No. 165A21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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ROCKY DEWALT, ROBERT PARHAM, ANTHONY MCGEE, and SHAWN BONNETT, individually and on behalf of a class of similarly situated persons, Plaintiff-Appellants, v. ERIK A. HOOKS, in his official capacity as Secretary of the North Carolina Department of Public Safety, and the NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Defendant-Appellees.	)	From Wake County 19 CVS 14089

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MOTION OF NC NAACP FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS.

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Pursuant to Rule 28(i) of the North Carolina Rules of Civil Procedure, the North Carolina NAACP (NC NAACP moves this Court for permission to file the attached Amicus Brief in support of Plaintiffs- In support of this Motion, movants shows the following:

STATEMENT OF INTEREST

The NC NAACP is a grassroots-based, non-profit, civil rights organization with the mission of ensuring the rights of all persons to political, educational, social, and economic equality, and eliminating racial discrimination. The NC NAACP is the oldest and largest civil rights organization in the state,[1] and dedicates significant organizational resources to protecting and advancing equal voting rights, promoting voter and civic participation of African Americans and other groups of people historically denied that right in North Carolina, and advocating for the rights of incarcerated people within the State and federal penal system. For decades, the NC NAACP has worked, through its Criminal Justice and Legal Redress Committees to address issues which impact individuals who are confined to prisons. Most recently, the NC NAACP was a plaintiff in litigation to minimize the Covid-19 risks to incarcerated individual and that effort resulted in a significant decrease in the prison population and the imposition of preventative measures for those who continue to serve terms of imprisonment and those who staff confinement facilities. Typically, this criminal justice and prison advocacy reaches across racial lines, but emphasizes

[1] The NC NAACP was established in 1938 and today has over 20,000 members, the largest number of members of any NAACP state conference in the South, and the second largest in the country. The NC NAACP has more than 100 active branches in urban centers and rural communities throughout the state of North Carolina.

the disproportionate impact that the incarceration practices have had on African Americans and people of color. The NC NAACP is thus uniquely situated to provide the Court with information contextualizing the severity of the injury imposed by solidarity confinement on racial minorities and communities of color and the dangerous consequences to the public interest of permitting this unconstitutional and inhumane practices to continue unabated.

WHY THE *AMICUS CURIAE* BRIEF IS DESIRABLE

The NC NAACP brings to this case an additional perspective based on its over sixty years of experience fighting for the constitutional and civil rights of African Americans and people of color in North Carolina. That experience has addressed a broad range of constitutional and civil rights issues which includes efforts to improve the care of individuals who have been incarcerated and the conditions under which that incarceration occurs. In particular, the proposed brief discusses the widespread negative impacts that solitary confinement has had on incarcerated African Americans, people of color and others who have endured the psychological harms that have resulted from placement in solitary confinement, its continuing impact on communities once those individuals have been released from incarceration and the Trial Court's misapplication of the law when it refused to grant Class Certification for this case.

ISSUES OF LAW TO BE ADDRESSED

If permission is granted, the NC NAACP will discuss the profound life-altering and long-lasting harms that solitary confinement has caused and continue to cause to incarcerated persons who are confined within the North Carolina Prison system and that the Trial Judge erred when he refused to grant class certification to the Plaintiffs in this case.

POSITION OF *AMICUS CURIAE*

The NC NAACP considers Solitary Confinement to be torture and confinement, under the conditions which accompany this practice, are not protected by the United States Constitution, the North Carolina Constitution nor by applicable statutes which authorize and define lawful applicable punishments which are appropriate for persons who have been convicted of crimes in this State and nation and that those individuals who are incarcerated within the State's Prison system constitute a viable class and population who are able to challenge this inhumane practice.

CONCLUSION

For the foregoing reasons, The NC NAACP respectfully requests that the Court grant this motion to file the accompanying proposed brief of amicus curiae in support of Plaintiffs-Appellants.

Respectfully submitted this the 2nd Day of July, 2021.

