

NORTH CAROLINA
COUNTY COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FILE NOS. XX CRS XXXXX
XX CRS XXXXX

STATE OF NORTH CAROLINA)
)
v.) JOINT
) MOTION FOR APPROPRIATE RELIEF
NAME,)
Defendant)

As the novel coronavirus that causes COVID-19 has spread across the globe, millions of people have been infected and hundreds of thousands of people have died.¹ There is no known cure. Development of a vaccine is likely at least 12 months away.² In the face of this unprecedented public health crisis, Governor Roy Cooper declared North Carolina under a state of emergency on March 10, 2020, and ordered all mass gatherings to cease and schools to close on March 14, 2020.³ The Chief Justice of the Supreme Court of North Carolina, declaring that “catastrophic conditions” exist in this state, suspended all but essential state court hearings until June 1, 2020.⁴

North Carolina prisons have never confronted a global health pandemic like this one.⁵ The typical operation of correctional facilities makes it challenging to prevent transmission of COVID-19 among inmates and staff or to isolate and treat individuals who become infected. For

¹ The World Health Organization has officially classified the spread of Covid-19 as a global pandemic. See <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>.

² Saralyn Cruickshank, “Experts Discuss Covid-19 and Ways to Prevent Spread of Disease,” John Hopkins Mag. (Mar. 17, 2020), <https://hub.jhu.edu/2020/03/17/coronavirus-virology-vaccine-social-distancing-update>

³ Executive Order No. 116, *Declaration of a State of Emergency to Coordinate Response and Protective Actions to Prevent the Spread of COVID-19* (Mar. 10, 2020); Executive Order No. 117, *Prohibiting Mass Gatherings and Directing the Statewide Closure of K-12 Public Schools to limit the spread of COVID-19* (Mar. 14, 2020).

⁴ Order of the Chief Justice of the Supreme Court of North Carolina (Apr. 13, 2020).

⁵ Given COVID-19’s contagiousness and relatively high death rate, particularly in vulnerable populations, the President ordered a 15-day directive to avoid gatherings in groups of more than 10 people. The President’s Coronavirus Guidelines for America, Whitehouse.gov (Mar. 16, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf.

the reasons set forth below, Defendant's ongoing incarceration poses an imminent threat to Defendant's life and to the health and safety of the community from a deadly infectious disease.

Under these specific and wholly unique circumstances, the parties bring this motion under N.C. Gen. Stat. §§ 17-33(2) and 15A-1415(b)(8), the Eighth Amendment to the United States Constitution, and Article I, § 27 of the North Carolina Constitution. Forcing Defendant to serve **his/her** sentence as it was initially imposed would be cruel under the Eighth Amendment and Article I, § 27. A sentence that violates Article I, § 27 is unlawful under N.C. Gen. Stat. § 15A-1415(b)(8), and Defendant may seek relief under the North Carolina motion for appropriate relief statutes. In the alternative, North Carolina law allows Defendant to be discharged from confinement when the original imprisonment was lawful but later circumstances entitle Defendant to relief. In support of their motion, the parties show:

1. Defendant was convicted on **DATE**, of **felony breaking and entering, larceny after breaking and entering, and attaining habitual felon status** in the above captioned file numbers.
2. **Defendant was sentenced to 73-100 months for the class H felonies enhanced to class D with a prior record level of V.**
3. **According to North Carolina Department of Public Safety Offender Public Information data, Defendant's projected release date is DATE.**
4. On March 11, 2020, the World Health Organization declared a global pandemic.⁶ Citing "deep[] concern[] both by the alarming levels of spread and severity, and by the alarming levels of inaction," it called for countries to take "urgent and aggressive action."⁷
5. The Governor has declared a Public Health Emergency identifying COVID-19 as an

⁶ See *supra* note 1.

⁷ *Id.*; see also "Coronavirus: COVID-19 Is Now Officially A Pandemic, WHO Says," NPR (March 11, 2020), <https://www.npr.org/sections/goatsandsoda/2020/03/11/814474930/coronavirus-covid-19-is-now-officially-a-pandemic-who-says>.

imminent threat to the health and safety of the community, requiring emergency protective actions. Since then, normal life has ceased. Businesses, restaurants, schools, government offices, and churches are closed. People who have control over their bodies are self-isolating to prevent contracting or spreading this deadly disease.

