

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
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,)
Plaintiffs-Petitioners,)
v.)
ROY COOPER, in his official capacity)
as Governor of North Carolina, ERIK A.)
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,)
Defendants-Respondents.)

**DEFENDANTS' RESPONSE TO
REQUEST FOR ADDITIONAL
INFORMATION**

NOW COME Defendants, by and through the undersigned counsel, and hereby respond to the Court's order for additional information as follows.

Order for Production of Information #1

The Court has ordered Defendants to produce a listing of Defendants' prison or incarceration facilities which provides as to each a verified statement as to whether such facility provides to all incarcerated individuals:

- A. Face masks of the same type and quality as those provided to staff;
- B. More than one face mask per person;

- C. Unrestricted access to effective sanitation supplies including but not limited to hand soap, laundry soap, and alcohol-based sanitizer;
- D. Living conditions designed to reasonably prevent the spread of COVID-19, including but not limited to reassigning bunks to allow for six feet or more between each sleeping occupant, a “head to foot” bunk arrangement, and rearranged scheduling to prevent or eliminate the mixing of individuals between different housing areas;
- E. The opportunity to prevent the spread of COVID-19, in compliance with best practices as presented by the CDC, World Health Organization (WHO), or other learned and respected sources of public health procedure. These practices include, but are not limited to, social distancing, accessing restrooms and washing facilities which have undergone proper sanitation procedures; working in facilities which allow for social distancing; and eating and sleeping in facilities which allow for social distancing procedures.

RESPONSE: Defendants have provided a chart that details these issues, to the best of Defendants’ ability within the short time frame ordered by the Court, at each of Defendants’ 51 adult facilities. *See Facility Level Chart – Adult Facilities*. The information in this chart has been verified in facility-level affidavits that are being filed with this submission. *See Facility-Level Verifications*. In addition, the Affidavit of Todd Ishee, Commissioner of Prisons, expands upon the information previously provided to the Court in the Hooks affidavit and Supplemental Hooks affidavit, and attempts to address the specific issues raised by the Court’s order for additional information. *See Ishee Affidavit*. The Affidavit of William Lassiter and attached chart separately addresses these issues in the State’s juvenile facilities. *See Lassiter Affidavit and Facility Level Chart – Juvenile Facilities*. The Affidavit of Anthony Vann, Director of

Correction Enterprises, provides additional information concerning supplies available within state prisons. *See Vann Affidavit.*

Order for Production of Information #2

The Court has ordered Defendants to produce a listing of Defendants' prison or incarceration facilities which provides as to each a verified statement as to those facilities' current ability to suitably prevent the spread of COVID-19 throughout incarcerated populations in concert with Constitutional and statutory requirements. Defendants must also include information for each facility regarding:

- A. The number of positive COVID-19 cases, both as a number and as a percentage of the overall facility population;
- B. Any and all additional steps taken for facilities with any positive cases of COVID-19 in their populations.

RESPONSE: Defendants' chart sets forth this information at each of Defendants' 51 adult facilities. *See Facility Level Chart – Adult Facilities.* The information has been verified in affidavits that are being filed with this submission. *See Facility Level Verifications; see also Ishee affidavit.* In addition, facility level affidavits with additional information have been provided for facilities with confirmed cases. *See Affidavits for Bertie; Caledonia; Caswell; Neuse; NCCIW; Pasquotank; Pender; Scotland; and Southern.* Furthermore, an affidavit from Dr. David Snell, DPS' Medical Director, provides information about inmates' recovery from COVID-19. *See Snell Affidavit.*¹

¹ Dr. Snell was unable to have his affidavit notarized by the Court's deadline; however, a notarized version of the affidavit will be substituted as soon as practicable.

Order for Production of Information #3

The Court has ordered that, “If facilities are currently unable to suitably prevent the spread of COVID-19 such that incarcerated persons are substantially more likely to contract the disease than the non-incarcerated population, then Defendants are further ordered to provide to the Court and Plaintiffs for each prison or incarceration facility a detailed and specific plan demonstrating specific steps which DPS plans to take within the next thirty days to diminish the spread of COVID-19.”

