

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
No. 20CVS500110

NORTH CAROLINA STATE  
CONFERENCE OF THE NAACP, *et al.*,

Plaintiff-Petitioners,

v.

ROY COOPER, in his official capacity  
as Governor of North Carolina,  
*et al.*,

Defendant-Respondents.

**PLAINTIFFS' SUPPLEMENTAL SUBMISSION FOLLOWING  
OCTOBER 15, 2020 STATUS REVIEW HEARING**

NOW COME Plaintiff-Petitioners ("Plaintiffs"), by and through counsel, and respectfully submit for the Court's consideration the following supplemental points and information, which address concerns and issues discussed by the Court at the October 15, 2020 Status Review Hearing.

**1. Transfer and Quarantine Data.**

At the Status Review Hearing, Defendants said that they are primarily complying with this Court's Order by quarantining transferees in "quarantine dorms," as opposed to testing people before transfer. According to Defendants, since or about August 16, 2020 (the first day of Week 6), all DPS facilities except Randolph Correctional Center have "quarantine dorms," Defs' Update (Oct. 13,

2020) at 7, which “house a maximum of 32-34 offenders,” Defs’ Resp. to Mot. Enforce (Aug. 26, 2020) at 15-16; Ishee Sixth Aff. ¶ ¶28-30. Defendants make no mention of any prison having more than one Quarantine Dorm.

As presented by Plaintiffs’ counsel during the Status Review Hearing, Plaintiffs state the following concerns regarding Defendants’ transfer and quarantine practices.

***a. The use of “quarantine dorms” without testing encourages transmission of COVID-19.***

Defendants’ data shows people routinely arrive at the same destination facility on the same day from many different facilities, without a COVID-19 test immediately before transfer. Because tests are not performed before transfer, DPS has no idea if people who are quarantined together at the destination facility are COVID-19 positive. These people, some of whom may be COVID-19 positive, are then quarantined together in the same “quarantine dorm,” exposing new transferees in these dorms to a high risk of COVID-19 infection from other untested transferees.

For example, during Week 12 (Sept. 27 - Oct. 3, 2020) at Caldwell Correctional Center:

- 53 people from 10 facilities were transferred into Caldwell CC.
- On Sept. 29, 24 administrative transfers came into Caldwell CC from Craven CI, which had a sustained COVID-19 outbreak in the seven weeks preceding the transfers. Two of those transferred had tested positive on their last test, and none had been tested in over a month.
- 5 administrative transfers into Caldwell CC that week came from Piedmont CI, which was experiencing an active outbreak and reported

44 positive cases that week. None of those transferees had been tested in the prior two weeks before transfer.

See Defs’ 28th Notice of Filing (Oct. 6, 2020) at 5-11. That same week, 67 people were transferred to Southern Correctional Institution (over twice the maximum capacity of a “quarantine dorm”). Thirty of these transfers to Southern CI were administrative transfers from Craven CI, which had previously experienced a weeks-long outbreak. All of these transferees had not been tested for two weeks or more when transferred.

***b. Defendants’ data shows new transfers into a prison on consecutive weeks, even though a quarantine is supposed to last 14 days.***

As counsel for Defendants stated during the Status Review Hearing, placing new transferees into a “quarantine dorm” at any time during an ongoing 14-day quarantine period would go “against the principles of quarantine,” because it would result in possibly introducing a person carrying COVID-19 in the middle of others’ period of quarantine. But as the Table below illustrates, Defendants’ weekly filings show that Defendants are transferring people into the same facility on multiple consecutive weeks, raising concerns that newly transferred incarcerated people are being introduced to “quarantine dorms” *before others who are already there have finished their 14-day quarantine period.*

**TABLE 1: Prisons Reporting New Transfers on Consecutive Weeks**

Facility	WK 6	WK 7	WK 8	WK 9	WK 10	WK 11	WK 12	WK 13	Total
Albemarle	0	1	4	2	1	1	2	2	13
Alexander	52	19	12	6	6	7	5	5	112
Avery-Mitchell	35	1	1	0	7	13	11	9	77
Bertie	4	10	4	0	29	2	0	0	49

Caldwell	1	0	1	16	4	4	53	5	84
Carteret	5	1	1	0	0	3	8	9	27
Eastern	1	22	11	0	2	3	0	1	40
Franklin	1	3	4	1	17	2	35	4	67
Greene	4	58	9	7	28	2	1	0	109
Marion	5	17	0	0	10	12	0	0	44
Maury	6	20	12	4	2	2	5	11	62
Mountain View	5	25	6	21	8	24	2	2	93
Nash	1	1	5	7	10	1	2	2	29
Pasquotank	6	19	31	2	2	12	28	27	127
Tabor	1	39	28	26	28	31	5	0	158

See Defs’ 18th & 23rd-29th Notices of Filing.

