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DOCKET NO. UWY-CV20-6054309-S

CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION; WILLIE BREYETTE; DANIEL RODRIGUEZ; MARVIN JONES; KERRI DIRGO; and JOSEPH WILCOX	:	**SUPREME COURT**
	:	
	:	**STATE OF CONNECTICUT**
	:	
	:	
	:	
v.	:	
	:	
NED LAMONT, Governor; and ROLLIN COOK, Commissioner of the Department of Correction	:	
	:	
	:	

MAY 8, 2020

APPLICATION FOR CERTIFICATION OF IMMEDIATE EXPEDITED APPEAL BY THE CHIEF JUSTICE

Pursuant to General Statutes § 52-265a and Practice Book §§ 60-2 and 83-1, the Plaintiffs, Connecticut Criminal Defense Lawyers Association ("CCDLA"), Willie Breyette, Daniel Rodriguez, Marvin Jones, Kerri Dirgo, and Joseph Wilcox (collectively, the "individual plaintiffs"), respectfully seek certification by the Chief Justice of the State of Connecticut for an immediate expedited appeal from the trial court's (*Bellis, J.*) April 24, 2020 decision granting the Defendants' motion to dismiss for lack of subject matter jurisdiction based on standing and the political question doctrine.

I. QUESTION OF LAW ON WHICH THE APPEAL IS BASED

Whether, during a public health emergency declared by the Governor under General Statutes § 28-9, a Connecticut state court has the authority to consider the merits of the instant lawsuit which raises constitutional and statutory claims and was brought by the plaintiffs in order to protect Connecticut's prison facilities inmates' health and safety in light of the COVID-19 pandemic.

II. FACTUAL BACKGROUND AND HISTORY OF PROCEEDINGS

A. Factual Background

Public health experts have cautioned that prisons and jails are extremely high-risk settings for the spread of COVID-19.[1] In Connecticut (as elsewhere), these warnings have proven tragically accurate. The Department of Correction ("DOC") reported its first staff member to test positive for COVID-19 on March 23, 2020,[2] and the first incarcerated person to test positive on March 30, 2020.[3] Just six weeks later, those numbers have

[1] Centers for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, https://tinyurl.com/y8pmv5p9 (last visited May 8, 2020).

[2] Press Release, Conn. Department of Correction, First Department of Correction Employee to Test Positive for COVID-19 Virus (March 23, 2020), https://tinyurl.com/y78punr8 (last visited May 8, 2020).

[3] Press Release, Conn. Department of Correction, First Department of Correction Offender

increased exponentially: 361 DOC staff members and 484 incarcerated people have tested positive, and 6 incarcerated people have died.[4]

Responding to the threat posed by COVID-19, Governor Lamont declared civil preparedness and public health emergencies on March 10. Since then, the Governor has issued 36 executive orders closing or substantially altering operations in nearly all settings where people congregate in large numbers, including by: restricting entry into nursing homes; closing public schools and universities; prohibiting bars and restaurants from serving sit-in customers; postponing the presidential primary; limiting workplace operations of non-essential businesses; restricting gatherings to no more than five people; limiting the provision of short-term lodging; and suspending non-critical court operations.

Notwithstanding the outsized threat that COVID-19 poses in correctional settings, however, Governor Lamont has steadfastly refused to address the risk to the incarcerated population. As of today, no executive order addresses incarcerated residents. While DOC has adopted a COVID-19 response plan, that plan falls far short of the measures prescribed by public health experts. The plan contains no provision for social distancing among incarcerated people, no provision for regular cleaning of cells and dormitories, and no provision for reducing population density.[5] Moreover, the Defendants' plan for quarantining those infected with COVID-19 is to transfer them to Northern CI, where they are simply locked in maximum-security cells for days without being allowed to shower, or leave their cells for any reason other than (in some instances) to make a short phone call.[6]

Tests Positive for COVID-19 Virus (March 30, 2020), https://tinyurl.com/y9o2z9s6 (last visited May 8, 2020).

[4] Conn. Department of Correction, Covid-19 Tracker, https://tinyurl.com/ycyfkoyk (last visited May 8, 2020).

