Connecticut Superior Court
Judicial District of Waterbury

Connecticut Criminal Defense Lawyers Association,
Willie Breyette,
Daniel Rodriguez,
Anthony Johnson,
Marvin Jones, and
Kerri Dirgo,
Plaintiffs

No. UWY-CV20-6054309-S

April 21, 2020

v.

Ned Lamont and **Rollin Cook**,
Defendants.

Reply in Further Support of Plaintiffs' Motion for Temporary Order of Mandamus

In this dispute, a group of plaintiffs facing imminent harm from the COVID-19 pandemic's spread in prisons seeks relief from the defendants' failure to provide basic safety in the form of adequate distancing, sanitation, or medical care. The defendants oppose any form of relief for the people in their custody, arguing that their prisons are, at least on paper, in some compliance with guidelines established by the Centers for Disease Control (CDC),[1] and, that the individual plaintiffs do not qualify for any statutory means of early release. They also spend pages detailing the individual plaintiffs' medical histories, including conditions that have no bearing on this dispute, gratuitously revealing highly personal and embarrassing information.

Amidst the broad assurances and mean-spirited attacks, defendants fail to address the merits of the Eighth Amendment and statutory claims at issue: that, as

[1] *Coronavirus Disease 2019 (COVID-19), Guidance for Correctional and Detention Facilities*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html ("CDC Guidance") (last visited Apr. 19, 2020).

Plaintiffs' experts' uncontroverted testimony makes clear, Defendants' failure to take swift action is placing individual Plaintiffs and others at imminent risk of infection, serious illness, and possible death. Defendants also fail to provide a bona fide reason why this Court cannot properly fashion mandamus relief, neglecting the long history of judicial oversight of correctional institutions to remedy inadequate conditions – even where doing so required ordering release. *Brown v. Plata*, 563 U.S. 493, 510-11 (2011) ("When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population."). As the facts on the ground demonstrate—set against an unrelenting surge in infections throughout DOC facilities—a global order from this Court regarding conditions of confinement is vital.

1. Defendants' Duties to Safeguard Plaintiffs' Lives and Health Are Not Discretionary

Mandamus will lie when a defendant's duty is non-discretionary, the plaintiff has a right to the performance of the duty, and the plaintiff has no adequate remedy at law. *E.g.*, *Stewart* v. *Watertown*, 303 Conn. 699, 711-12 (2012).

The fundamental flaw in Defendants' argument is the repeated suggestion that there is no mandatory duty at issue in this case. This misses the forest for the trees: While individual custodial release mechanisms already codified in Connecticut law, such as compassionate parole or furlough, may be discretionary, *the legal duties in this case are those mandated by the U.S. Constitution and Connecticut General Statutes § 28-9(b)(5) and § 18-7*. It is mandatory, not discretionary, that Defendants not subject sentenced prisoners to cruel and unusual punishment under the Eighth Amendment, including by confining them in conditions that pose an unreasonable risk of damage to their health. *Helling v. McKinney*, 509 U.S. 25, 33–34 (1993). It is mandatory, not

discretionary, that Defendants provide for the health and safety of those in pretrial custody under the Fourteenth Amendment, so as to avoid *any* condition "designed to punish." *Youngberg v. Romeo*, 457 U.S. 307, 315–16, 322 (1982). And it is mandatory, not discretionary, that "[t]he Governor shall take appropriate measures for protecting the health and safety of inmates of state institutions and children in schools." Conn. Gen. Stat. § 28-9(b)(5), and that the Commissioner "preserve the life and health of the inmates in the custody of the department." *Commissioner of Correction v. Coleman*, 303 Conn. 800, 819 (2012).

Defendants devote countless pages to listing existing avenues of relief for which the plaintiffs do not qualify. But this is beside the point. Regardless of whether a particular plaintiff was entitled, in pre-pandemic times, to take advantage of a particular release mechanism, Defendants have mandatory obligations to safeguard those in their custody, and the individual prisoner plaintiffs have a legal right to see that they do so.

