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STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY	SUPERIOR COURT DIVISION NO.: 20 CVS 500110

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, DISABILITY RIGHTS NORTH CAROLINA, AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, KIM T. CALDWELL, JOHN E. STURDIVANT, SANDARA KAY DOWELL, and CHRISTINA RHODES,

Plaintiff-Petitioners,

v.

ROY COOPER, Governor of the State of North Carolina, ERIK HOOKS in his official capacity as Secretary of the North Carolina Department of Public Safety, and BILL FOWLER, ERIC MONTGOMERY, ANGELA BRYANT, and GRAHAM ATKINSON, in their official capacities as Post-Release Supervision and Parole Commissioners,

Defendant-Respondents.

PRELIMINARY INJUNCTION

This matter came before the Undersigned on Plaintiffs' Motion for Preliminary Injunction. Properly noticed hearings were held remotely on April 28, 2020 and June 3, 2020 via Webex by consent of the parties. The Court having considered the submissions of the parties, matters of record, and the arguments of counsel, hereby orders that Plaintiffs' Motion for Preliminary Injunction is GRANTED to the extent set forth herein.

BACKGROUND

A preliminary injunction is properly ordered when (1) a plaintiff shows a likelihood of victory on the merits and (2) a plaintiff is likely to sustain irreparable loss unless the injunction is issued. *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 577, 561 S.E.2d 276, 281 (2002).

The Court must also perform a balancing of equities in order to grant a preliminary injunction within the court's discretion. *State v. School*, 299 N.C. 351, 357-58, 261 S.E.2d 908, 913 (1980)).

The Court finds it likely that Plaintiffs will succeed on the merits of their claim that the conditions of confinement for people in Defendants' custody violate Article I, § 27 of the North Carolina Constitution. Absent additional guidance from North Carolina's appellate courts, the Court notes the difference between the Eighth Amendment's "cruel and unusual" standard as compared to Article I, § 27's "cruel or unusual" standard. This case is distinguished from *State v. Green*, which only holds that North Carolina courts have historically "analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions." 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998). The analysis in that case differs from the question before the Court, which is not whether a particular sentence violates a criminal defendant's rights, but relates to the State's responsibility to care for the medical needs of incarcerated people. *See Hutto v. Finney*, 437 U.S. 678 (1978). This responsibility has been given great deference. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976).

The Court recognizes the difference between the text of Article 27 of the North Carolina Constitution, which prohibits "cruel or unusual punishment" and the Eighth Amendment of the U.S. Constitution, which prohibits "cruel and unusual punishment." The Court need not decide the legal standard to be applied under the state Constitution, because the Eighth Amendment sets the minimum protections safeguarded under Article I, § 27, and Plaintiffs are likely to satisfy the Eighth Amendment standard that Defendants have been deliberately indifferent to a substantial

risk of serious harm test. *Farmer v. Brennan,* 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 811 (1994).

It appears based on the record that Defendants have failed to provide the sufficient COVID-19 testing to accompany the crowded and communal social distancing protocols; Defendants are transferring incarcerated individuals between facilities without properly protecting those individuals, or preventing the spread of COVID-19, in contradiction to Centers for Disease Control ("CDC") guidelines; and Defendants are providing disparate levels of COVID-19 protection between different facilities. The Court finds that these actions, at the very least, lie "somewhere between the poles of negligence at one end and purpose or knowledge at the other." *Id.* 511 U.S. at 836.

Further, this Court holds that Plaintiffs have established a risk of irreparable harm, including the risk of COVID-19 rapidly spreading throughout the vulnerable prison population, along with the substantial risk of death and long-lasting health consequences stemming from the disease. Thousands of these individuals in Defendants' custody are elderly, have disabilities, or have underlying health conditions, making them particularly vulnerable to COVID-19's threat of serious injury and death. The balance of equities and the public interest favor the granting of Plaintiffs' Motion for Preliminary Injunction. When considering the challenges associated with protecting incarcerated people against the substantial risk of rapid and deadly spread of a fatal disease throughout a population over which Defendants have non-delegable responsibilities, the only equitable and proper path forward is through preliminary injunction.

Accordingly, the Court orders the following preliminary injunctive relief based on the determination that Plaintiffs are likely to establish deliberate indifference to substantial risks of serious harm created by (1) overcrowding and cohort-based social distancing, (2) transfers, and

(3) disparate levels of COVID-19 protections in different facilities. The actions ordered herein are to continue in effect as required to address the substantial risk posed by COVID-19. The Court will continue this order in effect and establish such other orders as necessary. Defendants may move for the dissolution of this Preliminary Injunction when Defendants can show that the risk of COVID-19 across prison facilities around the state has been satisfactorily diminished or for good cause based on other changed circumstances, such that the below injunction is no longer necessary to ensure compliance with Article I, § 27 and to prevent irreparable harm or the matter has been heard in full.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs have demonstrated a likelihood of succeeding on their claim that Defendants are in violation of Article I, § 27 of the North Carolina Constitution.
2. The terms of this Preliminary Injunction apply to Defendants, their officers, agents, contractors, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice in any manner of this Order. References in this Order to "Defendants" encompasses all individuals and entities referenced in this paragraph.
3. With regard to overcrowding, the Court hereby orders that:
    a. Defendants shall reopen the application process for any homes, facilities, organizations, and programs which are willing to participate as reentry partners to serve incarcerated or formerly incarcerated individuals who meet the necessary requirements for post-release or extended-limits-of-confinement services.
    b. The Court authorizes Defendants to identify and determine if any new factors can be utilized to calculate sentence credits for those who have met the minimum

sentence requirements and may be used in effectuating their release. For purposes of calculating and awarding sentence reduction credits, extending limits of confinement, or any other method of release, Defendants are directed to apply additional factors as outlined below, and may identify and determine additional factors to be considered when calculating sentence reduction credits.