North Carolina Conference of the NAACP

By: */s/ Aviance Brown*
I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned certifies that the following *MOTION FOR LEAVE TO FILE AMICUS BRIEF* has been served on all parties and/or counsel by email, at the addresses below:

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ROCKY DEWALT, ROBERT PARHAM, ANTHONY MCGEE, and SHAWN BONNETT, individually and on behalf of a class of similarly situated persons, Plaintiff-Appellants, v. ERIK A. HOOKS, in his official capacity as Secretary of the North Carolina Department of Public Safety, and the NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Defendant-Appellees.	)	From Wake County 19 CVS 14089

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NC NAACP AMICUS BRIEF

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The NC NAACP hereby certifies that no one except amicus and its undersigned counsel wrote this brief or contributed money for its preparation, pursuant to Rule 28(i)(2) of the North Carolina Rules of Appellate Procedure.

INDEX

Table of Contents ……..…….2

Statement of Interest ……4

Introduction ……..……5

Impact of Solitary Confinement ……..…….7

African Americans and Other Minority Groups Suffer The Most Harm…….. ..……..13

The Trial Court Erred When It Did Not Grant Class Certification.…….……..14

History of Denying Class Certification…….…….17

Conclusion……..……19

Certificate of Service ……..……..……..20

TABLE OF CASES AND AUTHORITIES

Cases:

Brown v. Board of Education,
347 U.S. 483 (1954) ……..…….……18

Crow v. Citicorp Acceptance Co.,
319 N.C. 274, 354 S.E.2d 459 (1987) …….……..…..14, 17

Eisen v. Carlisle & Jacquelin,
417 U.S. 156…….…..……... 17

Faulkenbury v. Teachers' and state Emps,' Ret. Sys. Of N.C.,
345 N.C. 683, 483 S.E.2d 422 (1997) …….16,17

Constitutions:

U.S. Constitution, Eighth Amendment……..…… 15

N.C. Const. Art. I, § 27 15

Statutes:

N.C. Gen. Stat. §1A-1, Rule 23……..…….……14, 15, 19

N.C. Gen. Stat. §15A-1340.12……..…….6

N.C. Gen. Stat. §15A-1340.10……6

Other Authorities:

Gillings School of Global Public Health (University of North Carolina) Solitary Confinement Linked with Increased Risk of Death After Release from Prison (October 17, 2019)
……..….12

Jeffrey Metzner, Jamie Fellner, Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics, J. Am. ACA Psychiatry Law (2010) …….….9

Jules Lobel & Huda Akil, Law & Neuroscience: The Case of Solitary Confinement, Daedalus Journal of the American Academy of Arts
& Sciences (2018)……..…….8

Lauren Brinkley-Rubenstein, Josie Sivaraman, David L. Rosen, et. al. Association of Restrictive Housing During Incarceration with Mortality After Release, JAMA Net Open (2019)……...…….…….8

Leon Digard, Sara Sullivan & Elna Vanko, Rethinking Restrictive Housing, Vera Institute (May 2018) ……11

Luke Woollard, North Carolina is Torturing Thousands of Prisoners, It Needs to Stop, N.C. Policy Watch (2021)…….……11-12

North Carolina Task Force for Racial Equity Criminal Justice Report 2020 (December 2020) ……..……11,12

Tiana Herrin, Prison Policy Initiative, The Research is Clear: Solitary Confinement Causes Long-Lasting Harm (2020)……...……7

The Correctional Leaders Association & The Arthur Liman Center for Public Interest Law (Yale University Law School), Time-In-Cell 2019: A Snapshot of restrictive Housing based on Nationwide Survey of U.S. Prison Systems (September 2020)…….……..……..13

NC NAACP HISTORY and INTEREST

The North Carolina State Conference of the National Association for the Advancement of Colored People ("NC NAACP") submits this proposed brief as amicus curiae in support of Plaintiffs' Statement in Response to the trial court's denial of class certification for the plaintiffs.