[5] Conn. Department of Correction, COVID-19 Operational Response Plan 1 (Mar. 20, 2020), https://tinyurl.com/y9thulac (last visited May 8, 2020).

[6] Conn. Department of Correction, Orientation Notice, Northern Correctional Institution – COVID Units, https://tinyurl.com/y8mfrwea (last visited May 8, 2020).

B. Trial Court Proceedings

The Plaintiffs brought this action to protect the health and safety of inmates at Connecticut's correctional facilities. In particular, the Plaintiffs claimed that the Defendants' failure to take steps to mitigate the spread of the virus has exposed Connecticut's incarcerated population to a substantial risk of serious illness. The Plaintiffs claimed that the Defendants' failure to act violated (1) the Eighth Amendment (with respect to sentenced persons) and Fourteenth Amendment (with respect to pretrial detainees) of the federal constitution, (2) the corresponding provisions in article first, §§ 8 and 9 of the state constitution, (3) Governor Lamont's obligation under General Statutes § 28-9(b)(5) to "protect[] the health and safety of inmates of state institutions" during public health and civil preparedness emergencies," and (4) Commissioner Cook's obligation under General Statutes § 18-7 to "provide for the relief of any sick or infirm prisoner …." The Plaintiffs sought various forms of relief, including release of incarcerated people at heightened risk for serious illness or death from COVID-19, an order to reduce the population density at all DOC facilities, and an order to submit a plan to provide adequate sanitation, social distancing, and medical treatment. The Defendants moved to dismiss, claiming that the Plaintiffs lacked standing, and that the action is barred by the political question doctrine.[7]

On April 24, 2020, the trial court, Bellis, J., granted the Defendants' motion to dismiss, concluding that Connecticut courts have no jurisdiction over the Plaintiffs' suit. First, the court held that none of the Plaintiffs had standing because they did not sufficiently allege that they suffered any direct injury as a result of the Defendants' actions. With respect to the individual plaintiffs, the trial court focused solely on the substance of the Eighth Amendment claim, rather than whether the Plaintiffs alleged a colorable claim of

[7] Defendants also moved to dismiss the action on Eleventh Amendment grounds, an argument the court dismissed by the court and not at issue in this appeal.

injury. Order re Mot. to Dismiss, pp. 5-6. The court also did not mention the Plaintiffs' separate allegations that the Defendants violated the Fourteenth Amendment—given that the Plaintiffs who are pretrial detainees do not come under the Eight Amendment in the first place—and General Statutes §§ 18-7 and 28-9(b). Instead, the court concluded (improperly) that the Plaintiffs lacked standing solely because the complaint failed to state a claim under the Eighth Amendment. Id.

Second, the trial court concluded that the Plaintiffs' claims involved nonjusticiable political questions. Despite acknowledging that the Plaintiffs' claims "depend … on a determination that the individual plaintiffs' constitutional rights are being violated," Order re Mot. to Dismiss, p. 9, the court nevertheless held that it was powerless to adjudicate this case because certain statutes that are unrelated to the Plaintiffs' claims "provide discretion to the executive branch officials with regard to the transfer or release of inmates." Id., p. 8.

III. THE SUBSTANTIAL PUBLIC INTEREST INVOLVED

This appeal is about the ability and obligation of Connecticut's courts to protect constitutional and statutory rights even during a public health emergency. The Plaintiffs' claims seek to safeguard the life and health of people in Department of Correction custody based on: (1) the Fourteenth Amendment of the U.S. Constitution (for pre-trial detainees); (2) the Eighth Amendment of the U.S. Constitution (for sentenced prisoners) of the U.S. Constitution; (3) Article first, §§ 8 and 9 of the Connecticut Constitution (for all inmates); and (4) Connecticut General Statutes § 28-9(b)(5) (for all inmates of state institution).

