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Courts Address COVID-19 Issues in Prisons and Jails

❖ Introduction

The coming of the COVID-19 pandemic has significantly altered almost every aspect of life in the United States this year and most of the world. There has certainly been a significant impact on federal, state, and local prisons and jails, in which the close quarters, overcrowding, housing patterns, sanitation problems, and scarce resources put prisoners, detainees, and staff members at imminent risk of infection, the worsening of existing health problems, and even death. Many prisoners and detainees, including those with existing conditions such as obesity, diabetes, high blood pressure, heart problems, tuberculosis, MRSA, HIV/AIDS, etc., or who are elderly, are at particular risk.

Some of the measures utilized in the outside world to attempt to minimize these risks can be particularly difficult, or sometimes even impossible to fully implement in the cramped quarters of prisons, jails, and other detention facilities. Inevitably, there have already been a number of lawsuits in both federal and state court by prisoners and detainees challenging their conditions of confinement in light of the ongoing pandemic.

This article takes an initial look at how the courts have, so far, addressed these lawsuits. In most instances, they have been loath to question the discretion exercised by correctional officials in attempting to deal with this latest unprecedented crisis. One federal appeals court, however, recently upheld some aspects of an injunction ordering certain measures concerning sanitation, testing, and provision of face masks to reduce the risks of harm in a major county jail, based on the trial court's detailed factual findings, while rejecting other claims relating to social distancing, group housing, and double-celling, finding that the wrong legal standard was applied. The first section of this article takes a detailed look at the reasoning of this important federal appeals court ruling.

It is followed by a brief round-up summarizing some of the other court decisions in this area, and a listing of useful and relevant resources and references.

❖ Injunction Partially Upheld

Cook County Chicago jail detainees filed a class action lawsuit after the jail reported an outbreak of COVID-19. They argued that the sheriff violated their Fourteenth Amendment due process rights by failing to provide them with reasonably safe living conditions. They sought an injunction requiring him to implement procedures related to social distancing, sanitation, diagnostic testing, and personal protective equipment for the duration of the pandemic.

The trial court granted a temporary restraining order (TRO), requiring the sheriff to provide hand sanitizer and soap to all detainees and face masks to detainees in quarantine, and prohibiting the use of a "bullpen" for new detainees. Dismissing the sheriff's argument that he faced feasibility limitations on further social distancing, in granting a preliminary injunction, the trial court later concluded that the detainees were reasonably likely to succeed on their claim that group housing and double-celling is objectively unreasonable, except in certain situations.

Cook County jail in Chicago, Illinois, the court noted, is "an enormous facility with the population of a small town." And the inherent nature of the jail presents "unique challenges" for fighting the spread of COVID-19. Specifically, it is designed to accommodate large and densely-packed populations. Many detainees reside in "dormitory" units, with hundreds of detainees sleeping in a single room on closely-spaced bunk beds. Additionally, there are many common spaces where a wide variety of necessary activities are carried out in which detainees are in close proximity to one another.

On April 8, 2020, *The New York Times* reported that, at that time, the jail was the largest known-source of coronavirus infections in the United States. Timothy Williams and Danielle Ivory, *Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars* (April 8, 2020) N.Y. Times, (last visited August 27, 2020). At the time that the plaintiffs filed their motion for a preliminary injunction, on April 14, 541 detainees and jail staff had tested positive for COVID-19. By April 23, only a few days before the trial court issued the preliminary injunction, six detainees had died from complications of a virus infection

The Seventh Circuit reversed in part. *Mays v. Dart*, #20-1792, 2020 U.S. App. Lexis 28359 (7th Cir.). The trial court erred in analyzing the issue of group housing and double-celling by failing to consider the sheriff's conduct in its totality, failing to afford proper deference to the sheriff's judgment in adopting policies necessary to ensure safety and security, and cited an incorrect "better than negligible" legal standard when evaluating the likelihood of success of the claims; The court upheld, however, the remainder of the injunction relating to sanitation, testing, and provision of face masks because the trial court made "detailed factual findings," properly considered the sheriff's conduct in its totality, and closely tailored the relief it ordered to Centers for Disease Control guidelines.

