

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

_____)	
DAVID TERWILLIGER,)	No. 3:20-cv-540
)	
<i>Petitioner,</i>)	
)	April 21, 2020
v.)	
)	PETITION FOR WRIT OF
ROLLIN COOK, Commissioner,)	HABEAS CORPUS AND
Connecticut Department of Correction, and)	REQUEST FOR EMERGENCY
NICK RODRIGUEZ, Warden, Osborn)	ADMISSION TO BAIL
Correctional Institution,)	
)	
<i>Respondents.</i>)	
_____)	

PRELIMINARY STATEMENT

1. Petitioner David Terwilliger is an 80-year-old disabled veteran who suffers from serious medical conditions including a history of heart attacks, strokes, chronic hypertension, fainting requiring hospitalization, labored breathing, hearing loss, and degenerative joint disease. He has nearly completed his sentence of incarceration in the custody of Respondents and was approved for community release by Respondents on April 7, 2020. In light of the grave threat to the life and health caused by COVID-19 and his undisputed presence in numerous high-risk categories for severe disease identified by the Centers for Disease Control, Mr. Terwilliger seeks immediate release on the grounds that he is in custody in violation of the Eighth Amendment to the United States Constitution and the Americans with Disabilities Act.

2. COVID-19 is a highly infectious, novel coronavirus that has infected millions of individuals across the world in less than four months. Prisons are particularly susceptible to rapid, uncontrolled viral spread due to close contact between incarcerated individuals, poor sanitation,

and insufficient medical resources. These conditions place Mr. Terwilliger at a high risk of exposure to and severe illness or death from COVID-19.

3. Mr. Terwilliger petitions this Court for a writ of habeas corpus to remedy his prolonged confinement in unlawfully dangerous conditions, and also seeks his immediate admission to bail pending a decision on the underlying petition.

PARTIES

4. Petitioner David Terwilliger is an 80-year-old disabled veteran with multiple medical comorbidities. He is currently incarcerated in Osborn Correctional Institution (“Osborn CI”). Multiple people living in Osborn CI have tested positive for COVID-19, including correctional staff.

5. Respondent Rollin Cook is the Commissioner of the Connecticut Department of Correction (“DOC”).

6. Respondent Nick Rodriguez is the warden of Osborn CI.

JURISDICTION

7. This case arises under the Eighth Amendment to the United States Constitution and the Americans with Disabilities Act, 42 U.S.C. § 12132.

8. The Court has subject matter jurisdiction over this Petition pursuant to Article I, § 9, cl. 2 of the U.S. Constitution; the Eighth Amendment of the U.S. Constitution; 28 U.S.C. § 1331; 28 U.S.C. § 1651; and 28 U.S.C. § 2241, or in the alternative 28 U.S.C. § 2254.

VENUE

9. Venue is proper in the District of Connecticut because Petitioner is physically present in Connecticut in the custody of Respondents, and because a substantial part of the events

and omissions giving rise to these claims occurred and continue to occur in this district. 28 U.S.C. § 1391(b).

FACTS

A. Petitioner David Terwilliger

10. Petitioner Mr. Terwilliger is an 80-year-old veteran nearing the final year of a 20-year sentence. He is incarcerated at Osborn CI, Unit D. His inmate number is 307495.

11. Mr. Terwilliger was born in 1939 in Jersey City, New Jersey. In eleventh grade, he left Keypoint High School in order to join the United States Marine Corps (“Marines”). After deployments to Lebanon and Cuba, he was honorably discharged in 1963. He then worked as a carpenter and licensed truck driver. He also married and had two children.

12. In 1973, Mr. Terwilliger re-enlisted with the United States Navy as a reservist and later transitioned to active duty. In 1992, he retired from the Navy with an honorable discharge, after more than 21 years total of active duty service. He received multiple medals and other awards recognizing his faithful service. After his retirement, he again worked as a truck driver.