2. **The Conditions at DOC Facilities Present Substantial Risk of Infection to Those in Custody, and Defendants' Generalities Provide No Defense Against the Facts**

Defendants provide no evidence that they have taken constitutionally adequate measures to protect the wellbeing of the more than eleven thousand people in their custody. Among the five affidavits submitted, only one—from the Department's chief physician Byron Kennedy—purports to speak to overall compliance. Dr. Kennedy declares in general terms that the DOC "has implemented measures in conformity with CDC guidelines for correctional facilities regarding the COVID-19 pandemic," Kennedy Aff. ¶ 15. That affidavit, when considered in light of the firsthand testimony from individuals in the defendants' custody, is remarkable for its lack of detail and first-hand knowledge. And despite the rosy portrait painted by Defendants' filings, the numbers

reveal a much grimmer picture: an exponential leap from **8** prisoners and **16** staff infected as of the date of filing of Plaintiffs' complaint, to **293** incarcerated people and **202** staff as of today, only 18 days later; an infection rate scores higher than anywhere else in the state; and already, one prisoner dead.

In contrast to Defendants' assertions, affidavits submitted in support of plaintiffs' motion reveal a dangerous combination of close proximity, conflicting and loose standards, and lack of sanitation and medical resources—so much so that the Department of Correction's own staff continues to issue urgent, public pleas for assistance.[2] These affidavits describe conditions for which this Court could order injunctive relief, such as: mandating that each person be provided with the cleaning products and soap necessary to sanitize their living areas; ordering that recreational equipment, dining facilities, phones, bathrooms, showers, and other common spaces be disinfected routinely throughout the day; holding meal times in shifts so that people will be able to maintain safe social distance six feet apart; and other measures mandated by the CDC and suggested by Plaintiffs' experts, including releasing enough people, urgently, so that others are able to socially distance.

Connecticut's prisons are a far cry from complying with any of these measures. At Robinson CI, symptomatic people are housed alongside the uninfected in large open dormitories despite trying to convince guards to remove them from the presence of

[2] *See, e.g.*, Siobhan McGirl, *'Stressful'; CT Correction Officer Details Fight Against COVID-19 Inside Prison*, NBC Conn. (Apr. 8, 2020) (citing staff statements that DOC was "not prepared" for the outbreak, continues to be "reactive" and "still has a long way to go" because, among other things, "we are not getting the equipment we need to do our jobs"), https://cutt.ly/wt3ViVl; Kelan Lyons, *Shifting Plans and a COVID-19 Outbreak at a Connecticut Prison*, Conn. Mirror (Apr. 17, 2020), *available at* https://ctmirror.org/2020/04/17/shifting-plans-and-a-covid-19-outbreak-at-a-connecticut-prison/ (DOC medical workers stating that handling of the pandemic—including moving prisoners frequently within facilities, and from facility to facility—has "blatantly go[ne] against what our medical advice was").

others. Affidavit of Ken Pierce (attached as Exhibit 1) ¶¶ 5, 13 (describing conditions at Robinson Correctional Institution). At another—Brooklyn—the medical staff is so scant that prisoners have been waiting for flu shots for the past three months, perennially told that nurses are "busy with other things." Affidavit of William Bruno (attached as Exhibit 2) ¶ 11. Notwithstanding CDC direction regarding staggering meals and choosing recreation spaces where people can spread out, at MacDougall-Walker CI, prisoners eat together "spaced about a foot apart" and "there is no social distancing" when they are out of their cells. Declaration of Kezlyn Mendez (attached as Exhibit 3) ¶¶ 3, 5. *See* CDC Guidance (setting forth that jailers should "[s]tagger meals;" "[r]earrange seating in the dining hall so that there is more space between individuals (e.g., remove every other chair and use only one side of the table);" "[s]tagger time in recreation spaces;" and "choose recreation spaces where individuals can spread out.").

At Robinson CI, people sleep 90 to a room, packed so tightly that each man has ten others within four feet of him when asleep, *id*. ¶ 6, notwithstanding that "COVID-19 is a respiratory disease that spreads easily from person to person and may result in serious illness or death . . . ." Gov. Lamont Exec. Order No. 7 at 1. *See* CDC Guidance (urging wardens to "[a]rrange bunks so that individuals sleep head to foot to increase the distance between them" and "reassign bunks to provide more space between individuals, ideally 6 feet or more in all directions") The story is the same at Brooklyn CI, where 114 people living in an open dormitory have never been told to socially distance, Bruno Aff. ¶ 5, and would not have the space to do so even if they had, because the dimensions of the room in which the defendants keep them do not permit a spacing of more than two feet. *Id*. Similar to their Robinson counterparts, night finds Brooklyn prisoners sleeping two or three feet apart from one another in low-walled cubicles

holding six men, *id.* ¶ 6, an experience that can no longer be offered for sale outside of prison. *See* Gov. Lamont Exec. Order No. 7T (attached as Exhibit 4) at 1, 3 (prohibiting "overnight accommodations by commercial transaction" outside of limited exceptions because "it is imperative to take aggressive mitigation measures to slow the spread of COVID-19.").

