, they will be scattered to distant countries including Brazil, Colombia, Peru, Nicaragua, and the Dominican Republic, where they will not be accessible to Petitioner.¹⁴ Once deported, under U.S. immigration law these individuals are unlikely to be granted a visa to re-enter the United States, whether for a deposition in Petitioner's anticipated federal action or otherwise.

38. Given the bases of their immigration claims and the ongoing risk of persecution that many face in their countries of origin, those who are deported may suffer – at worst – imprisonment, injury, and/or death – or at best – they may be extremely difficult for Petitioner to locate.

39. Accordingly, the essential, potentially dispositive testimony of individuals who were detained with Mr. Vial must be perpetuated now, while these witnesses are still available, and their memories are still reasonably reliable. The risk of not allowing this testimony would be to potentially lose access to these witnesses in perpetuity, thus, depriving Petitioner of her ability and opportunity to litigate her claims.

F. Expected Adverse Parties¹⁵

40. As stated above, the United States of America is expected to be an adverse party to Petitioner's FTCA claims. Based on evidence gathered to date, Petitioner anticipates the acts and

¹⁴ See, e.g., *Penn Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1375 n.3 (D.C. Cir. 1995) (“Several cases have stated that a potential deponent’s plans to leave the country for a long period of time may be grounds for perpetuating testimony, presumably because the difficulties of serving process and conducting a deposition overseas create a risk of losing testimony.”) (citing cases); *New Mexico ex rel. Balderas v. Real Estate Law Center, P.C.*, 406 F. Supp. 3d 1049, 1068 n.7 (D.N.M. 2019) (“Most petitions to perpetuate testimony have been granted when a witness is aged or gravely injured and in danger of dying or there are geographical constraints.”) (internal quotation marks and citation omitted).

¹⁵ FED. R. CIV. P. 27(a)(1)(D).

omissions of officers, agents, or employees of the U.S. Department of Homeland Security, specifically, its agency component U.S. Immigration and Customs Enforcement – Enforcement and Removal Operations, will likely form the basis of some or all of Petitioner’s FTCA and/or Rehabilitation Act claims.

41. As stated above, CoreCivic and/or Tarrant County and unknown employees or agents¹⁶ of CoreCivic and/or Tarrant County are expected to be adverse parties to Petitioner’s claims brought under 42 U.S.C. § 1983, the ADA, the Rehabilitation Act, the New Mexico Civil Rights Act, or New Mexico common law negligence.

42. The addresses of these anticipated adverse parties are:

a. United States of America:

United States Attorney’s Office, Civil Division
District of New Mexico
P.O. Box 607
Albuquerque, NM 87103

b. CoreCivic and its employees and agents:

5501 Virginia Way, Suite 110
Brentwood, TN 37027

10 Burton Hills Boulevard
Nashville, TN 37215

c/o Kennedy Moulton & Wells, PC
2201 Third Street NW
Albuquerque, NM 87102

209 County Road AO49
Estancia, NM 87016

¹⁶ Petitioner is not certain at this time which employees or agents may be subject to suit because she does not have access to that information at this time. She anticipates having more information once documents are received through public records requests. CoreCivic and Tarrant County, however, have access to their employees and agents that were responsible for the care and custody of Mr. Vial while he was in the TCDF. Therefore, they should be able to identify which employees or agents may be subject to suit.

c. Torrance County and its employees and agents:

P.O. Box 48
205 S Ninth Street
Estancia, NM 87016

43. Petitioner notes that although the U.S. Department of Homeland Security's *Touhy* regulations, 6 C.F.R. § 5.41 *et seq.*, do not apply to actions in which federal agents or the federal government is a party, *see, e.g., Watts v. Sec. & Exchange Comm'n*, 482 F.3d 501 (D.C. Cir. 2007), she has complied with these regulations for this pre-suit proceeding because it is styled as a miscellaneous action.

G. Name, Address, and Expected Substance of Testimony of Each Deponent¹⁷

44. Petitioner seeks to depose the below-listed individuals who were detained in ICE custody with or otherwise had direct, nonincidental contact with Mr. Vial while he was in ICE custody.¹⁸

45. Deponents and Expected Testimony:

- a. Weslei Vitor (A# [REDACTED]).¹⁹ Mr. Vitor's current address is: 13 Patten Street Watertown, Massachusetts 02472. Mr. Vitor was detained in the TCDF with Mr. Vial and had direct, nonincidental contact with him during their time in detention together. Mr. Vitor also had contact with facility staff and government officials while detained in the TCDF with Mr. Vial and will testify regarding their actions

¹⁷ FED. R. CIV. P. 27(a)(1)(E).

¹⁸ Petitioner anticipates the expected adverse parties requesting a limited-purpose protective order regarding the identities of these individuals in order to comply with the Privacy Act and federal laws governing the release of information about noncitizens. Petitioner is amenable to such an order.

¹⁹ Petitioner has redacted the deponents' U.S. Department of Homeland Security file numbers, also known as "A-numbers," in this public filing, in keeping with FED. R. CIV. P. 5.2(a)(1).

and communications, as well as the conditions of confinement and mental health services in the TCDF.