13. In 1993, he obtained a divorce and remarried soon thereafter. He has grandchildren and great-grandchildren.

14. Mr. Terwilliger suffers from multiple serious health conditions. He has had heart attacks on at least two occasions and has chronic hypertension. He has had a stroke and transient ischemic attacks. He has been hospitalized for fainting and suffers from labored breathing. He also has hearing loss and degenerative joint disease. He is partially deaf.

15. Defendants have rated Mr. Terwilliger’s health as a 4 out of 5—on a scale where 5 signifies the poorest health.

16. The United States Department of Veterans Affairs (“VA”) recognized Mr. Terwilliger’s transient ischemic attacks, hearing loss, and degenerative joint disease as connected to his service.

17. By mid-2002, the VA had classified him as disabled and given him a disability rating of 30 percent; Mr. Terwilliger had also sought VA benefits related to symptoms of Post-Traumatic Stress Disorder.

18. In 2003, after a tragic dispute in his driveway that led to his son-in-law’s death, Mr. Terwilliger was arrested and charged with manslaughter. He has been incarcerated since then.

19. Mr. Terwilliger was found guilty of manslaughter at his original trial in 2005. He was initially given a sentence of 30 years, execution suspended after 15 years of prison and 10 years of probation. Under his original sentence, he would have been released in 2018.

20. Mr. Terwilliger appealed his initial conviction and won a new trial. At his second trial, he was convicted and received a sentence of 20 years. He is now due for release in September 2021.

21. Mr. Terwilliger is at high risk of exposure to COVID-19 in prison. He is aware that other inmates have COVID-19 and that correctional officers have the virus as well. He lives with a cellmate, making it impossible for him to self-isolate to protect himself from the virus.

22. Mr. Terwilliger’s family members are terrified that if he contracts COVID-19, he will become very sick and die because of his age and medical conditions. His family is anxious for his release from the dangerous conditions in which he is living.

23. Respondents approved Mr. Terwilliger on or around April 7 for community release to Hartford, Connecticut, but have not in fact released him, for undisclosed reasons.

24. Mr. Terwilliger wishes to be released to live with his daughter in Georgia. His daughter is willing to meet all of his needs and take care of him. His daughter has a bedroom set up for his arrival. His daughter is also willing to personally provide transportation for Mr. Terwilliger from Osborn CI to Georgia.

25. Mr. Terwilliger could self-quarantine in Georgia for as long as necessary. He should be allowed to go to Georgia where he has family support and a safe, stable place to live.

26. In Georgia, Mr. Terwilliger could seek health care from a nearby VA hospital if needed.

B. The COVID-19 Pandemic has Created a Statewide and National Emergency.

27. COVID-19 is a highly infectious, novel coronavirus that has reached pandemic status. As of April 18, 2020, over 2,160,000 individuals in over 110 countries and territories have been diagnosed with coronavirus and 146,088 people have died as a result.¹

28. In the United States alone, over 770,000 people have been diagnosed with coronavirus as of April 21 (as of the day of this filing),² with over 20,000 confirmed cases in the state of Connecticut.³

29. A vaccine for COVID-19 is not expected to be available for another 12 to 18 months.

30. COVID-19 is 10 times deadlier than the common flu. It causes severe disease in approximately 16% of cases, with around 20% of infected patients requiring hospitalization. The

¹ World Health Organization, *Coronavirus disease 2019: Situation Report – 89* (Apr. 18, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200418-sitrep-89-covid-19.pdf?sfvrsn=3643dd38_2.

² Centers for Disease Control and Prevention, *COVID-19: U.S. at a Glance*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-in-us.html (last accessed Apr. 21, 2020).

³ Connecticut Department of Public Health, *COVID-19 Update* (Apr. 21, 2020), <https://portal.ct.gov/-/media/Coronavirus/CTDPHCOVID19summary4212020.pdf?la=en> (last accessed Apr. 21, 2020).

observed fatality rate of COVID-19 will be significantly higher if local healthcare resources are overwhelmed.