STATEMENT OF INTEREST

The NC NAACP is a grassroots-based, non-profit, civil rights organization with the mission of ensuring the rights of all persons to political, educational, social, and economic equality, and eliminating racial discrimination. The NC NAACP is the oldest and largest civil rights organization in the state,[1] and dedicates significant organizational resources to protecting and advancing equal voting rights, promoting voter and civic participation of African Americans and other groups of people historically denied that right in North Carolina, and advocating for the rights of incarcerated people within the State and federal penal system. For decades, the NC NAACP has worked through its Criminal Justice and Legal Redress Committees to address issues which impact individuals who are confined to prisons, many of whom are members of the NC NAACP. Most recently, the NC NAACP was a plaintiff in litigation to minimize the COVID-19 risks to incarcerated individuals and that effort resulted in a significant decrease in the prison population and the imposition of preventative measures for those who continue to serve terms of imprisonment and those who staff confinement facilities. *NAACP v. Cooper*, case no. 20CVS500110, Wake County Superior Court (filed April 20, 2020). Typically, this criminal justice and prison advocacy reaches across racial lines but emphasizes the disproportionate impact that the incarceration practices have had on African Americans and other minority groups. The

[1] The NC NAACP was established in 1938 and today has over 20,000 members, the largest number of members of any NAACP state conference in the South, and the second largest in the country. The NC NAACP has more than 100 active branches in urban centers and rural communities throughout the state of North Carolina.

NC NAACP is thus uniquely situated to provide the Court with information contextualizing the severity of the injury imposed by solitary confinement on racial minorities and communities of color and the dangerous consequences to the public interest of permitting these unconstitutional and inhumane practices to continue unabated.

Introduction

The NC NAACP provides this Amicus discussion in support of the Plaintiffs' appeal of the trial court's decision not to certify, as a class, those incarcerated persons who are presently confined to restrictive housing or solitary confinement punishment or who are in imminent danger of being placed in this inhumane form of confinement. Based on personal accounts, statistics and psychological studies, incarcerated individuals who are placed in solitary confinement are subjected to an unconstitutional, unnecessary, and unhealthy level of mental torture. This torture has an extremely high and unacceptable probability of causing permanent psychological damage to those individuals who are forced into each of the various levels of solitary confinement. This State-created damage extends to and threatens others within and outside of the prison environment.

Statistics also demonstrate that people of color and individuals who are experiencing serious psychological illnesses are disproportionately placed in solitary confinement for unacceptably long periods of time by North Carolina Prison officials. Most of these individuals, who have been damaged by or had their psychological impairment worsened by the solitary confinement experience, will return to communities around the state where they are more likely to die within a year of their release or re-engage in criminal conduct resulting in their return to the prison environment at a disproportionate rate.

In every criminal case, where a conviction has occurred, the sentence, which is imposed by the trial judge, is the only punishment authorized by the North Carolina General Assembly that is mandated for the convicted person. Pursuant to N.C. Gen. Stat. §15A-1340.12:

> "The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrence to criminal behavior."

The widespread use of solitary confinement, as administered by the North Carolina Department of Public Safety, does not intend to accomplish or promote any of those lawful purposes.

North Carolina statutes authorize trial judges to punish people convicted of crimes by sentencing them to active periods of incarceration, suspending sentences subjected to probation supervision and/or the imposition of fines, fees, and restitution. These terms and conditions of confinement represent the totality of punishment to which convicted individuals can be subjected to in this State no matter how egregious the offense or how blameworthy the individual's conduct. A trial judge with this level of power to impose a period of confinement, is not allowed, pursuant to a statute nor the authorization of the North Carolina Constitution, to condemn an individual or to impose a period of incarceration which requires the convicted person to spend one day in solitary confinement. Yet, a prison official, on a finding of less than "proof beyond a reasonable doubt," is allowed to impose this draconian punishment on an incarcerated individual for a mere violation of a prison rule or regulation. N.C. Gen. Stat. § 15A-1340.10 et. seq.