*c. Defendants’ data shows that there are often more transfers in a given week than a “quarantine dorm” can accommodate.*

Despite Defendants’ representation to this Court that the “quarantine dorm” in each of their prisons can house a maximum of only 34 people, Defendants’ weekly filings show that DPS is transferring more people into non-diagnostic facilities<sup>1</sup> than fit into one 34-person “quarantine dorm.” These numbers are illustrated in the table below.

**TABLE 2: Prisons Reporting >34 Incoming Transfers in a Given Week**

Week	Facility	Transfers to Facility
6 (8/16-8/22)	Davidson CI	49
7 (8/23-8/29)	Greene CI	58
	Columbus CI	57
	Southern CI	58
8 (8/30-9/5)	Caledonia	46
	Catawba	41

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<sup>1</sup> Defendants have previously explained that they define a “diagnostic facility” as one of six prisons where people newly admitted from county jails are processed for intake. Ishee Sixth Aff. ¶49-50.

	Tyrrell	41
9 (9/6-9/12)	Morrison	44
12 (9/27-10/3)	Caldwell	53
	Southern	67
	Wilkes	45
14 (10/11-10/17)	Anson	43
	Bertie	46

See Defs' 18th & 23rd-25th, 28th, & 30th Notices of Filing.

***d. Contrary to Defendants' representations to the Court, Randolph CC, which has no "quarantine dorm," has received transfers of incarcerated people who were not tested immediately before transfer.***

In Defendants' pre-Status Review Conference filing to the Court, Defendants explained that Randolph Correctional Center has no "quarantine dorm," and stated that all transfers to Randolph CC therefore "should have been tested immediately before transfer." Defs' Update (Oct. 13, 2020) ¶ 11. Counsel for Defendants again emphasized this point at the Status Review Hearing.

But the weekly filings from Defendants for Week 6, Week 7, and Week 10 show that many people were transferred to Randolph CC well after August 16, 2020, (the date Defendants' "quarantine dorm" plan began) who had not been tested in weeks. In fact, between August 20, 2020, and September 16, 2020, 13 people were transferred to Randolph CC based on tests that were around a month old or older, and:

- 11 of those 13 transfers were administrative, and one of those administrative transferees had tested positive on their last COVID-19 test, which was administered nearly two months before the transfer.
- 7 people were transferred from Piedmont CI to Randolph CC in Week 7. In Week 8, Piedmont experienced an outbreak of COVID-19.

- 1 administrative transfer during Week 10 was from Scotland CI, which was then in the middle of a weeks-long sustained outbreak and where 61 people tested positive for COVID-19 that week.
- 2 administrative transfers in Week 10 were from Central Prison, which that week was experiencing a new outbreak.

See Defendants 18th, 23rd, and 26th Notices of Filing. Defendants marked all 13 of those transfers to Randolph CC as having undergone quarantine, but it is unclear how they were quarantined if Randolph CC has no “quarantine dorm,” especially given that on at least one day (8/26/2020), six people were transferred in at the same time from Piedmont CI.

***e. Defendants’ post-hearing Week 14 Filing reveals continuing outbreaks and concerning testing and transfer data.***

Since the Status Review Hearing, Defendants have submitted their Thirtieth Notice of Filing reporting testing and transfer data for Week 14 (Oct. 11-17, 2020). Defendants’ Week 14 data shows a positive test rate of 18.9 percent, and the highest number of confirmed COVID-19 cases since mass testing was completed. *See* Defs’ 30th Notice of Filing. Currently, 18 of Defendants’ prisons are experiencing active outbreaks, also the highest number since mass testing was completed. *Id.*

Defendants’ Week 14 data also shows that the trend of prisons experiencing “sudden” spikes in positive COVID-19 cases after weeks of little-to-no testing, (which Plaintiffs laid out for the Court at the Status Review Hearing and in their pre-hearing report, Pls’ Report (Oct. 13, 2020) at 4-8) continues unabated.