31. Fatality rates for coronavirus are increased in certain populations of individuals. People over the age of 50 are at higher risk, with those over 70 at serious risk. At any age, the risk of severe disease is higher in people with certain medical comorbidities including: heart disease, history of strokes, blood disorders, and lung disease.⁴

32. Transmission of COVID-19 is thought to occur predominantly via person-to-person contact and contact with infected surfaces. Coughing and sneezing produce respiratory droplets which spread COVID-19 to individuals in close proximity—as far as six feet away. The virus can remain in the air for several hours and on surfaces for several days.

33. Containment and social distancing are two main categories of interventions intended to prevent the spread of COVID-19. Containment includes intensive handwashing, decontamination of surfaces, and identification and isolation of infected individuals and close contacts. Social distancing involves remaining 6 to 12 feet from other people.

C. Incarcerated Individuals Are Particularly Vulnerable to COVID-19 Infection.

34. Prisons are particularly susceptible to the spread of infectious diseases. HIV, Hepatitis B and C, and tuberculosis are significantly more common in prisons than in the community-at-large. Severe outbreaks of H1N1 influenza occurred in prisons during the epidemic in 2009.

⁴ Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19): People Who May Be at Higher Risk for Severe Illness* (2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html>.

35. Of the eight largest clusters of COVID-19 cases in the United States, six are in prisons and jails. The largest single outbreak in the entire United States is at an Ohio prison, with 1,937 cases.⁵

36. Many prison facilities lack the medical infrastructure necessary to identify, isolate, and treat infected individuals. Medical care is often provided by part-time or under-qualified individuals with inadequate personal protective equipment. These limited resources increase reliance on already-taxed outside healthcare facilities.

37. Many prisons lack sanitary equipment to appropriately disinfect surfaces, and personal protective equipment for prisons and correctional staff.

38. Asymptomatic persons can carry and transmit COVID-19. Screening and isolation of symptomatic cases alone will not prevent viral spread.

39. Placement of incarcerated individuals in solitary confinement, as DOC has done for some persons who tested positive for the virus, is not an effective method of preventing exposure to COVID-19. Solitary confinement units share ventilation systems with other parts of the prison facility, potentially allowing for airborne viral transmission. Meal preparation and service necessitate contact with correctional staff, and hygiene activities such as showering carry the risk of exposure to infected surfaces.

D. Respondents Have Failed to Adequately Respond to COVID-19 in Connecticut Prisons Including Osborn CI.

40. As of April 21, the day of this filing, 222 DOC staff members and 308 inmates have contracted COVID-19.⁶

⁵ *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

⁶ Connecticut Department of Correction, *COVID-19 Tracker* (Apr. 21, 2020), <https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Health-Information-and-Advisories>.

41. On April 13, the first individual incarcerated in a Connecticut state prison died of COVID-19. That person was serving just a two-year sentence and like Petitioner had been approved for community release, but DOC failed to identify another place for him to live. Instead of being released, he remained incarcerated and died.

42. Connecticut is currently experiencing a widespread outbreak of COVID-19, with 305 cases in Tolland County alone, where Osborn CI is located and Respondents have confined Mr. Terwilliger.⁷ Nonetheless, the prisons continue to face a constant influx of persons from community settings, including both correctional staff and newly incarcerated individuals.

43. At Osborn CI, inmates and corrections officers have tested positive for COVID-19. On April 13, DOC reported the first death of an Osborn CI inmate from COVID-19.⁸ The inmate was sixty-two years old.⁹

44. Conditions in Osborn CI present significant potential for rapid spread of COVID-19. Incarcerated individuals are in close proximity on a constant basis, and interact frequently with communal surfaces. The facility layout does not provide the ability to achieve social distancing and spaces are poorly ventilated.