Armed with this knowledge, it is alarming that the court would conclude that incarcerated persons, who are either presently confined to solitary confinement or are in imminent danger of being placed in this restrictive housing, do not constitute a class which satisfies the requirements for a Rule 23 certification.

Impact of Solitary Confinement

> "Living in solitary confinement is really painful. Being in such a small cell all day makes me feel like I'm losing my mind. I am jittery and on edge all the time. When I wasn't in solitary I didn't think about wanting to die, but now I think about that a lot. I try to stay positive but it's really hard. It breaks you down. It feels like there's no hope."
>
> Plaintiff Anthony McGee, describing conditions that she suffered while in Solitary Confinement at Alexander Correctional Institution.

Though prison officials have increasingly turned to solitary confinement as a way to manage incarcerated people whom they deem difficult or dangerous, researchers and formerly incarcerated people have made it clear that any "positive" benefits that correctional institutions could gain by using solitary confinement are outweighed by the severe and often permanent damages caused by prolonged isolation. Tiana Herrin, Prison Policy Initiative, *The Research is clear: solitary confinement causes long-lasting harm* (2020). While prisons and jails are already recognized as being inherently harmful, the additional burden of stress resulting from solitary confinement has been shown to cause permanent alterations to the brains and personalities of those who are subjected to the practice. *Id*. According to "Law & Neuroscience: The Case of Solitary Confinement," the part of the brain that plays a major role in memory, has been shown to physically shrink after long periods without human interaction. Jules Lobel & Huda Akil, Daedalus Journal of the American Academy of Arts & Sciences, *Law & Neuroscience: The Case*

of Solitary Confinement (2018), https://www.amacad.org/publication/law-neuroscience-case-solitary-confinement.

Depriving people of the ability to interact with others and socialize can cause "social pain" - the feelings of hurt and distress that come from negative social experiences such as social deprivation, exclusion, rejection, or loss. Not only does solitary confinement affect the brain, personality, and social health of incarcerated persons, according to a 2019 study, individuals who spent any time in restrictive housing were 24% more likely to die in the first year after release compared to individuals who were incarcerated and not placed in restrictive housing. Lauren Brinkley-Rubinstein, Josie Sivaraman, David L. Rosen, et al., JAMA Net Open, *Association of Restrictive Housing During Incarceration With Mortality After Release (2019).* While people in solitary confinement comprise only six to eight percent of the total prison population, they account for approximately half of those who die by suicide. Jules Lobel & Huda Akil, Daedalus Journal of the American Academy of Arts & Sciences, *Law & Neuroscience: The Case of Solitary Confinement* (2018), www.amacad.org/publication/law-neuroscience-case-solitary-confinement. Compared to individuals who were incarcerated and not placed in restrictive housing, those who are forced to experience restrictive housing are 78% more likely to commit suicide, 54% more likely to be killed by homicide, and 127% more likely to overdose within the first two weeks after release. Brinkley-Rubinstein, Sivaraman & Rosen, *supra*.

The damage of solitary confinement is further exacerbated for those with mental health disorders. Dr. Jeffrey L. Metzner, a Clinical Professor of Psychiatry at the University of Colorado, and Attorney Jamie Fellner, Senior Counsel at Human Rights Watch have concluded that "Solitary Confinement is recognized as difficult to withstand; indeed, psychological stressors such as isolation can be as clinically distressing as physical torture." Jeffrey Metzner, Jamie Fellner, J Am

Aca Psychiatry Law, *Solitary confinement and mental illness in U.S. prisons: a challenge for medical ethics* (2010), https://pubmed.ncbi.nlm.nih.gov/20305083/. Describing the extremely harsh results and damages from solitary confinement, they explain:

> "The adverse effects of solitary confinement are especially significant for persons with serious mental illness, commonly defined as a major mental disorder (e.g., schizophrenia, bipolar disorder, major depressive disorder) that is usually characterized by psychotic symptoms and/or significant functional impairments. The stress, lack of meaningful social contact, and unstructured days can exacerbate symptoms of illness or provoke recurrence. Suicides occur disproportionately more often in segregation units than elsewhere in prison. All too frequently, mentally ill prisoners decompensate in isolation, requiring crisis care or psychiatric hospitalization. Many simply will not get better as long as they are isolated." *Id.*

The damning conclusion reached by Dr. Metzner and Attorney Fellner is that "Mental Health professionals are often unable to fully mitigate the harm associated with isolation," which is the hallmark feature of solitary confinement. *Id*. Plaintiff Shawn Bonnett describes the mental health impact of his time spent in solitary confinement:

> "After the nine years I spent in solitary confinement at Central Prison, I had a difficult time dealing with returning to the conditions regular of regular population when I was let out of solitary there in 2007. I was told that I had sensory deprivation syndrome. I had anxiety attacks when I was around other people. When I watched TV, sometimes got dizzy if the camera was zooming in. Being back in solitary confinement now is bringing everything back up from before…Sometimes I feel like I am losing touch with reality, which is worse if I don't get letters. I feel helpless and abandoned, which makes me angry. *See* R.O.A. 278.

Luke Woollard, an attorney with Disability Rights North Carolina, described his personal observations of solitary confinement in a North Carolina prison which mirrors the psychological conclusions reached by Dr. Metzner and Attorney Fellner. In a report published by North Carolina Policy Watch, Attorney Woollard detailed his knowledge of conditions. Luke Woollard, NC Policy Watch, *North Carolina is torturing thousands of prisoners. It needs to stop* (2021), www.ncpolicywatch.com/2021/02/04/north-carolina-is-torturing-thousands-of-prisoners-it-needs-to-stop/. After hearing solitary cells were like living in a parking space, he concluded that solitary cells are the opposite of a parking space. He explained:

> "They are crowded, dark closets the dimension of a parking space. Add to that space a solid steel door, an uncovered toilet that is also a sink, a single bed and small metal desk, all bolted to cement walls. Throw in harsh overhead lighting and a translucent window, the width of your hand. That is a solitary cell. Put a person in that cell, no phone calls. No books, radio, TV or personal property of any sort to engage them. Put them in this solitude for months, years. Only there for 22-24 hours a day. All day, every day. Never knowing when they will get out or what they must do to get out. Shrink their life into a walled parking space, make them stay there, with the least control imaginable of their existence or destiny. Make their world whatever come through the slit in the locked door. That is solitary confinement." *Id*.

As described by Attorney Woollard and confirmed by Dr. Metzner and Attorney Fellner, when placed in solitary cells under these conditions, incarcerated individuals are left to mentally degrade for months and years with no adequate treatment and no way out. Metzner & Fellner, *supra.* Woollard, *supra*. Both McGee and Bonnett confirm this with their own recounts of mental degradation as a result of being in "the hole." *See* R.O.A. 270-281.

As expressed to the Trial Judge and confirmed by a report provided to the Court by the Vera Institute of Justice, a highly regarded criminal justice research institute, "the restrictive housing units in North Carolina prisons are characterized by conditions of extreme isolation and sensory deprivation." Leon Digard, Sara Sullivan, & Elna Vanko, Vera Institute, *Rethinking Restrictive Housing* (May 2018), https://www.vera.org/rethinking-restrictive-housing. The Vera Institute's Report of the situation and conditions which exist in North Carolina prisons confirmed that those who were condemned to solitary confinement spent twenty-three hours a day in their cells with severely limited interactions with other people and were allowed out of these cages into a small secure enclosure for one hour a day, five days a week where there was very little programming or congregate activities. *Id*. Solitary confinement constitutes torture. It is used as a form of punishment for which the individual was not sentenced to receive. As explained in the recently released North Carolina Task Force for Racial Equity Criminal Justice Report for 2020:

> "In North Carolina, restrictive housing – or solitary confinement – is often used as a form of punishment either directly related to an infraction or due to infractions that increase the perceived 'dangerousness' of a person. Categories of restrictive housing in North Carolina confine people to their cell for 22 to 24 hours a day. People in their cells have limited visitation, and are restricted in when and how they exercise and shower. This confinement comes at the cost of great mental and emotional harm. Multiple studies have indicated that solitary confinement causes severe psychiatric harm, is toxic to brain functioning, and causes harm that manifests as panic attacks, paranoia, perceptual distortions, and problems with impulse control." North Carolina Task Force for Racial Equity in Criminal Justice,

2020 Report, (Dec. 2020) http://ncdoj.gov/wp-content/uploads/2020/12/TRECReportFinal_12132020.pdf.

A University of North Carolina cohort study concluded that 229,274 persons who were released from prison between 2000 and 2015 after being confined to solitary confinement were 24% more likely to die within a year of their release, with most of these deaths resulting from suicide. Gillings School of Global Public Health, *Solitary Confinement Linked with Increased Risk of Death After Release from Prison* (October 17, 2019), https://sph.unc.edu/sph-news/solitary-confinement-linked-with-increased-risk-of-death-after-release-from-prison/. This study also revealed that the recidivism rates for persons who had been subjected to solitary confinement were significantly greater than the rates for those who had not experienced solitary confinement. *Id*.

All of this data conflicts with the principle that a prison sentence is designed to be punishment for a criminal conviction and that individuals are not sentenced in order to subject them to inhumane treatment by State officials who are responsible for providing humane care and protection. Not only does this punishment constitute a form of torture, but it is also dehumanizing, long-lasting, life altering and is regularly imposed without a scintilla of due process. The prison disciplinary process, which allows the imposition of solitary confinement, is conducted without any constitutional safeguards or any objectively defined parameters by legally untrained prison personnel.

African Americans and other minority groups suffer the most harm

As bad as the negative effects of solitary confinement are on any incarcerated person, relevant research data further reveals that African Americans and other people of color are disproportionately represented among those persons who are subjected to and negatively impacted by this horrendous form of torture. As of May 2021, the NC prison population was 29,504 of which

51% were African Americans and 40% were Whites, in a state where African Americans represent a mere 22% of the general population. The remaining 9% of the prison population were people of color or their races were unknown. DPS Research and Planning Automated Search Query **(**A. S. Q. DOC 3.0b), available at https://webapps.doc.state.nc.us/apps/asqExt/ASQ

Statistics provided by the North Carolina Department of Public Safety to the NC Task Force for Racial Equity in Criminal Justice revealed that African Americans were more than 52% of the total prison population in December 2020, but they made up 80% of those in high maximum security solitary confinement and 62% of those who were incarcerated in Restrictive Solitary Confinement. NC Task Force for Racial Equity in Criminal Justice, *supra*. Secretary Erik Hooks, Secretary of the N.C. Department of Public Safety, testified that solitary confinement comes at the cost of great mental and emotional harm in North Carolina prisons. *Id*.

The disproportionate impact of solitary confinement on people of color is exemplified in a study conducted by The Liman Center at Yale Law School. The Correctional Leaders Association & The Arthur Liman Center for Public Interest Law at Yale Law School, *Time-In-Cell 2019: A Snapshot of Restrictive Housing based on Nationwide Survey of U.S. Prison Systems* (September 2020). Among the thirty-two jurisdictions that reported on race and ethnicity among male inmates in the total custodial population and in restrictive housing, Black men constituted 43.4% of the total male restrictive housing population as compared to 40.5% of the total male custodial population in those jurisdictions. *Id*. at 25. In addition to the disproportionate impact solitary confinement has on Black men, it also has a disproportionate impact on Hispanic and Latino men. While Hispanic and Latino men make up only 15.4% of the total male custodial population, they comprised 16.9% of the male restrictive housing population across all reporting jurisdictions. *Id*. at 25. In North Carolina, Hispanic and Latino men make up 2.2% of the total

custodial population and 2.1% of the restrictive housing population. *Id*. at 30-31. Not only is there a disproportional impact by way of race, but there is also an intersectionality of race and gender disparities as well. Across reporting jurisdictions, Black females only accounted for 21.5% of the total female custodial population, however, they comprised 42.1% of the female restrictive housing population.