The Centers for Disease Control issued Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities ("CDC Guidelines"). The document "is intended to provide guiding principles for healthcare and non-healthcare administrations of correctional and detention facilities" to "help reduce the risk of transmission and severe disease from COVID-19" in light of the unique challenges correctional and detention facilities present.

The Guidelines recommended various measures, including making available sufficient hygiene and cleaning supplies, frequently cleaning and disinfecting high-touch surfaces and objects, and implementing social distancing strategies where feasible, among many others. The Guidelines noted, in bold font, that the "guidance may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions." Additionally, in the section recommending the implementation of social distancing in jails, the CDC's guidance notes "[s]trategies will need to be tailored to the individual space in the facility and the needs of the population and staff."

The Cook County sheriff, who operates the jail, did take numerous proactive measures to prevent the spread of COVID-19. This included developing a plan for an outbreak, including increasing disinfection and sanitization, devising protocols to screen detainees for symptoms, and moving infected detainees to separate housing.

Upon the governor's declaration of Illinois as a disaster area on March 9, the sheriff set up a space for new detainees to quarantine for seven to fourteen days before entering the general population. By mid-March, the jail was working to open three closed divisions of the jail to create more single-cell units and reduce density. The sheriff also overrode longstanding rules forbidding possession of hand sanitizer, which has a high alcohol content.

The sheriff also undertook efforts to reduce the jail population through securing release or electronic monitoring for over 1,200 detainees. A supply of masks was obtained. And a rapid COVID-19 test began to be administered at the jail.

The appeals court found that by failing to evaluate the request for a policy precluding double celling and group housing in light of the other aspects of the sheriff's COVID response, the trial court did not properly consider the totality of the facts and circumstances when evaluating the objective unreasonableness of the sheriff's actions.

Just as important, the court noted, given the deference courts owe to correctional administrators on matters implicating safety concerns and the substantial role that security interests play in housing assignments, the failure to consider these interests was a legal error.

Thirdly, the trial court began its analysis of the plaintiffs' request for a policy requiring socially distanced housing by noting that, to demonstrate a likelihood of prevailing, the plaintiffs had to show "only a better than negligible chance of success," a "low threshold."

The appeals court found that this was erroneous, pointing to the U.S. Supreme Court invoking a higher standard in n *Winter v. Nat. Res. Def. Council, Inc.*, #07-1239, 555 U.S. 7 (2008)**.** In that case, the Court stated that "[a] plaintiff seeking a preliminary injunction must establish that he is *likely* to succeed on the merits." (emphasis added). Similarly, when discussing the required showing to establish irreparable injury required for a preliminary injunction, the Court explained that its

standard "requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction."

The appeals court did, however, uphold the other aspects of the preliminary injunction, since they were based on "detailed factual findings about the risks of COVID-19, the sheriff's existing policies, and the execution of these policies, relying on hearing testimony and affidavits from plaintiffs' experts, detainees, and correctional administrators."

Most importantly, the trial court was found to have assessed the requested relief considering the totality of the sheriff's conduct, rather than reviewing it in isolation. As an example, the trial court declined the plaintiffs' request to mandate testing of new detainees since the sheriff already had in place a policy requiring detainees to quarantine for fourteen days upon their arrival to the jail.

"The district court also carefully considered the sheriff's conduct in light of the CDC Guidelines and hewed closely to the Guidelines in its explanation of each measure of relief it ordered." The appeals court noted that the CDC Guidelines—like other administrative guidance—do not themselves set a constitutional standard.

But compliance with the Guidelines was relevant to an objective reasonableness inquiry, even though it does not set the constitutional standard. "This is particularly true here, where the CDC Guidelines provide the authoritative source of guidance on prevention and safety mechanisms for a novel coronavirus in a historic global pandemic where the public health standards are emerging and changing."