i. The Court deems the additional factors referenced in this paragraph a necessary measure for population management of facilities to achieve the safety and protection of each person in custody during the time when there is still a risk or concern for the spread of COVID-19 of such magnitude that the State is taking emergency action(s) with regard to COVID-19 through the application of Executive Orders by the Governor.

ii. The additional factors to be considered for the calculation of sentence credits may include but are not limited to known vulnerabilities and high-risk factors as identified by the CDC and/or DHHS.

iii. For incarcerated people who are eligible for release due to sentence credits awarded or extension of their limits of confinement, or who may have become eligible under the factors outlined above, Defendants shall take affirmative steps to apply the factors to effectuate such releases and make individuals aware of their eligibility.

iv. Defendants shall identify those incarcerated people who are or will be within 30 days of the date of this Order eligible for consideration for release according to this paragraph, including those incarcerated people

who have completed or will complete within 30 days of the date of this Order their statutory minimum sentence, making them eligible for outright release through the use of sentencing reduction credits. Defendants shall continue to evaluate individuals for discharge under the terms of this paragraph, including when they are within 30 days of their statutory minimum sentence in order that release need not be delayed once the sentence reduction credit factors (as modified by this paragraph) are applied. The provisions of this paragraph are subject to the Court's continued oversight to ensure that Defendants achieve compliance with Article I, § 27 and the order of the Court. Nothing in this Order precludes Defendants' use of means not specified herein to achieve compliance with Article I, § 27.

v. Nothing in this Order precludes an individual petitioner or petitioners' claims for relief via motion for appropriate relief, petition for habeas corpus, or any other form of relief that may be available to the individual petitioner or petitioners.

4. With regard to transfers, the Court orders that:

a. There shall be no transfer of any person in DPS custody (other than for medical or health reasons or to address an immediate and serious risk to the person's safety or another's safety), unless the person is first tested for COVID-19. In addition, all individuals newly admitted shall first be tested for COVID-19. In lieu of a test, the person may be isolated for 14 days after transfer, as recommended by the CDC.

b. Isolation, for purposes of the preceding subparagraph, must not be effectuated with actions or in a manner that would have otherwise been used for punitive or disciplinary purposes prior to the COVID-19 pandemic. For purposes of this paragraph, prohibited methods include: the use of solitary confinement or isolation that would have been deemed punitive prior to the COVID-19 pandemic and includes loss of privileges such as confinement to a locked cell, restriction of phone calls, loss of canteen privileges, personal property, restrictions to recreational, religious, educational or vocational activities, exercise, TV, radio, and placement in restraints for out-of-cell time that would otherwise be available but for the require isolation

5. With regard to conditions in Defendants' prisons, the Court orders:

    i. Defendants shall cooperate with counsel for Plaintiffs to develop and submit to the Court, by noon on June 22, 2020, a plan that Outlines the necessary steps for testing each individual in each of Defendants' prisons;

    ii. Defendants shall develop and submit to the Court, by noon on June 22, 2020, a plan that identifies the disparities in prevention strategies that exist between different facilities.

        1. This plan will address current prevention strategies and report all measures already taken to implement these strategies. The report will reflect variations between facilities to be addressed to avoid disparate treatment. In no event shall the availability of personal

protective equipment, other preventative equipment, cleanliness or distancing standards at any facility be reduced.

2. Upon the submission Defendant's plan, Plaintiffs may file objections or suggest modifications.

3. Defendants shall provide to counsel for Plaintiffs a draft plan, no later than 5 p.m. on June 19, 2020. The draft plan shall include but is not limited to the following information :

iii. A description of the prevention strategies taken at each prison;

iv. A census of each prison, and photographs or videos and a description of the living and sleeping spaces of each, including the number and size of cells in each cell block and dormitories, the number and location of windows in the cells and dormitories, the number of individuals assigned to each, and the length of space available between bunks; the current conditions of confinement applied to individuals in each cell block including whether the door to the cell is locked and for how many hours a day, any restriction of phone calls, loss of canteen privileges, personal property, restrictions of recreational, religious, educational or vocational activities, exercise, TV, radio, and placement in restraints for out-of-cell time.

v. The number of "cohorts" at each prison, the number of people in each cohort, how the cohorts are determined, and how many people in each cohort have been tested for COVID-19;

vi. An accounting of and photographs of the types of masks distributed to individuals and staff at each prison, and information as to how many masks each incarcerated person has been issued;

vii. A description and photographs or videos of the cells used to isolate individuals who have tested positive for COVID-19 at each prison and a description of the medical care and treatments that are provided to them during their isolation.

viii. A description of what, if any, measures are taken at each prison to specifically protect people over the age of 65 and people who, at any age, have any of the underlying medical conditions listed above in paragraph 4(b)(ii) of this Order.Any other information that the parties agree to be necessary or useful to comply with the Court's Order for a plan as described above.

6. This Preliminary Injunction shall continue in effect until there is a full determination of the merits of the claims in this action, unless otherwise expressly superseded by a subsequent order of this Court.

7. The Plaintiffs' bond in the amount of $1 is sufficient for the issuance of this Order.

SO ORDERED this 16th day of June, 2020.

THE HONORABLE VINSTON ROZIER, JR.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via e-mail transmission addressed as follows:

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This the 16th day of June 2020.

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