The Court has authority to provide global relief regarding sanitation. Cleaning routines at many facilities remain the same as they were pre-pandemic, with no extra supplies or cleaning shifts, Pierce Decl. ¶ 7, even though "routine cleaning of public spaces and frequently handled items will greatly reduce the risk of COVID-19 transmission." Gov. Lamont Exec. Order No. 7N at 3. The employees at Robinson purchased disinfectant with their own money for prisoners to use, but doing so would require additional supervision and so prisoners are not actually permitted to use it. Pierce ¶ 7. Soap for Robinson prisoners is still available only by purchase, *id.* ¶ 9, while at Garner, people have to make do cleaning their cells with their own shampoo. Affidavit of Tyrone Spence (attached as Exhibit 5) ¶ 4. *See* CDC Guidance (setting forth that prisons should "[p]rovide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing.").

Periodic cell cleanings occur only once a week with diluted cleaner at Garner, Affidavit of Frank Kelly (attached as Exhibit 6) ¶ 4, where one prisoner is responsible for cleaning the entire housing unit and does not have time to sufficiently do so each day. *Id.* ¶ 7. At Brooklyn, the prisoners who clean the dormitory lack enough disinfectant to clean table tops. Bruno Decl. ¶ 10. *See* CDC Guidance (advising that doorknobs, light switches, sink handles, countertops, toilets, toilet handles, recreation equipment, kiosks, and telephones be cleaned "several times a day"). Notwithstanding the lack of soap,

"alcohol based sanitizer," which Defendant Lamont has concluded greatly reduces the spread of the pathogen, Gov. Lamont Exec. Order No. 7N at 3, is prohibited to prisoners in his custody. Bruno Decl. ¶ 10, Kelly Decl. ¶ 4, Pierce Decl. ¶ 11, Spence Decl. ¶ 6.

Moreover, even though *outside of the walls*, "any person in a public place . . . who . . . does not maintain a safe social distance of approximately six feet" from others is now required to "cover their mouth and nose with a mask or cloth face-covering" on account of the "compelling interest . . . to limit the transmission of COVID-19," Gov. Lamont Exec. Order No. 7BB at 1 (Apr. 17, 2020), use of masks by prisoners *inside the walls* is optional. Pierce Decl. ¶ 10; Bruno Decl. ¶ 7.

Even assuming *arguendo* that it is being implemented in any kind of consistent manner, the "action plan" Defendants identified in their filings has been roundly condemned by public health experts as both ineffective and inhumane. *See Letter from 58 Yale Medical Facility Members to Governor Lamont*, Apr. 20, 2020 (attached as Exhibit 7). First, the "plan does not address the specific disease characteristics of SARS-CoV-2 --e.g. current screening measures do not account delayed symptomology or asymptomatic carriers-- nor does the current response plan utilize the most effective COVID-prevention strategy, the rapid and thoughtful reduction of the State's prison population." Second, "the decision to utilize Northern Correctional Institution--itself a maximum-security facility--to isolate patients who test positive for SARS-CoV-2 is particularly concerning," given that the "inherently punitive nature of confinement associated with Northern C.I. may ultimately de-incentivize individuals from reporting if they become symptomatic." *Id.* For that reason, "isolation of sick patients in Northern C.I. is a punitive measure, not a public health one." *Id.* Affidavits of those who have been taken to Northern after testing positive corroborate this: Sick

people are simply locked in cells there with no specialized medical care, unable to leave their cells to take a shower or make a phone call. Affidavit of Roger Johnson (attached as Exhibit 8) ¶¶ 13, 14. Those held in Northern have had to beg for days just to be allowed to let family members know they were sick. *Id.* ¶ 14. Predictably, others are now attempting to hide symptoms, terrified of being sent to Northern. *Id.* ¶ 18.

The disparities between what the CDC recommends, what policies DOC has put in place, and what is actually happening in prisons are stark. Defendants' response to the pandemic is neither uniform nor comprehensive, but a grab-bag of aspirational half-measures that is insufficient to provide constitutionally adequate conditions of confinement. Because of the ongoing violation of the Eighth and Fourteenth Amendments, and of Defendants' statutory duty to provide care for those in DOC custody, global relief from the Court is required.

