

To: Counsel

From: The Honorable Vince Rozier, Jr.

Date: Jun 8, 2020

Re: NAACP v. Cooper, 20CVS500110, Supplemental Information for Drafting of Order

I am providing this memo as a supplement to the oral information I provided in open court on June 8, 2020. This information is designed to assist Plaintiff's counsel as they complete a draft order, and is not intended to be exhaustive.

A preliminary injunction is properly ordered when the Court finds (1) plaintiff shows a likelihood of victory on the merits and (2) the 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) (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). 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))

Plaintiff has proven all of the above elements. Accordingly, the Court rules in favor of Plaintiffs and grants a preliminary injunction under the following terms.

A preliminary injunction is entered against Defendants, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice in any manner of the order.

The Court finds it likely that Plaintiffs will succeed on the merits due to their showing that Defendant's conduct violates 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 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). This analysis differs from the question before the Court, as regarding the State's responsibility to care for the medical needs of inmates. 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).

Furthermore, this Court finds that Defendant's acted in violation of the Eighth Amendment's "deliberate indifference test." *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 811 (1994). The Court

notes that Defendant failed to provide substantial COVID-19 testing to accompany the crowded and communal social distancing protocols, transferring inmates between facilities without properly protecting those inmates or preventing the spread of COVID-19 in contradiction to CDC guidelines, and providing disparate levels of COVID-19 protection as between different facilities. These actions, at the very least, lie “somewhere between the poles of negligence at one end and purpose or knowledge at the other.” *Id* at 836, 114 S. Ct. 1978, 128 L. Ed. 824.

Further, this Court holds that the risk of irreparable harm is present, including the risk of COVID-19 rapidly spreading throughout the vulnerable prison population, along with the substantial risk of death and long-lasting disability stemming from the disease. When considering the challenges associated with protecting inmates against the substantial risk of rapid and deadly spread of a fatal disease throughout a population over which Defendants have non-delegable responsibilities, the equitable and proper path forward is through preliminary injunction.

Accordingly, the Court orders Defendants to take the following steps, which have been organized with the three forms of deliberate indifference: overcrowding and cohort-based social distancing, transfers, and disparate levels of COVID-19 protection in different facilities. These steps are to continue until the substantial risk of COVID-19 has been satisfactorily diminished.

(1) Release

- a. Defendants are ordered to reopen the application process for those homes, facilities, and programs who are willing to participate as Early Release partners in the event that approved inmate candidates meet the necessary requirements.
- b. Defendants are authorized to identify and determine new factors that may be utilized to calculate “gain time” for inmates who have met the minimum sentence requirement but not yet available for release.
  - i. These factors may be deemed 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).
  - ii. The factors to be considered for the calculation of “gain time” may include, but are not limited to, known vulnerabilities and high-risk factors related to North Carolina’s current State of Emergency.
- c. Upon any modification of factors to be considered for the earlier release of an inmate following meeting the minimum sentence, DPS shall take affirmative steps to effectuate such release and provide a process for making eligible inmates aware of their new status.

(2) Transfer

- a. There should be no transfer of any inmate (other than for medical/health reasons or immediate risk) unless the inmate is given a test to confirm or deny, positively or negatively whether the person has contracted COVID-19. In lieu of a test, the inmate may be placed in isolation for 14 days as suggested by the CDC.
- b. Isolation must not be effectuated with actions or in a manner that would have been deemed punitive or utilized as a means of punishment prior to the need for COVID medical isolation.

(3) Internal conditions

- a. Plaintiffs and Defendants shall provide the court with a plan outlining the necessary steps for testing each inmate in every facility. The plan shall be submitted to the court by June 22<sup>nd</sup> at noon.
- b. Plaintiffs and Defendants shall further create a plan to identify the disparities in prevention strategies that exist between different facilities which shall be submitted to the Court by June 22<sup>nd</sup> at noon.
  - i. This plan will address the issues and report all measures already taken to address these issues.
  - ii. The report may acknowledge variations between facilities that serve as challenges to avoiding disparate treatment.
  - iii. The recognition of any disparity that fails to properly provide for the safety of an inmate may serve as a medical need for transfer if that inmate is deemed to be in a high-risk category.
  - iv. An inmate should not be less likely to avoid or contract COVID based on the proactivity of different wardens. Put another way, an inmate's chances of contracting COVID-19 should not depend upon the facility in which the inmate is housed. It is the responsibility of the State to ensure that all inmates over which the State exercises a duty of care, other than those determined to be at higher risk by the CDC, have the same chances to avoid contracting COVID-19.

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