6. As of May 28, 2020, 1,698,523 people have been diagnosed with COVID-19 in the United States, with 100,446 deaths confirmed.⁸

7. The numbers of people diagnosed reflect only a portion of those infected;⁹ very few people have been tested, and many are asymptomatic transmitters.¹⁰ Thousands of people are carrying a potentially fatal disease that is easily transmitted—and few are aware of it.

8. The current estimated incubation period is between 2 and 14 days.¹¹ Approximately 20% of people infected experience life-threatening complications, and between 1% and 3.4% die.¹²

9. The virus is thought to spread through respiratory droplets or by touching a surface or object that has the virus on it.¹³ Thus, infected people—who may be asymptomatic and not even know they are infected—can spread the disease even through indirect contact with others.

10. Officials and experts urge “social distancing”—isolating oneself from other people as much as possible.¹⁴ Social distancing is virtually impossible inside correctional facilities.

⁸ Centers for Disease Control, Coronavirus 2019, <https://www.cdc.gov/coronavirus/2019-ncov/cases-in-us.html>

⁹ Melissa Healy, “True Number of US Coronavirus Cases is Far Above Official Tally, Scientists Say,” L.A. Times (Mar. 10, 2020), <https://www.msn.com/en-us/health/medical/true-number-of-us-coronavirus-cases-is-far-above-official-tally-scientists-say/ar-BB110qoA>.

¹⁰ Roni Caryn Rabin, “They Were Infected with the Coronavirus. They Never Showed Signs,” N.Y. Times (Feb. 26, 2020, updated Mar. 6, 2020), <https://www.nytimes.com/2020/02/26/health/coronavirus-asymptomatic.html>; Aria Bendix, “A Person Can Carry And Transmit COVID-19 Without Showing Symptoms, Scientists Confirm,” Bus. Insider (Feb. 24, 2020), <https://www.sciencealert.com/researchers-confirmed-patients-can-transmit-the-coronavirus-without-showing-symptoms>.

¹¹ “Coronavirus Disease COVID-19 Symptoms,” Centers for Disease Control (updated: Feb. 29 2020), <https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html>.

¹² Vox, *Why Covid-19 is worse than the flu, in one chart*, <https://www.vox.com/science-and-health/2020/3/18/21184992/coronavirus-covid-19-flu-comparison-chart>.

¹³ Centers for Disease Control, Coronavirus Factsheet (Mar. 3, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>.

¹⁴ See *supra* notes 2 & 3.

11. Dr. Jaimie Meyer, an expert in public health in jails and prisons, recently explained that “the risk posed by COVID-19 in jails and prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.”¹⁵ This is due to a number of factors: the close proximity of individuals in those facilities; their reduced ability to protect themselves through social distancing; ventilation systems that encourage the spread of airborne diseases; difficulties quarantining individuals who become ill; the increased susceptibility of the population in jails and prisons; the fact that jails and prisons normally have to rely heavily on outside hospitals that will become unavailable during a pandemic; and loss of both medical and correctional staff to illness.¹⁶

12. While individuals are provided access to medical care while in prison, the capacity of this care is limited.

13. This combination of close quarters and limited medical capacity create a dangerous situation, putting detainees, correctional staff, and the communities they belong to at greater risk of illness and death.

14. These general factors apply specifically to North Carolina prisons. Social distancing at most, if not all facilities, is impractical or even impossible.¹⁷ As North Carolina Prisoner Legal Services Executive Director Mary Pollard noted, in dormitory-style camps, “dozens of men sleep

¹⁵ Declaration of Dr. Jaimie Meyer, Yale School of Medicine, filed in case number 1:20-CV-1803 in the United States District Court for the District of Oregon, available at <https://www.documentcloud.org/documents/6817018-318-2.html> (hereinafter “Meyer Declaration”).