A. The Jurisdiction of Connecticut State Courts

It is well-established that in state court "every presumption is to be indulged in favor of jurisdiction." State v. Carey, 222 Conn. 299, 304-306 (1992); Dayner v. Archdiocese of Hartford, 301 Conn. 759, 774, 23 A.3d 1192 (2011). "The superior court [is] the sole court of original jurisdiction for all causes of action, except such actions over which the courts of

probate have original jurisdiction, as provided by statute…" Id. (quoting General Statutes § 51-164s). As such, the superior court is presumed to have jurisdiction over all matters that come before it and cannot lose that jurisdiction by implication:

> The Superior Court is a court of general jurisdiction. It has jurisdiction of all matters expressly committed to it and of all other matters cognizable by any law court of which the exclusive jurisdiction is not given to some other court. The fact that no other court has exclusive jurisdiction in any matter is sufficient to give the Superior Court jurisdiction of that matter.... [T]he general rule of jurisdiction ... is that nothing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so; and on the contrary nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly so alleged.... [N]o court is to be ousted of its jurisdiction by implication.

In re Matthew F., 297 Conn. 673, 708-709 (2010) (*Rogers, C.J.*, concurring). The state constitution enshrines the principle that every injured person is entitled to his or day in court in Article First, section 10, which states that "[a]ll courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." A court should conclude that it has jurisdiction to reach the merits of a dispute whenever possible. See In re Jose B., 303 Conn. 569, 579-580 (2012) ("judicial policy preference to bring a trial on the merits of a dispute whenever possible and to secure the litigant his day in court.")

B. Plaintiffs' Constitutional Claims

The Plaintiffs here claimed that the Defendants have a duty to protect the lives of the approximately 11,000 people in their custody from COVID-19, a duty that stems directly from the U.S. and Connecticut Constitutions. The prohibitions against cruel and unusual punishment existing "under the auspices of the dual due process provisions contained in article first, §§ 8 and 9" of the Connecticut Constitution; State v. Santiago, 318 Conn. 1, 16 (2015); and the United States Constitution's Eighth Amendment, demand that the State provide for the "basic human needs" of prisoners in its custody. See Helling v. McKinney,

509 U.S. 25, 32 (1993). "[W]hen the State . . . fails to provide for [prisoners'] basic human needs . . . it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199-200 (1989); see also Youngberg v. Romeo, 457 U.S. 307, 324 (1982) (finding the State has a duty to provide certain services and care to institutionalized persons in its custody). Similar standards hold for pretrial detainees under the Fourteenth Amendment's due process clause. State v. Anderson, 319 Conn. 288, 317 (2015); see also Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017) (explaining that the Due Process clause of the Fourteenth Amendment demands protection of serious medical needs of people held in pre-trial confinement). In fact, protections for pretrial detainees are arguably stronger: they may not be held under *any* condition that amounts to punishment. Bell v. Wolfish, 441 U.S. 520, 535 (1979).

"[P]risoners may not be deprived of their basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—and they may not be exposed to conditions that pose an unreasonable risk of serious damage to [their] future health." Jabbar v. Fischer, 683F.3d 54, 57 (2d Cir. 2012) (citation omitted). The U.S. Supreme Court has recognized that the risk of contracting a "serious, communicable disease" constitutes an "unsafe, life-threatening condition" that threatens prisoners' "reasonable safety." McKinney, 509 U.S. at 33. Therefore, "correctional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease." Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996).

C. Plaintiffs' Statutory Claims

As a result of Governor Lamont's proclamation that public health and civil preparedness emergencies exist in the State of Connecticut, certain provisions of Connecticut law "shall immediately become effective and shall continue in effect until the

Governor proclaims the end of the civil preparedness emergency[.]" Conn. Gen. Stat. § 28-9(b). While certain of these are discretionary, others are not. In particular, during emergencies such as this, "[t]he Governor *shall take appropriate measures for protecting the health and safety of inmates of state institutions* and children in schools." Id. § 28-9(b)(5) (emphasis added). This duty is mandatory. See Connecticut State Police Union v. State Department of Emergency Services & Public Protection, 2012 WL 386679, at *5 (Graham, J.) (Conn. Super. Jan. 13, 2012). (explaining the use of "shall" in a statute creates mandatory duty); Eastern Color Printing v. Jenks, 150 Conn. 444, 450-51(1963) (ordering mandamus where "[t]he statute uses the words 'shall . . . view' and 'shall revalue.' So far as these two operations are concerned, the statute is mandatory, and the defendant is obliged to conform to it"). Accordingly, the Governor "is called upon to perform [these] acts in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment on the propriety of the acts being done." Id. The Commissioner of Correction, similarly, "has not only a compelling interest in preserving the life and health of the inmates in the custody of the department, but also a statutorily mandated duty to do so." Coleman, 303 Conn. at 819 (citing Conn. Gen. Stat. § 18-7's directive that the department "provide for the relief of any sick or infirm prisoner").