RESPONSE: Defendants’ position is that the prevention and mitigation measures they have adopted are reasonably calculated to prevent the spread of COVID-19 in DPS facilities. Thus, Defendants do not believe that each of the facilities is unable to suitably prevent the spread of COVID-19. In fact, as of the time that the information was collected for this submission, more than 40 of North Carolina’s 51 adult prison facilities have no confirmed cases of COVID-19, and none of North Carolina’s juvenile facilities have confirmed cases.

For the facilities with confirmed cases, Defendants have submitted facility-specific affidavits for the Court’s consideration. *See* Affidavits for Bertie; Caledonia; Caswell; Neuse; NCCIW; Pasquotank; Pender; Scotland; and Southern. For facilities with no confirmed cases, it does not appear that a response is required. Nonetheless, all of the steps outlined in the Hooks Affidavits, Supplemental Hooks Affidavit, and Ishee Affidavit are being undertaken at these facilities within the next 30 days to continue to mitigate risk and prevent spread. Defendants further note that because the CDC guidelines and other best known practices are being implemented across the system, minor facility-level differences are not material to evaluating Defendants’ overall response. Moreover, new facility-specific affidavits have been provided to illustrate implementation and provide additional information for the following facilities (in

addition to those with confirmed cases): Abermarle; Caldwell; Catawba; Columbus; Craggy; Dan River; Forsyth; Greene; Lumberton; Sampson; Swannanoa; and Wilke.

To the extent that the Court determines that written facility-specific plans are required from each of Defendants' 51 facilities, including those with no confirmed cases, in addition to the information and plans provided with this submission, Defendants respectfully request at least fourteen additional days to provide this information to the Court.

Order for Production of Information # 5

The Court's order related to reentry information is directed to Plaintiffs. However, Defendants respectfully submit the affidavit of Nicole Sullivan, DPS Director of Reentry, Programs and Services, for the Court's consideration.

Order for Production of Information #s 6 & 7

The Court has ordered Plaintiffs and Defendants to confer on the appointment of Special Masters. Plaintiffs and Defendants have conferred in good faith but were unable to agree on the appointment of a Special Master. Therefore, the Court has requested a list from each party of three proposed Special Masters, including

- A. Name and address;
- B. Relevant degree, specialization, publications, or other representations of relevant knowledge; and
- C. Willingness to serve.

RESPONSE: Defendants continue to oppose the appointment of a Special Master on the grounds that a Special Master is neither appropriate nor needed to either set DPS policy or supervise DPS' implementation of CDC guidelines and best practices for COVID-19 throughout

the state prison system.² Defendants submit that appointment of a Special Master to oversee executive branch discretionary decisions and/or implementation at a preliminary injunction phase of litigation on an issue of this scope and urgency is unprecedented and unwarranted. It violates the established principle of Separation of Powers and infringes on the executive branch's exercise of discretion as outlined in Defendants' response to the request for preliminary injunction. Furthermore, DPS has significant concern about the substantial cost (both time and financial resources) of engaging a Special Master, which would inevitably divert resources and attention from the COVID-19 response itself and other critical Prisons priorities, including staffing – which directly affects DPS' ability to respond to the current crisis.

If the Court is nonetheless inclined to appoint a Special Master, DPS respectfully requests that the Court first consider the following:

- Experience with corrections and a deep understanding of the operational aspects of prisons is critical to the role. Therefore, the three Special Masters proposed by Defendants below have substantial experience in the corrections field outside of

² Several of the cases Defendants previously cited rejected requests for special masters. *See Banks v. Booth*, No. 20-849, 2020 U.S. Dist. LEXIS 68766 (D.D.C. Apr. 20, 2020) (granting relief but declining to appoint a downsizing expert); *Baxley v. Jividen*, No. 3:18-cv-1526, 2020 WL 1802935 (S.D. W. Va. Apr. 8, 2020) (declining plaintiffs' request for special master or mediation); *Money v. Pritzker*, No. 1:20-cv-02093, Memorandum Opinion and Order (N.D. Ill. Apr. 10, 2020) (denying request for special master, among other requested relief).