¹⁶ *Id.* ¶¶ 7-19; “The pathway for transmission of pandemic influenza between jails and the community is a two-way street. Jails process millions of bookings per year. Infected individuals coming from the community may be housed with healthy inmates and will come into contact with correctional officers, which can spread infection throughout a facility. On release from jail, infected inmates can also spread infection into the community where they reside.” *Pandemic Influenza and Jail Facilities and Populations*, American Journal of Public Health, October, 2009; *See also* Dr. Anne Spaulding, Coronavirus and the Correctional Facility: for Correctional Staff Leadership, Mar. 9, 2020, https://www.ncchc.org/filebin/news/COVID_for_CF Administrators_3.9.2020.pdf

¹⁷ Affidavit of Mary Pollard in support of Emergency Original Petition for Writ of Mandamus, available at https://emancipatenc.org/wp-content/uploads/2020/04/NC-NAACP-v.-Cooper-COVID-19-PWM-Exs_TOFILE.pdf

in long rows of bunk beds that are almost certainly not six feet apart. Meals are generally taken communally in crowded chow halls.”¹⁸

15. For these reasons and in Dr. Meyer’s words, “[r]educing the size of the population in jails and prisons is crucially important to reducing the level of risk both for those within those facilities and for the community at large.”¹⁹

16. The Eighth Amendment to the United States Constitution “embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency.” *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251 (1976) (citation omitted).

17. The Eighth Amendment prohibits “punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain.” *Id.* at 102–03.

18. The cruel and unusual clause encompasses the conditions under which a person is confined in prison, *Helling v. McKinney*, 509 U.S. 25, 31, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993), and requires states to “provide humane conditions of confinement.” *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

19. “[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., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.” *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200, 109 S. Ct. 998, 1005–06, 103 L. Ed. 2d 249 (1989).

20. Medical issues rise to the level of Eighth Amendment violations when they pose a risk of

¹⁸ *Id.*

¹⁹ Meyer Decl. ¶ 37.

serious or significant physical injury or a substantial risk of serious harm resulting from exposure. *Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016).

21. Medical issues are serious when they have “been diagnosed by a physician as mandating treatment or is so obvious that even a lay person would easily recognize the necessity for a doctor’s attention.” *Gordon v. Schilling*, 937 F.3d 348, 356 (4th Cir. 2019).

22. “In the worst cases,” an Eighth Amendment violation occurs when a medical situation in prison “actually produce[s] physical torture or a lingering death.” *Estelle*, 429 U.S. at 103.

23. North Carolina “historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions.” *See, e.g., State v. Green*, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998).

24. However, the fact that Article I, § 27 of the North Carolina Constitution prohibits “cruel or unusual punishments” allows for broader protection under the North Carolina Constitution than under its federal counterpart (emphasis added).

25. *Green* did not definitively hold that proportionality analysis under the United States and North Carolina Constitutions would always yield the same result. *Green*, 348 N.C. at 603–04, 502 S.E.2d at 828. It remains an open question whether a punishment that is not both cruel and unusual under the federal constitution might violate the North Carolina Constitution on ground that it is either cruel or unusual.

26. Even when provisions are identical, North Carolina courts “have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.” *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988).

27. For example, in *Carter* the Supreme Court of North Carolina declined to “enfract a good faith exception to the exclusionary rule [of search and seizure law] under our state constitution,” thereby offering North Carolina citizens broader protection under Article I, § 20 of the North Carolina Constitution than is offered under the Fourth Amendment to the United States Constitution. *Id.* at 724, 562.

28. Because of the disjunctive cruel or unusual language in the North Carolina Constitution, this Court is free to determine whether the continued confinement of Defendant is excessive punishment under these unique, specific, and individual circumstances (i.e. cruel), without determining whether the punishment is in line with other sentences in this State or in the country (i.e. unusual).

29. Defendant has served 67 months of the required 73 months, or 92%, of his sentences.

30. Defendant is in minimum custody and has committed zero infractions during his time in prison.

31. North Carolina prisons house people in close proximity in facilities with shared ventilation systems that encourage the spread of airborne diseases.

32. These conditions of confinement put Defendant at risk of serious physical injury, as it is not disputed that COVID-19 can cause severe illness or death.

33. COVID-19 can lead to medically induced comas, severe headaches, nausea, and extreme difficulty breathing. People with the disease describe feeling like they’ve been in a fight with Mike Tyson, have an anvil sitting on their chests, or are drowning.²⁰

34. Because of REASONS, Defendant is more vulnerable to significant health complications if he were to contract COVID-19.