45. On April 9, DOC spokesperson Andrius Banevicius confirmed via email that an incarcerated person tested positive for COVID-19 at Osborn CI.¹⁰ That individual shared a housing

⁷ Connecticut Department of Public Health, *COVID-19 Update* (Apr. 21, 2020), <https://portal.ct.gov/-/media/Coronavirus/CTDPHCOVID19summary4212020.pdf?la=en>.

⁸ Taylor Hartz, *Dozens of Protesters Call for Prisoner Release as First Inmate Death from COVID-19 Reported*, *The Day* (Apr. 13, 2020), <https://www.theday.com/article/20200413/NWS01/200419781>.

⁹ Taylor Hartz, *Dozens of protesters call for prisoner release as first inmate death from COVID-19 reported*, *THE DAY* (Apr. 13, 2020), <https://www.theday.com/article/20200413/NWS01/200419781>.

¹⁰ Eliza Fawcett & Steven Goode, *State Department of Correction moves inmates with COVID-19 to Northern Correctional Institution, though quarantine questions persist*, *HARTFORD COURANT*, (Apr. 10, 2020), <https://www.courant.com/coronavirus/hc-news-coronavirus-northern-correctional-institution-20200410-scty5r36ygzflkw7a3iuw7gam-story.html>.

unit with other incarcerated people. Mr. Banevicius said that “a few offenders were inadvertently released for a short period of time from the quarantined unit.”

46. Though Mr. Banevicius said those inmates were “quickly recalled as soon as the error was discovered,” there is no telling how many additional inmates were infected due to the error. As of Friday, April 10, nine others from the same unit had tested positive for COVID-19.

47. On April 16, six individuals incarcerated at Osborn CI who tested positive were transferred to Northern CI’s Medical Isolation Unit.¹¹

48. On April 17, three more individuals incarcerated at Osborn CI who tested positive were transferred to Northern CI’s Medical Isolation Unit.¹²

49. On April 21, one more individual incarcerated at Osborn CI who tested positive was transferred to Northern CI’s Medical Isolation Unit.¹³

E. Petitioner David Terwilliger Is Especially Vulnerable to COVID-19.

50. Mr. Terwilliger has a number of risk factors in addition to his status as an incarcerated individual that make him particularly vulnerable to severe COVID-19.

51. The largest study of COVID-19 patients found an overall case-fatality rate (“CFR”) of 2.3%.¹⁴

52. Mr. Terwilliger is 80 years old. The CFR for individuals aged 80 years and older is 14.8%—approximately seven times that of the general population.¹⁵

¹¹ Connecticut Department of Correction, *COVID-19 Tracker* (Apr. 16, 2020), <https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Health-Information-and-Advisories>.

¹² Connecticut Department of Correction, *COVID-19 Tracker* (Apr. 17, 2020), <https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Health-Information-and-Advisories>.

¹³ Connecticut Department of Correction, *COVID-19 Tracker* (Apr. 21, 2020), <https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Health-Information-and-Advisories>.

¹⁴ Zunyou Wu & Jennifer M. McGoogan, *Characteristics of and Important Lessons From the Coronavirus Disease 2019 (COVID-19) Outbreak in China: Summary of a Report of 72,314 Cases from the Chinese Center for Disease Control and Prevention*, 323(13) J. AM. MED. ASS’N 1239 (2020).

¹⁵ *Id.*

53. Mr. Terwilliger has survived multiple heart attacks. The CFR for individuals with cardiovascular disease is 10.5%—approximately five times that of the general population.¹⁶

54. Mr. Terwilliger has also suffered a stroke and transient ischemic attacks.

EXHAUSTION OF STATE COURT REMEDIES

55. There is no statutory exhaustion requirement under 28 U.S.C. § 2241.

56. If the Court concludes that there is an exhaustion requirement under 28 U.S.C. § 2241, or that Mr. Terwilliger must properly proceed on this petition under 28 U.S.C. § 2254, then any failure to exhaust should be excused as futile.