The appeals court did note that the trial court, just as with its discussion of the plaintiffs' request for an order precluding double celling and group housing arrangements, made only a "passing reference" to the sheriff's interest in managing jail facilities and its obligation to defer to policies and practices necessary to preserve order and security, and did not meaningfully discuss this deference in its analysis.

"We are less troubled, though, given the nature of the relief ordered. Whereas safety and security concerns are fundamental to housing assignments, this is not true to the same degree for measures pertaining to sanitation, testing, and providing facemasks."

❖ Other Court Rulings

A number of other federal and state appellate courts have also addressed COVID-19 issues, and in most instances denied plaintiff prisoners and detainees relief.

In *Valentine v. Collier*, #20-20207, 956 F.3d 797 (5th Cir. 200), Texas prisoners claimed that state correctional authority's adoption and implementation of measures based on changing Centers for Disease Control (CDC) recommendations concerning the COVID-19 pandemic did not go far enough. Their class action claimed violations of the Eighth Amendment's prohibition against cruel and unusual punishment, and the Americans with Disabilities Act, and sought a preliminary injunction.

The federal appeals court granted the Texas Department of Criminal Justice's (TDCJ) motion to stay the trial court's preliminary injunction, which regulated the cleaning intervals for common areas, the types of bleach-based disinfectants the prison must use, the alcohol content of hand sanitizer that inmates must receive, mask requirements for inmates, and inmates' access to tissues (among many other things).

The injunction order went well beyond CDC guidelines. The court held that the defendant was likely to prevail on the merits of its appeal because after accounting for the protective measures that have been taken, the plaintiffs had not shown a "substantial risk of serious harm" that amounts to "cruel and unusual punishment," and the trial court committed a legal error in its application of *Farmer v. Brennan*, #92-7247, 511 U.S. 825 (1994) (holding that a prison official may be held liable under the Eighth Amendment for acting with "deliberate indifference" to inmate health or safety only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it), by treating inadequate measures as dispositive of the defendants' mental state.

In this case, even assuming that there was a substantial risk of serious harm, the plaintiffs lacked evidence of the defendants' subjective deliberate indifference to that harm. The appeals court also ruled that the TDCJ had shown that it will be irreparably injured absent a stay, and that the balance of the harms and the public interest favor a stay.

Additionally, the appeals court held that the plaintiffs had not exhausted their administrative remedies as required in the Prison Litigation Reform Act (PLRA), and that the trial court's injunction went well beyond the limits of what the PLRA would allow even if the plaintiffs had properly exhausted their claims in administrative proceedings.

In *Wilson v. Williams*, #20-3447, 2020 U.S. App. Lexis 29862 (6th Cir.), inmates housed in a low-security federal correctional facility filed a petition under 28 U.S.C. 2241 to obtain release from custody to limit their exposure to the COVID-19 virus. They sought to represent all current and future inmates at the facility, including a subclass of inmates who—through age and/or certain medical conditions—were particularly vulnerable to complications, including death, if they contracted COVID-19.

The district court entered a preliminary injunction in April 2020, directing the Federal Bureau of Prisons (BOP) to evaluate each subclass member's eligibility for transfer by any means, including compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough within two weeks, transfer those deemed ineligible for compassionate release to another facility where testing is available and physical distancing is possible, and not allow transferees to return to Elkton until certain conditions were met.

A federal appeals court vacated the injunction. While the trial court had jurisdiction under 28 U.S.C. 2241, that section does not permit some of the relief the plaintiffs requested. The court rejected the BOP's attempts to classify the claims as "conditions of confinement" claims, subject to the Prison Litigation Reform Act.

The trial court erred in finding a likelihood of success on the merits of the Eighth Amendment claim. There was sufficient evidence that the petitioners are "incarcerated under conditions posing a substantial risk of serious harm" but the BOP responded reasonably to the known, serious risks posed by COVID-19.