2. The Court May Remedy Constitutional Violations with the Measures it Sees Fit Regardless of Whether There is a Statute on Point

Secondly, the defendants put up a straw man of helplessness by cataloging the statutory relief to which the plaintiffs are *not* entitled. But the plaintiffs do not come to this Court looking for only that which is available by statute, and this Court is not so limited when fashioning a remedy.

Mandamus is an equitable remedy over which this Court has "plenary jurisdiction," *Beach v. Beach Hotel Corp.*, 117 Conn. 445, 447 (1933), and hence is "vested with broad authority to fashion equitable relief." *Elm City Cheese Co., Inc. v. Federico*, 251 Conn. 59, 94 (1999). "In matters of equity, the court is one of conscience which should be ever diligent to grant relief against inequitable conduct, however

ingenious or unique the form may be." *Town of New Hartford v. Connecticut Res. Recovery Auth.*, 291 Conn. 433, 459 (2009) (internal quotations omitted).

As medical and correctional experts attest, the Eighth Amendment's command that the defendants avoid cruelly exposing their prisoners to the pandemic requires a combination of rapid de-densification, sanitation, and medical care. Plaintiffs have provided uncontroverted evidence from public health experts—all medical doctors with significant expertise with correctional health settings—that this combination is the only way for Defendants to protect those in their care. *See* Aff. *See* Giftos Aff. (Exhibit 19) ¶17; Williams Aff. ¶ 18; Rich Aff. ¶ 15. Given the urgency of this requirement, and the inevitable lag time of ordinary release procedures (many of which are simply unavailable), the only effective way to remedy the violations presented by the plaintiffs is a global order requiring sanitation, medical care, and distancing. *See Helling*, 509 U.S. at 33 (because "the Eighth Amendment protects against future harms to inmates," a "remedy for unsafe conditions need not await a tragic event.").

Of course, "courts exercising their equitable powers are charged with formulating fair and practical remedies appropriate to the specific dispute," *Wall Systems Inc. v. Pompa*, 324 Conn. 718, 736 (2017) (internal quotation omitted), and the plaintiffs acknowledge the complexity of the factors under the Court's consideration. Fortunately, the Court enjoys the broad authority to craft novel remedies, as "[e]quity is a system of positive jurisprudence founded upon established principles which can be adapted to new circumstances where a court of law is powerless to give relief." *Harper v. Adametz*, 142 Conn. 218, 223 (Conn. 1955).

Courts around the country have worked creatively to vindicate the Constitution. In Cuyahoga County, Ohio, for example, a coalition of county judges, a prosecutor, and

the sheriff cooperated to enact a series of mass plea hearings to reduce the population of people incarcerated in county jails. Supreme courts in two states having original jurisdiction over mandamus actions have appointed special masters to devise COVID-19 responses that are practical and humane. The Hawaii Supreme Court appointed a special master to coordinate reductions in that state's incarcerated population. The Supreme Judicial Court of Massachusetts did the same. Not being confined merely to the statutory schemes that the defendants operate but refuse to bend notwithstanding their emergency powers, the Court may fashion whatever order works "relief grounded on substance and complete justice." *Morgera v. Chiappardi*, 74 Conn. App. 442, 458-59 (2003).

The defendants are being obstreperous to suggest that each plaintiff—and all those similarly situated—should individually pick their way through every legal or administrative avenue of relief *except for* this one. Much of the executive branch remains shuttered, as does the judiciary (including the court that hears nearly every habeas case in the state).[3]

There is no time to wait for more people to get infected and die. The most efficient avenue of relief for the constitutional and statutory violations the plaintiffs identify in these extraordinary circumstances is Connecticut's court of general jurisdiction. Accordingly, it should grant the plaintiffs' motion for relief forthwith.

[3] Defendants' prison population discussion is similarly misleading. The fact that the population was lower at the outset of this pandemic has nothing to do with whether DOC has released anyone because of the pandemic's dangers. Defendants similarly gloss over whether the recent releases have anything to do with the pandemic, rather than people maxing out on their sentences or fewer people entering the system. *See* Kaitlyn Krasselt, *Data Shows Prison Coronavirus Reduction Plan Not What It Appears*, Conn. Post, Apr. 12, 2020, https://www.ctinsider.com/news/coronavirus/ctpost/article/Hearst-CT-probe-Prison-reduction-plan-not-what-15195826.php. Absent entirely from their discussion is whether anyone has actually been released because of the urgent dangers of this pandemic, as directed by Plaintiffs' experts.

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Certificate of Service

I certify that a copy of the above, and any exhibits, was emailed on April 21, 2020 to all counsel of record, all of whom have filed written consent for electronic delivery:

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