57. The Connecticut Judicial Branch is functionally unavailable to serve as an avenue for relief due to the unprecedented interruptions to all sectors of society caused by COVID-19.

58. The Connecticut state courts are operating at severely reduced capacity. According to its March 12, 2020, Continuity of Operations Plan, the Judicial Branch was scheduling and hearing only items considered “Priority 1 Business Functions.”

59. Habeas petitions are not in the category of “Priority 1 Business Functions,” nor are any other mechanisms by which individuals in the state’s custody may challenge the legality of their confinement.

60. Connecticut General Statutes § 52-466 requires that a petition for a writ of habeas corpus be made to the Superior Court for the Tolland Judicial District.

61. As of the filing of this Petition, no courthouse is open in the Tolland Judicial District; no courthouse has been specified for transfer of matters ordinarily before that court.

62. As of April 15, 2020, the six operating Superior Courts have begun accepting non-Priority 1 civil filings via lockboxes in their lobbies. There has been no provision made for filings

¹⁶ *Id.*

at the Superior Courts, including the Tolland Judicial District, that are not currently operating, nor for expedited processing of emergency filings.

63. Therefore, there is no state forum available to hear Mr. Terwilliger's petition, rendering it impossible for him to seek relief from his continued confinement through the processes established by the State of Connecticut.

64. On this habeas petition, no statutory exhaustion requirement applies under 28 U.S.C. § 2241. To the extent the Court determines this petition is cognizable only under 28 U.S.C. § 2254, or that a prudential exhaustion requirement applies under 28 U.S.C. § 2241, such a petition is not subject to an exhaustion requirement when pursuing state remedies would be futile, including in the "absence of a state corrective process" or when "circumstances exist that render state processes ineffective to protect petitioner's rights." *Id.* § 2254(b)(1)(B)(i-ii); *see Duckworth v. Serrano*, 454 U.S. 1, 3 (1981); *Washington v. James*, 996 F.2d 1442, 1449 (2d Cir. 1993).

65. The functional closure of Connecticut courts in the face of the COVID-19 pandemic constitutes the absence of a state corrective process and circumstances that render state processes ineffective to protect Mr. Terwilliger's rights.

66. Inordinate delay in processing claims can also render exhaustion futile. *U.S. ex rel. Goodman v. Kehl*, 456 F.2d 863, 869 (2d Cir. 1972). To the extent that the state courts are conducting any business, their pace is insufficient to protect Mr. Terwilliger's rights. *See, e.g., Connecticut Criminal Def. Lawyers Ass'n et al v. Lamont*, CV20-6126477-S (Conn. Super. Ct. Apr. 3, 2020) (mandamus action to compel release of certain pretrial detainees and prisoners). Meanwhile, the number of confirmed cases in DOC facilities continue to rise.

67. Given the unprecedented circumstances created by COVID-19, a delay of even days or weeks in docketing and considering Mr. Terwilliger's claim for relief constitutes a violation of his rights, and could threaten his very life.

JUDICIAL AUTHORITY TO ADMIT TO BAIL

68. This Court has the "inherent authority" to admit a state prisoner to bail and order his immediate release pending adjudication of his habeas petition. *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001); *see also Rado v. Meachum*, 699 F. Supp. 25, 26 (D. Conn. 1988) ("A federal court has the inherent power to release a state prisoner on bail pending resolution of his habeas petition.").

69. To qualify for admission to bail, an individual must show that "extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective." *Mapp*, 241 F.3d at 230.

70. The risk that COVID-19 poses to Mr. Terwilliger given his age and medical conditions is an extraordinary circumstance that warrants his immediate release. If Mr. Terwilliger remains incarcerated, there is a high risk he will contract COVID-19 and as a result suffer severe illness or death. Immediate release is therefore the only way for Mr. Terwilliger to vindicate the habeas remedy.