Conditions for immigration detainees were at issue in *Hope v. Warden Pike County Correctional Facility*, #20-1784, 956 F.3d 156 (3rd Cir. 2020). In that case, twenty federal immigration detainees in two county correctional facilities filed a federal habeas petition under 28 U.S.C. 2241, seeking immediate release. They

claimed that due to underlying health conditions, their continued detention during the COVID-19 pandemic put them at imminent risk of death or serious injury.

The trial court found that they faced irreparable harm and were likely to succeed on the merits, that the government would "face very little potential harm" from their immediate release, and that "the public interest strongly encourages Petitioners' release." Without waiting for a response from the government, the trial court granted a temporary restraining order (TRO) requiring the release.

The government moved for reconsideration, submitting a declaration describing conditions at the facilities, with details of the plaintiffs' criminal histories. The court denied reconsideration, stating that the government had failed to demonstrate a change in controlling law, provide previously unavailable evidence, or show a clear error of law or the need to prevent manifest injustice. The court extended the release period until the COVID-19 state of emergency is lifted, but attached conditions to the prisoners' release.

The government reported that 19 plaintiffs were released, and that none have been re-detained. Typically, an interlocutory order granting or denying a TRO is not immediately appealable, as it is not a "final order" that ends the litigation.

A federal appeals court granted an immediate appeal, and an immediate administrative stay of the release order, stating that the order could not evade prompt review simply by virtue of the label "TRO." A purportedly non-appealable TRO that goes beyond preservation of the status quo and mandates affirmative relief may be immediately appealable under 28 U.S.C. 1292(a)(1). "Having concluded that jurisdiction exists, we will separately consider the merits after the parties have had the opportunity to brief the issues presented."

In *Federal Defenders of New York, Inc. v. Federal Bureau of Prisons*, #19-1778, 954 F.3d 118 (2nd Cir. 2020), a federal appeals court overturned the dismissal of federal defense attorneys' lawsuit against the Federal Bureau of Prisons and the warden of a particular federal prison over the severe curtailment of inmate-attorney visits at the prison in early 2019 during a period of government shutdown. The lawsuit claimed that the curtailment violated the Administrative Procedure Act (APA), and the constitutional right to counsel under the Sixth Amendment. The claims were not moot because the circumstances that disrupted the visits were likely to recur and the defenders had U.S. Const. art. III standing as the courts

could grant appropriate relief by ordering the center to conform its conduct to statutory and constitutional law.

The court pointed to the current crisis over the COVID-19 virus as showing the need for a solution to the problems posed by the case.

"We urge in the strongest possible terms that, as soon as the District Court again has jurisdiction over this case, it consider convening the parties to obtain their advice as to the appointment of an individual with the stature, experience, and knowledge necessary to mediate this weighty dispute and ultimately facilitate the adoption of procedures for dealing with ongoing and future emergencies, including the COVID-19 outbreak. Such a person should diligently and speedily work to ensure that those incarcerated at the MDC and those who represent them have access to each other, and that the BOP while maintaining its ability and authority to manage the facility in a safe way takes every reasonable step to preserve the statutory and constitutional rights of the inmates and their counsel. We are confident that under wise leadership and guidance, these parties, whose common interest is service to the public, will rise to the occasion and achieve a satisfactory resolution to their permanent credit."

A federal appeals court in *Swain v. Junior*, #20-11622, 958 F.3d 1081 (11th Cir. 2020), initially stayed an injunction that was issued against a county and the Director of the Miami-Dade Corrections and Rehabilitations Department (MDCR), requiring them to employ numerous safety measures to prevent the spread of COVID-19 and imposing extensive reporting requirements. Inmates had filed a class action challenging the conditions of their confinement seeking relief for the named plaintiffs with a "medically vulnerable" subclass of inmates.

The court ruled that defendants established that they were likely to prevail on appeal. The trial court likely committed errors of law in granting the preliminary injunction when it incorrectly collapsed the subjective and objective components of the deliberate indifference inquiry. The defendants were also likely to succeed on appeal, the court found, because the plaintiffs offered little evidence to suggest that the defendants were deliberately indifferent.