Specifically, in Week 14:

- At Mountain View CI, there were 98 positive results out of 146 tests administered. In the previous nine weeks, fewer than 20 tests total had been administered at Mountain View CI.

- At Gaston CC, there were 38 positive results out of 60 tests administered. In the previous nine weeks, a total of three tests had been administered at Gaston CC.
- At Catawba CC, there were 35 positive results from 63 tests. No tests were performed at Catawba CC for the first five weeks after mass testing. While 36 tests were performed in Week 11 with 5 positive results, no testing was performed in Week 12 and only one test was performed in Week 13.
- At Morrison CI, between Weeks 11 and 13, only 6-14 tests were administered weekly, resulting in 5-9 positives per week. When testing was expanded to 165 tests in Week 14, the number of positive results skyrocketed to 55.
- At Warren CI, in Week 14 there were 11 positive results out of 131 tests administered. In the previous nine weeks, three or fewer tests per week were performed at Warren CI.

*See* Defs' 30th Notice of Filing (Oct. 19, 2020). This most recent data continues to underscore, as Plaintiffs laid out in more detail in their pre-hearing filing, that Defendants' failure to conduct surveillance testing as the Court has ordered has created conditions in which the virus is left to spread undetected throughout a prison for weeks without detection. It is clear there is an urgent need to ensure surveillance testing of a sampling of incarcerated people *and staff* from each housing unit, *as already ordered by this Court*. Pls' Report (Oct. 13, 2020) at 7-8.

Defendants Week 14 Filing also makes clear that other worrying trends, which were also identified by Plaintiffs at the Status Review Hearing, continue:

- There continue to be ongoing, sustained outbreaks at several facilities, including at Albemarle CI, Greene CI, Hyde CI, New Hanover CC, Pender CI, Piedmont CI, and Scotland CI. After two weeks of zero positive cases, Craven CI is once again reporting positive tests (11 positive cases) in Week 14.
- Defendants continue to complete hundreds of transfers weekly (420 in Week 14), 322 (or 76.7 percent) of which were administrative transfers,

and high numbers of those transfers are conducted without testing immediately prior to transfer.

- Alarming, increasing numbers of these transferees who are not tested immediately before transfer are people who tested *positive* on their last COVID-19 test. During Weeks 5 through 10, fifteen or fewer transferees per week had tested positive on their most recent test before transfer. In subsequent weeks that number has risen: Week 11 (46); Week 12 (24); Week 13 (60); and Week 14 (60).

See Defs' 27th-30th Notices of Filing.

## **2. Follow-Up Needs Identified at the Status Review Hearing.**

As the Court stated at the Status Review Hearing, there is a need for further follow-up and/or additional information regarding the various issues about which the Court inquired. Plaintiffs' respectfully submit that the following areas require further follow-up.

### ***a. The scope of "crimes against persons."***

Plaintiffs respectfully request that the Court direct Defendants to provide not only a complete list of the offenses covered by the term "crimes against persons," as it is used for implementing the Extended Limits of Confinement ("ELC") program, but also any materials that DPS staff rely on to define that term in determining whether an individual is disqualified from ELC based on their crime of conviction. These materials could provide insights into the Court's questions about the process and how that process could be streamlined for faster consideration of candidates for ELC.

### ***b. Number of hospitalizations.***

The website chart provided by Defendants in their pre-hearing filing indicates only the number of incarcerated individuals who are hospitalized on any



given day; the data provided does not show how many COVID-related hospitalizations there have been overall. Defs' Update (Oct. 13, 2020) at 10-11.

Plaintiffs respectfully request that the Court direct Defendants to provide:

- The date of each COVID-19-related hospitalization and the prison from which the person was hospitalized, and
- The date of each COVID-related medical transfer to the Central Prison Healthcare Complex and the prison from which the person was transferred.

This data will provide the Court a better understanding of hospitalizations since the beginning of the pandemic.