LEGAL CLAIMS

FIRST CAUSE OF ACTION

VIOLATION OF EIGHTH AMENDMENT

71. Petitioner realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

72. The Eighth Amendment protects prisoners from cruel and unusual punishment, which extends to conditions of confinement. Prisons have an affirmative obligation to provide adequate care to address prisoners' medical needs, *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), and officials may not ignore conditions that are likely to cause grave illness in the future, *Smith v. Carpenter*, 316 F.3d 178, 185 (2d Cir. 2003).

73. COVID-19 presents a high risk of serious illness or death for individuals with underlying health conditions, including cardiovascular conditions, and for individuals of advanced age. DOC officials are aware of this risk and have failed to take reasonable steps to prevent future harm.

74. Before the COVID-19 outbreak, Respondents lacked adequate medical staff, personal protective equipment, and medical facilities to provide medical care during an outbreak of this nature. Its insufficient response has created unconstitutional conditions of confinement.

75. Respondents and other DOC staff continue to knowingly and recklessly subject Mr. Terwilliger to conditions under which he faces imminent risk of contracting COVID-19. He is at a high risk of mortality secondary to infection, and respondents' failure to take appropriate steps to abate this risk constitutes deliberate indifference to Mr. Terwilliger's right to be free from cruel and unusual punishment.

76. Respondents can fulfill the constitutional requirement to mitigate the risk at which they have placed Mr. Terwilliger only by releasing him. *See also DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (“[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, . . . medical care, and reasonable

safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.”).

77. Respondents are violating Mr. Terwilliger’s Eighth Amendment rights by continuing to confine him in conditions that greatly increase his risk of exposure to COVID-19, which could prove deadly due to his advanced age and multiple comorbidities.

SECOND CAUSE OF ACTION

VIOLATION OF AMERICANS WITH DISABILITIES ACT

78. Petitioner realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

79. Title II of the Americans with Disabilities Act (“ADA”) prohibits public entities from discriminating against qualifying individuals with disabilities by depriving them of the opportunity to participate in services, programs, or activities of the public entity because of a disability. 42 U.S.C. § 12132.

80. DOC is a public entity covered by Title II of the ADA. 42 U.S.C. § 12131.

81. Mr. Terwilliger’s medical conditions qualify as disabilities under the ADA. 42 U.S.C. § 12102(1) in that they substantially limit major life activities, including respiratory and circulatory functions, breathing, walking, and hearing. 42 U.S.C. § 12102(2).

82. Respondents are violating Title II of the ADA by failing to provide Mr. Terwilliger with reasonable accommodations necessary and available to protect his life—which in this case include granting him immediate release into the care of relatives who are able to ensure his health and safety.

PRAYER FOR RELIEF

WHEREFORE, Petitioner David Terwilliger respectfully requests that the Court:

- a) Admit him to bail and order his immediate release pending disposition of the underlying petition, *see Mapp*, 241 F.3d at 226;
- b) Order prompt return by Respondent Warden Rodriguez;
- c) Issue a Writ of Habeas Corpus and order his immediate release from custody to his family in Georgia;
- d) Award him his costs and reasonable attorneys' fees; and
- e) Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

/s/ Michael J. Wishnie

Jade Ford*

Arjun Mody*

Kayla Morin*

Cara Newlon*

Molly Petchenik*

Leah Samuel*

Blake Shultz*

Casey Smith*

Law Student Interns

Renee Burbank, Supervising Attorney, ct30669

Marisol Orihuela, Supervising Attorney, ct30543

Michael J. Wishnie, Supervising Attorney, ct27221

Jerome N. Frank Legal Services Organization

Veterans Legal Services Clinic

Yale Law School

P.O. Box 209090

New Haven, CT 06520

Phone: (203) 432-4800

michael.wishnie@ylsclinics.org

Counsel for Petitioner

*Motion for Law Student Appearances
Forthcoming.