Furthermore, the defendants had shown that they would be irreparably injured in the absence of a stay because they would lose the discretion vested in them under state law to allocate scarce resources among different county operations necessary to fight the pandemic. Finally, the balance of the harms and the public interest weighed in favor of the stay.

In a subsequent opinion on the merits of the case in *Swain v. Junior*, #20-11622, 961 F.3d 1276 (11th Cir. 2020), the court concluded that the trial court erred in issuing an injunction against the county and the Director of the Miami-Dade Corrections and Rehabilitations Department (MDCR), requiring the defendants to employ numerous safety measures to prevent the spread of COVID-19 and imposing extensive reporting requirements.

The court concluded that the plaintiffs failed to show a substantial likelihood of success on the merits of their constitutional claim for deliberate indifference.

It explained that the trial court erred in relying on the increased rate of infection, and in concluding that the defendants' inability to ensure adequate social distancing constituted deliberate indifference.

In this case, the court simply could not conclude that, when faced with a "perfect storm" of a contagious virus and the space constraints inherent in a correctional facility, the defendants acted unreasonably by "doing their best." The court also agreed with the defendants that the trial court erred in its likelihood-of-success-on-the-merits analysis because it failed to consider "two threshold issues" as defenses.

These were the heightened standard for municipal liability under *Monell v. Department of Social Services*, #75-1914, 436 U.S. 658 (1978), and the requirement for exhaustion of administrative remedies under the Prison Litigation Reform Act.

Finally, the court held that the district court erred in holding, without any meaningful analysis, that plaintiffs would suffer irreparable injury absent an injunction. Furthermore, the district court erred in its determination of the balance-of-the-harms and public-interest factors.

The highest state court in Massachusetts in *Committee for Public Counsel Services v. Chief Justice of Trial Court*, #SJC-12926, 484 Mass. 1029, 143 N.E.3d 408 (2020), ruled that, due to the critical situation caused by the COVID-19 pandemic,

it would exercise its superintendence authority to require the trial court departments to develop procedures to enable defense counsel to seek expedited approval of funds for social workers and others needed to establish medical parole eligibility for those who are being held pretrial, those who are civilly committed for substance abuse treatment, and those who are serving a committed sentence. Reports to a special master were ordered to help decrease the number of pretrial detainees to help avoid the spread of disease. To decrease exposure to COVID-19 within correctional institutions, the plaintiff defense attorneys sought the release to the community of as many pretrial detainees and convicted prisoners as possible.

The court held, however, as to those serving final sentences for conviction of crimes, that the court could not use its constitutional authority to stay final sentences absent an ongoing challenge to the underlying conviction or a violation of constitutional rights as the requested global stays of sentences would have co-opted executive functions in ways that were not permitted.

In another ruling by the same court, *Foster v. Commissioner of Correction (No. 1)*, #SJC-12935, 484 Mass. 698, 146 N.E.3d 372 (200), the court denied the plaintiffs' motion for a preliminary injunction enjoining the Department of Correction (DOC) from housing prisoners in facilities where the population exceeded its design-rated capacity and from housing prisoners areas where they must live within six feet of another person.

The court held that, despite the COVID-19 pandemic, the plaintiffs were unlikely to succeed on the merits of their claim for violations of the Eighth Amendment. The plaintiffs, who were incarcerated inmates serving sentences or individuals who were civilly committed, filed a class action lawsuit claiming that their conditions of confinement exposed them to unreasonable risks from the COVID-19 pandemic.

They argued that the defendants' alleged failure to take steps to reduce the incarcerated population so as to permit adequate physical distancing constituted cruel and unusual punishment in violation of the Eighth Amendment and violated substantive due process requirements. They sought a preliminary injunction in their claims for unconstitutional conditions of confinement because of the risk of a disease. The court denied the motion, holding that the plaintiffs were unlikely to succeed on the merits of their claim.