²⁰ The New York Times, ‘An Anvil Sitting on My Chest’: What It’s Like to Have Covid-19, <https://www.nytimes.com/article/coronavirus-symptoms.html>

35. As of May 28, 2020, there were 651 confirmed cases of COVID-19 within the North Carolina state prison system.²¹ With these confirmed cases from within the prison system, it is likely that North Carolina prisons will soon face massive infection rates. OR Defendant is currently housed at a facility, FACILITY, with NUMBER of other people who have tested positive for COVID-19.²²

36. Defendant is at substantial risk of serious harm resulting from exposure, and infection would likely produce physical torture or a lingering death.

37. The State of North Carolina has an affirmative duty to protect Defendant because it has limited his freedom to act on his own behalf. *DeShaney*, 489 U.S. at 200.

38. Therefore, Defendant's continued confinement in a North Carolina prison violates his right to be free from cruel punishment under Article I, § 27 of the North Carolina Constitution, as forcing Defendant to complete his sentence as it was originally imposed under these unique, specific, and individual circumstances would be cruel, whether the punishment is in line with other sentences in this State or in the country.. The threat from COVID-19 is "so obvious that even a lay person" would recognize it. *Gordon*, 937 F.3d at 356.

39. A sentence that violates Article I, § 27 of the North Carolina Constitution is unlawful under N.C. Gen. Stat. § 15A-1415(b)(8).

40. Defendant's Defendant may therefore seek relief under the North Carolina motion for appropriate (MAR) relief statutes. Indeed, the MAR statutes were enacted as mechanisms for amending sentences previously believed to be lawful.

41. If this court finds that the motion for appropriate relief statutes do not provide a

²¹ N.C. Dept. of Public Safety, Prisons Actions/Info on COVID-19, <https://www.ncdps.gov/our-organization/adult-correction/prisons/prisons-info-covid-19>

²² N.C. Dept. of Public Safety, Prisons Actions/Info on COVID-19, <https://www.ncdps.gov/our-organization/adult-correction/prisons/prisons-info-covid-19>

mechanism for amending Defendant's sentence, North Carolina's habeas statutes do.

42. While the writ of habeas corpus once issued only in narrow circumstances, "it is clear now that the scope of a court's habeas corpus jurisdiction is much broader." *Hoffman v. Edwards*, 48 N.C. App. 559, 561–62, 269 S.E.2d 311, 312 (1980).

43. N.C. Gen. Stat. § 17-33(2) allows a party to be discharged from confinement "[w]here, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged."

44. In light of the foregoing, the parties move to amend Defendant's sentence to reduce the risk to Defendant and those who come in contact with Defendant of severe illness from COVID-19.

45. Defendant agrees to proceed without a hearing on this matter.

46. The State and Defendant agree to vacate Defendant's conviction for attaining habitual felon status in 13 CRS 05609.

47. The State and Defendant agree that Defendant had 14 prior record point and was level V at the time of sentencing.

48. The State and Defendant agree that Defendant's two convictions in 13 CRS 57223 shall remain consolidated under a single judgment.

49. The State and Defendant agree that Defendant's amended judgment without habitual felon status under 13 CRS 57223 shall impose one class H, level V sentence of 15-27 months.

50. The State and Defendant agree the Defendant shall receive the same 386 days of jail credit on the amended judgment as he did at his original sentencing.

51. The State and Defendant agree that no part of this Consent Order is binding or may be used by either party for any purpose unless and until the whole has been accepted by the

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IN THE GENERAL COURT OF JUSTICE
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FILE NO XX CRS XXXXX
XX CRS XXXXX

STATE OF NORTH CAROLINA)
)
v.)
)
NAME,)
Defendant)

ORDER

This matter having come before the Court on the parties' motion for appropriate relief filed DATE, the Court hereby ORDERS that:

6. Defendant's conviction for attaining habitual felon status in County County file number XX CRS XXXXX is VACATED.

7. Defendant's convictions in XX CRS XXXXX remain consolidated under one single judgment.

8. Defendant's amended judgment without habitual felon status under XX CRS XXXXX impose one class H, level V sentence of 15-27 months.

9. Defendant is awarded 386 days of jail credit on the amended judgment.

10. The judgment in XX CRS XXXXX is entered *nunc pro tunc* to reflect that it was imposed on DATE.

The Court hereby enters Judgments and Commitments reflecting the foregoing, and directs that certified copies thereof, along with a certified copy of this order, be provided to the North Carolina Department of Public Safety Office of Combined Records.

IT IS SO ORDERED.

Date

Superior Court Judge Presiding