D. The Trial Court Wrongly Abdicated Its Duty to Address the Plaintiffs' Claims

The trial court determined that it had no authority to hear the Plaintiffs' claims based on two theories: standing and the political question doctrine. With respect to standing, the trial court determined that it could not consider the merits of this lawsuit because the CCDLA did not allege an adequate injury. However, the trial court failed to consider that constitutional rights of this magnitude can by asserted by parties with "special relationships" with those whose constitutional rights would be protected by the case, such as lawyers

asserting the constitutional rights of groups of individuals who they would represent. See United States Dept. of Labor v. Triplett, 494 U.S. 715, 719–21 (1990) (attorney had standing to assert due process claims to fee restrictions on behalf of clients he represented); Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, (1965) (physician and Planned Parenthood official had standing to assert constitutional privacy rights of married couples); NAACP v. Alabama, 357 U.S. 449 (1958) (NAACP had standing to assert first amendment rights of members); Craig v. Boren, 429 U.S. 190 (1976) (liquor vendor could assert constitutional rights of potential customers). Here, the CCDLA had standing to assert the constitutional and statutory rights of their clients in these actions because it is impractical for CCDLA's members to individually obtain relief for their clients. Absent relief through this case, CCDLA members are put in a position where some members are, effectively, unable to perform their jobs and obtain protection for their clients from prison conditions that put their health, safety, and life at risk.

The trial court also refused to hear the Plaintiffs' claims on the basis that the individual plaintiffs, all of whom are currently incarcerated, did not allege a sufficiently direct injury because they did not allege that they are currently infected with COVID-19 or housed in close proximity to someone who is. However, the Plaintiffs are seeking protection from contracting COVID-19 and its attendant harms. To require them to first suffer that harm, which could fatal, makes no sense, and is not required by the Eighth Amendment. See McKinney, 509 U.S. at 33 (The Eighth Amendment "protects against future harms to inmates" even if the "complaining inmate shows no serious current symptoms").

The trial court also avoided considering the merits of the Plaintiffs' claims by invoking the political question doctrine. However, the political question doctrine does not apply when the Plaintiffs are asserting a constitutional right or mandatory statutory duty, both of which are at issue in this case and within the purview of the Judicial Branch. See

Office of Governor v. Select Committee of Inquiry, 271 Conn. 540 (2004) (rejecting political question doctrine in case concerning legislative subpoena of governor because "it is well within the province of the judiciary to determine whether a coordinate branch of government has conducted itself in excess of the authority conferred upon it by the constitution"); Youngston v. Sawyer, 343 U.S. 579 (1952) (upholding injunctive relief against Presidential order seizing steel mills during Korean War on grounds that President exceeded Article I wartime power). Here, the trial court's application of the political question doctrine was based on the executive branch's general authority over the transfer and release of inmates as set forth in the General Statutes, not the state constitution. Essentially, the trial court concluded that those statutes insulate the executive branch from judicial review of any claim challenging the fact or conditions of confinement. That conclusion would have far-reaching effects that would prevent our courts from ordering executive branch officials to comply with their constitutional and statutory obligations.