- b. Natalino Pereira-Da Silva (A# [REDACTED]). Mr. Pereira-Da Silva's current address is: 5 Hemlock Lane, Milford, Massachusetts 01757. Mr. Pereira-Da Silva was detained in the TCDF with Mr. Vial and had direct, nonincidental contact with him during their time in detention together. Mr. Pereira-Da Silva also had contact with facility staff and government officials while detained in the TCDF with Mr. Vial and will testify regarding their actions and communications, as well as the conditions of confinement and mental health services in the TCDF.
- c. Daniel Braun (A# [REDACTED]). Mr. Braun's current address is: 2909 Avenue D, Birmingham, Alabama 35218. Mr. Braun was detained in the TCDF with Mr. Vial and had direct, nonincidental contact with him during their time in detention together. Mr. Braun also had contact with facility staff and government officials while detained in the TCDF with Mr. Vial and will testify regarding their actions and communications, as well as the conditions of confinement and mental health services in the TCDF.
- d. Yevin Estiven Gil-Moreno (A# [REDACTED]). Mr. Gil-Moreno's current address is: c/o The Law Offices of Rios, Parada & Seañez PLLC, 1505 East Missouri Avenue, El Paso, Texas 79902. Mr. Gil-Moreno was detained in the TCDF with Mr. Vial and had direct, nonincidental contact with him during their time in detention together. Mr. Gil-Moreno also had contact with facility staff and government officials while detained in the TCDF with Mr. Vial and will testify

regarding their actions and communications, as well as the conditions of confinement and mental health services in the TCDF.

- e. Cesar Augusto Ramirez-Ramirez (A# [REDACTED]). Mr. Ramirez-Ramirez's current address is: c/o Consumer Law Group, 6232 North Pulaski Road, Suite 300, Chicago, Illinois 60646. Mr. Ramirez-Ramirez was detained in the TCDF with Mr. Vial and had direct, nonincidental contact with him during their time in detention together. Mr. Ramirez-Ramirez also had contact with facility staff and government officials while detained in the TCDF with Mr. Vial and will testify regarding their actions and communications, as well as the conditions of confinement and mental health services in the TCDF.
- f. Wilman Eliecer Hincapie-Parra (A# [REDACTED]). Mr. Hincapie-Parra's current address is: Torrance County Detention Facility, 209 County Road AO49, Estancia, New Mexico 87016. Mr. Hincapie-Parra was detained in the TCDF at the same time as Mr. Vial, had contact with facility staff and government officials while detained in the TCDF, and will testify regarding their actions and communications, as well as the conditions of confinement in the TCDF.
- g. Milton Gamaliel Saenz-Palacios (A# [REDACTED]). Mr. Saenz-Palacios's current address is: 466 Bahia Way, San Rafael, California 94901. Mr. Saenz-Palacios was detained in the TCDF with Mr. Vial and had direct, nonincidental contact with him during their time in detention together. Mr. Saenz-Palacios also had contact with facility staff and government officials while detained in the TCDF with Mr. Vial and will testify regarding their actions and communications, as well as the conditions of confinement and mental health services in the TCDF.

- h. Marco Humberto Paulino-Aquino (A# [REDACTED]). Mr. Paulino-Aquino's current address is: Torrance County Detention Facility, 209 County Road AO49, Estancia, New Mexico 87016. Mr. Paulino-Aquino was detained in the TCDF with Mr. Vial and had direct, nonincidental contact with him during their time in detention together. Mr. Paulino-Aquino also had contact with facility staff and government officials while detained in the TCDF with Mr. Vial and will testify regarding their actions and communications, as well as the conditions of confinement and mental health services in the TCDF.
- i. Jhon Fredy Pinto-Marquez (A# [REDACTED]). Mr. Pinto-Marquez's current address is: Torrance County Detention Facility, 209 County Road AO49, Estancia, New Mexico 87016. Mr. Pinto-Marquez was detained in the TCDF at the same time as Mr. Vial, and had contact with facility staff and government officials while detained in the TCDF, and will testify regarding their actions and communications, as well as the conditions of confinement and mental health services in the TCDF.
- j. Orlando de los Santos-Evangelista (A# [REDACTED]). Mr. De los Santos-Evangelista's current address is: Torrance County Detention Facility, 209 County Road AO49, Estancia, New Mexico 87016. Mr. De los Santos-Evangelista was detained in the TCDF at the same time as Mr. Vial, and had contact with facility staff and government officials while detained in the TCDF, and will testify regarding their actions and communications, as well as the conditions of confinement and mental health services in the TCDF.

IV. Relief Requested

Given these witnesses' likely unavailability by the time Petitioner is able to institute her anticipated federal action, Petitioner seeks to perpetuate the above-described testimony by way of pre-suit depositions, which will be critical to preserving her ability and opportunity to litigate her claims. Based on the foregoing Petitioner respectfully requests the following relief:

1. Within three days of receiving this Petition, issue an Order setting a hearing within 21 days pursuant to FED. R. CIV. P. 27(a)(2);
2. Issue an Order authorizing depositions of the named persons listed in Paragraphs 45a–j;
3. Retain jurisdiction over this cause for the purpose of entering any necessary protective orders or adjudication of any disputes that may arise regarding any deponent; and
4. Grant any other relief as may be necessary and proper.

Date: September 20, 2022

Respectfully submitted,

ACLU OF NEW MEXICO

/s/ Rebecca Sheff

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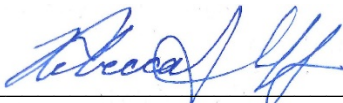
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Counsel for Petitioner

Verification

I, Rebecca Sheff, an adult resident of the State of New Mexico being of sound mind and constitution, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that all allegations of fact in the foregoing Petition are true and correct to the best of my understanding.

Date: September 20, 2022

By: 

Rebecca Sheff