In addition, a new case very recently decided by the Eleventh Circuit (after Defendants' response brief), *Swain v. Junior*, No. 20-11622-C (11th Cir. May 5, 2020), stays ordered injunctive relief and articulates deep concern about a court (or, in this case, a special master) attempting to oversee a prison system's response to the COVID-19 risk. The Court recognized that any order requiring resources and supplies at a prison could require their diversion from other facilities that likewise need the same resources and supplies. The Court also specifically rejected the argument that lack of social distancing in a prison setting could establish deliberate indifference. Defendants are submitting this decision as an additional relevant authority for the Court's consideration.

North Carolina.³ They have also served in high-level legal and/or consulting roles that have required evaluation of how to solve complex problems in the prison setting.

- To maximize the opportunity for a successful outcome that results in meaningful and practical results, and that appropriately balances inmate health with public safety concerns, Defendants respectfully request that the Court decline to consider candidates whose experience is in indigent defense, death penalty advocacy, or other similar advocacy roles outside of and in opposition to the state prison system. Among other concerns, these individuals do not have the experience with prison management and operations that is required to advise concerning this kind of high-level prison policy concern.
- In light of the concerns related to infringement upon Defendants' executive authority and valid cost and resource considerations, Defendants respectfully request that, if an appointment is made, the scope of any such appointment be clearly defined and limited to the current COVID-19 emergency. DPS proposes that, if a Special Master is appointed, the Special Master be given 30 days to review information from the parties and make recommendations to the Court, and

³ Defendants selected out of state individuals with high-level experience and credentials to avoid the potential for claims of bias. Moreover, in light of current circumstances, it appears that communication on this matter will be telephonic or internet-based; thus, it does not appear to Defendants that presence in North Carolina is required for this assignment. Defendants note that one proposed Special Master, Mohr, is currently consulting with North Carolina state prisons and thus has familiarity with the system. In the event that the Court prefers a local expert, Defendants stand ready to recommend retired experts with experience in correctional management who reside within the State.

that the Special Master have no continued involvement after that submission absent a further order of the Court.

Defendants' three proposed candidates are set forth below.

1. Reginald Wilkinson
44 Buttles Avenue
Columbus, Ohio 43215

Wilkinson is an independent consultant specializing in leadership development and justice related topics, among other issues. He is a Member, Corporate Board of Directors for Management and Training Corporation, which contracts to operate prisons. From 1991-2006, he was Director of the Ohio Department of Rehabilitation and Correction. He has served as an expert in legal cases involving prisons issues. He is a Member of the Ohio Governor's Strike Team on Covid-19 and Prison Operations. His CV, which contains additional information and experience, is included with Defendants' Second Notice of Filing.

Wilkinson is willing to serve. His requested rate is \$210 per hour or \$235 per hour for legal proceedings.

2. Gary Mohr
221 Saint Clair Drive,
Chillicothe, Ohio 45601

Mohr is an independent consultant who has consulted with the Department of Justice supporting implementation strategies for the First Step Act (a bipartisan effort to improve criminal justice outcomes) throughout the Federal Bureau of Prisons. He is also consulting with North Carolina to "reform the System" and support a reorganization, so he has direct experience with North Carolina's prisons. He is also currently the President of the American Correctional Association – an organization that is dedicated to the improvement of correctional facilities and involved with accreditation of all aspects of correctional facilities. He previously served as

Director of the Ohio Department of Rehabilitation and Correction. His CV, which contains additional information and experience, is included with Defendants' Second Notice of Filing.

Mohr is willing to serve. His requested rate is \$125 per hour.

3. Jeffrey Beard
199 Jefferson Circle
Bellefonte, Pennsylvania 16823

Beard has served as an independent consultant working with various correctional jurisdictions since 2016 and serves as Professor of Practice for Penn State University's Justice Research Center. He evaluated prisons in Nuevo Leone, Mexico and provided recommendations for best practices and accreditation. He advised a court to help New York City corrections improve their misconduct system and advised LA County corrections on the use of force for a legal matter. He also recently inspected a Bureau of Prisons facility for the Department of Justice for COVID-related issues. He previously served as Secretary of Corrections for the California Department of Corrections, the 2nd largest prison system in the nation. His CV, which contains additional information and experience, is included with Defendants' Second Notice of Filing.

Beard is willing to serve. His requested rate is \$350 per hour or \$400 per hour for legal proceedings.