IV. DELAY WOULD WORK A SUBSTANTIAL INJUSTICE

This Court's immediate intervention is needed because the approximately 11,000 incarcerated people in Connecticut face ongoing deprivations of their constitutional rights, as well as substantial risk of serious illness or death. For example, people incarcerated at Robinson CI sleep 90 to a room, packed so tightly that each person sleeps within four feet of ten others, and symptomatic people are housed alongside the uninfected in large open dormitories. Ex. 1 to Reply in Support of Motion for Mandamus ("Pl. Reply," Dkt. No. 125.00), ¶¶ 5, 6, 13. The story is the same at Brooklyn CI, where 114 people living in an open dormitory have never been told to socially distance, would not have the space to do so even if they had, and sleep two or three feet from one another in cubicles holding six men. Ex. 2 to Pl. Reply, ¶¶ 5, 6. And 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. Ex. 3 to Pl. Reply, ¶¶ 3, 5.

The Defendants' primary strategy for quarantining those infected by COVID-19—moving them to Northern—has been roundly condemned by public health experts, because the "inherently punitive nature of confinement associated with Northern C.I. may ultimately de-incentivize individuals from reporting if they become symptomatic." See Ex. 7 to Pl. Reply. For that reason, "isolation of sick patients in Northern C.I. is a punitive measure, not a public health one." Id. This concern has been borne out, as sick people transferred to Northern 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. Ex. 8 to Pl. Reply, ¶¶ 13, 14. Those held in Northern have had to beg for days just to be allowed to notify family members they were sick, while others are attempting to hide symptoms, terrified of being sent to Northern. Id. ¶¶ 14, 18.

V. LEGAL GROUNDS RELIED ON

The Plaintiff relies on General Statutes § 52-265a and Practice Book §§ 60-2 and 83-1 as the grounds for granting this application. For the reasons set forth above, this case presents issues of substantial public interest, delay in the resolution of which will deleteriously affect the Plaintiffs and all those incarcerated in Connecticut prisons. These are exceptional times. Expedited review of the Plaintiff's claims is warranted. Plaintiffs have the legal right—grounded in both Connecticut statute and federal law—to seek protection for the health and safety of Connecticut's inmates. The Plaintiffs respectfully request that the Chief Justice grant the instant application, set an expeditious briefing, and schedule a video oral argument.

WHEREFORE, the Plaintiffs respectfully requests that the Chief Justice grant the instant application for an immediate expedited appeal.

ATTORNEYS FOR THE PLAINTIFFS,

By /s/ Proloy K. Das (#418609)
Proloy K. Das, Esq.
Kevin W. Munn, Esq.

Murtha Cullina LLP
280 Trumbull Street
Hartford, Connecticut 06103
Telephone: 860.240.6000
Facsimile: 860.240.6150
pdas@murthalaw.com
kmunn@murthalaw.com
Juris No. 040248

Dan Barrett (# 437438)
Elana Bildner (# 438603)
ACLU Foundation of Connecticut
765 Asylum Avenue
Hartford, CT 06105
(860) 471-8471
e-filings@acluct.org

Hope Metcalf (# 424312)
Allard K. Lowenstein Int'l Human Rights Clinic
Yale Law School
127 Wall Street
New Haven, CT 06511
(203) 432-9404
hope.metcalf@ylsclinics.org

Miriam Gohara (# 437966)
Marisol Orihuela (# 439460)
Jerome N. Frank Legal Services Organization
P.O. Box 209090
New Haven, CT 06520
(203) 432-4800
miriam.gohara@ylsclinics.org
marisol.orihuela@ylsclinics.org

David Rosen & Associates, P.C. (#051240)
400 Orange Street
New Haven, CT 06511
(203) 787-3413
drosen@davidrosenlaw.com

CERTIFICATION OF FORMAT AND SERVICE

Pursuant to Practice Book §§ 62-7 and 83-1, the undersigned hereby certifies that this application complies with all format provisions of the Rules of Appellate Procedure, and further certifies that, on this 8th day of May 2020, a copy of said application was sent via facsimile and/or electronic medium to:

James Michael Belforti (#438739)
Steven R. Strom (#085102)
Terrence M. O'Neill (#412261)
James W. Donohue (#440858)
Office of the Attorney General
110 Sherman Street
Hartford, CT 06105
terrence.oneill@ct.gov
steven.strom@ct.gov
james.belforti@ct.gov
james.donohue@ct.gov
Counsel for the Defendants

/s/ Proloy K. Das (#418609)
Proloy K. Das, Esq.