Subsequently, in *Foster v. Commissioner of Correction (No. 2)*, #SJC-1235, 484 Mass. 1059, 146 N.E.3d 408 (200), a case brought by incarcerated individuals challenging the conditions of confinement during the COVID-19 pandemic, the Massachusetts high court allowed the parole board's motion to dismiss only with respect to the claims of the individuals civilly committed, and allowed the Governor's motion to dismiss, holding that the Governor was not liable under the facts alleged.

The complaint claimed that by confining the plaintiffs under conditions that put them in grave and imminent danger of contracting the COVID-19 virus and by failing to reduce the incarcerated population, the defendants were violating the plaintiffs' right to be free from cruel and unusual punishment and their right to substantive due process.

The plaintiffs also alleged that confining persons who have been civilly committed in correction facilities violates the individuals' rights to substantive due process. The court granted the Governor's motion to dismiss, holding that the Governor's presence was not necessary to provide any relief that a court may order in this case.

It also allowed the parole board's motion to dismiss only with respect to the claims of individuals civilly committed, holding that if the plaintiffs' constitutional claims were to prevail, the parole board would be a logical and necessary party to accomplish a reasonable remedial process. It ruled that the prisoners sufficiently alleged that the parole board was deliberately indifferent to the risk of death and serious illness to certain prisoners, particularly elderly and medically vulnerable prisoners because the complaint alleged that the parole board had been deliberately indifferent in its exposure of the prisoners to unreasonable risks from the COVID-19 pandemic.

❖ Resources

- CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19). (Updated July 22, 2020).
- AELE resource page on COVID-19 virus.

- Discussion of Strategies for Jails, Prisons, and Oversight Bodies During the COVID-19 Crisis**,** National Association for Civilian Oversight of Law Enforcement.
- National Sheriffs' Association Coronavirus (COVID-19) Information.
- Correctional and Detention Facilities--Plan, Prepare, and Respond, Centers for Disease Control (CDC).
- COVID-19 in U.S. prisons and jails, Prison Legal News.
- Federal Bureau of Prisons web page on response to COVID-19.
- Keeping COVID-19 out of the Jails, San Francisco Sheriff's Office.

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❖ **Prior Relevant Monthly Law Journal Articles**

- Civil Liability for Inadequate Prisoner Medical Care, 2007 (9) AELE Mo. L.J. 301.
- Civil Liability for Inadequate Prisoner Dental Care, 2009 (9) AELE Mo. L. J. 301.
- Mental Health Care of Prisoners, 2009 (11) AELE Mo. L. J. 301.
- Avoiding Liability for Antibiotic Resistant Infections in Prisoners, 2011 (3) AELE Mo. L. J. 301.
- Civil Liability for Inadequate Prisoner Medical Care: Eye and Vision Related, 2014 (12) AELE Mo. L. J. 301.

❖ **References:** (*Chronological*)

1. COVID-19, Incarceration, and Reentry, by Carrie Pettis-Davis, Stephanie Kennedy, and Faye Miller, Florida State University, College of Social Work (August 2020).
2. Video Visiting and Telephone Calls Under the Coronavirus Aid, Relief, and Economic Security (CARES), Federal Bureau of Prisons Program Statement 002-2020 (June 22, 2020).

3. Viewpoint--COVID-19 in Prisons and Jails in the United States, Journal of the American Medical Association, April 28, 2020.
4. COVID-19 Model Finds Nearly 100,000 More Deaths Than Current Estimates, Due to Failures to Reduce Jails, by a Partnership Between ACLU Analytics and Researchers from Washington State University, University of Pennsylvania, and University of Tennessee (April, 2020).
5. Recommended Strategies for Sheriffs Jails to Respond to the COVID-19 Crisis**,** Michele Deitch, Senior Lecturer Lyndon B. Johnson School of Public Affairs University of Texas at Austin (March 20, 2020).

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- The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal

articles should not be considered as “legal advice.” Lawyers often disagree as to the meaning of a case or its application to a set of facts.

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