*c. Surveillance testing.*

During the Status Review Hearing, Defendants stated that it would take a month or more of testing for COVID-19 during annual TB tests before they might know what kind of samples from each prison and/or housing unit are captured in such a testing regime. As explained in Plaintiffs' pre-hearing report, coupling COVID-19 tests with annual TB screens is not what the Court has ordered nor what public health experts recommend, and further delaying the broad-based, surveillance testing that this Court ordered on July 10, 2020, will continue to leave people vulnerable and could lead to avoidable deaths. As this Court suggested during the Status Review Hearing, a simpler route is in order, and has already been ordered by the Court: Plaintiffs respectfully request that the Court order, without

further delay, that Defendants administer at least 2,583 COVID-19 tests<sup>2</sup> per month, distributed across each housing unit in each of their prisons.

***d. Role of a Court Liaison.***

At the Status Review Hearing, the Court acknowledged its concerns for keeping people in state custody safe. Plaintiffs respectfully submit that the best way to monitor the rapidly evolving situation in Defendants' prisons and save lives is the appointment of a Special Master or Court Liaison to assist the Court in carrying out its constitutional duty.

The Court and Plaintiffs must rely on information from Defendants. A Court Liaison or Special Master can engage more actively with Defendants, and can do so in real time, asking follow-up questions as needed to fully understand not just Defendants' position in periodic hearings, but the realities in the prisons in between hearings.

Plaintiffs respectfully suggest the following functions based on the status of the information that has emerged to date:

- i. **Evaluation of ELC Processing.** It is unclear how many staff are working on processing ELC eligibility, what additional resources could be useful, and what constraints are limiting the timely processing of individuals for release.
- ii. **Evaluation of ELC Criteria.** The Court's and the parties' understanding of the ELC process would be enhanced by the collection and analysis of data on which factors have limited the use of ELC or, conversely, how specific changes in ELC factors would impact population reduction. For example, a Court Liaison or Special Master could gather and assess data on how many

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<sup>2</sup> Defendants have stated that they have capacity to test each of their approximately 31,000 of their prison population each year. Defs' Update (Oct. 13, 2020) ¶41. Doing so would yield 2,583 per month.

additional people could be eligible for ELC consideration if the limits on release dates are extended or eliminated.

- iii. **Identification of Additional Avenues for Release.** A Court Liaison or Special Master could evaluate and advise on how additional mechanisms, such as time credits, could target reductions by, for example, focusing on reducing large cohorts. This individual could also identify barriers to Defendants' use of such mechanisms and seek to address those barriers.
- iv. **Identifying Emerging Outbreaks.** The Court and Plaintiffs are limited in their ability to identify emerging outbreaks because the data provided is backward-looking, and is general data regarding each facility (i.e. it is not specific to housing units). The ability to receive and review details at a housing unit level could aid the Court's understanding and evaluation of Defendants' efforts to prevent and remedy outbreaks.

As the Court noted, Defendants have full control of the facilities, and the virus continues to enter and spread. This has resulted in more infections, more hospitalizations, more deaths, and more outbreaks with no end in sight. Given Defendants' continued failure to remedy the ongoing cruel or unusual punishment of 31,000 human beings, Plaintiffs respectfully suggest that the Court consider the recommendations of a Court Liaison or Special Master to order additional measures consistent with the Court's constitutional role.

"Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it." *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 642 (2004) (citations omitted). If any statute, regulation, or policy prevents the Court from ordering an adequate remedy, that provision is invalid and must be ignored. *See Craig ex rel. Craig v. New Hanover Cty. Bd. of*

*Educ.*, 363 N.C. 334, 342, 678 S.E.2d 351, 357 (2009) (plaintiff could bring constitutional claim for damages even though the school board had not waived statutory immunity). And any remedy must be proportional in scope and substance to the constitutional injury. *See Brown v. Plata*, 563 U.S. 493, 527 (2011) (affirming statewide prison population cap when lesser remedies could not adequately address unconstitutional overcrowding). Applying these principles, a California state court recently ordered officials at San Quentin prison (which was ravaged by a large-scale outbreak, during which 28 incarcerated people died of COVID-19) to reduce the prison population to 50 percent of its June 2020 population. *In re Staichi*, 2020 Cal. App. LEXIS 974 (Cal. Ct. App. Oct. 20, 2020).

This the 21st day of October, 2020.

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## CERTIFICATE OF SERVICE

I certify that counsel for Defendants have stipulated to service via electronic mail, and that on October 21, 2020, I served the foregoing on:

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This the 21st day of October, 2020.

/s/ Leah J. Kang \_\_\_\_\_

Leah J. Kang

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