The Trial Court Erred When It Did Not Grant Class Certification

Rule 23 of the NC Rules of Civil Procedure provides:

> If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly ensure the adequate representation of all may, on behalf of all, sue or be sued.

N.C. Gen. Stat. 1A-1, Rule 23.

Standing alone, that requirement would encompass every individual who is incarcerated within the State's Department of Prisons. The North Carolina Supreme Court stated in *Crow v. Citicorp Acceptance Co.* that Rule 23 should receive a liberal construction and it should not be loaded down with arbitrary and technical restrictions. *Crow v. Citicorp Acceptance Co.* 319 N.C. 274, 280, 354 S.E.2d 459, 464 (1987).

Incarcerated persons do not have ample access to the Courts and are afflicted with common dangers and arbitrary decisions due solely to the fact that they are incarcerated. Rule 23(a) is made for instances such as this, when there are common issues and facts which negatively impact each incarcerated person and/or is highly likely to subject each of them to a common danger. In this case, that common danger is being placed in solitary confinement for a short or a prolonged period of time which carries an extremely high risk of creating and aggravating serious psychological injury. If these individuals do not constitute a class, no one does. A liberal application of this standard should encompass each individual who is incarcerated in a North Carolina prison and

who stands in danger of being placed in solitary confinement at some point during their period of incarceration.

The Court has determined that, for Rule 23(a) purposes, a class exists when each member has an interest in either the same issue of law or fact and there are no existing issues which predominate over issues which only affect individual members of the class. *Id.* at 354, 354 S.E.2d at 462. In this context, the only issue of relevance is whether the psychological harm and danger to incarcerated persons in North Carolina prisons violate the protections provided by Art. I, Section 27 of the North Carolina Constitution, Cruel or Unusual Punishment, or of the Eighth Amendment to the United States Constitution, Cruel and Unusual Punishment. U.S. Const. Amend. VIII.

In assessing the sufficiency of a class certification, a trial court should determine if the Plaintiffs satisfy the following factors:

> (1) The named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class.

Faulkenbury v. Teachers' and State Emps,' Ret. Sys. Of N.C., 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997).

Addressing these *Faulkenbury* factors, the relevant facts here establish that the named representatives are incarcerated individuals who have already been placed in solitary confinement or are in danger of being placed in this dangerous situation. As the North Carolina state prison

rules and regulations are presently constructed, every incarcerated person can be placed in this restrictive housing for almost any conduct which a prison official subjectively determines to be in violation of any prison rule or can be confined because of a determination that the person is voluntarily or involuntarily in need of physical protection. As such, any incarcerated person can satisfy this factor.

With respect to this claim, which is for declaratory and injunctive relief, there are no conflicting issues nor is there a need to establish the presence of separate liability or an amount of individual harm or damages which each or several incarcerated persons have experienced. As such, there is not a danger of a conflict of interest developing between the class members.

Additionally, the named Plaintiffs, in this case, are presently immersed in the very real danger that results from solitary confinement. They have either previously experienced this danger, are presently housed in a solitary confinement unit or, as a result of being incarcerated, they are presently in imminent danger of being subjected to solitary confinement. Each of these situations, constitutes more than a mere technical interest in this claim where there is a personal common interest in the outcome.

Each incarcerated person who is presently in solitary confinement or is merely in a regular prison unit and at risk of being sent to solitary confinement, is a potential class member. The release from incarceration of those who survived solitary confinement does no more than transfer the damaging impact of the psychological harm, as those released individuals now carry the resulting psychological damage with them back into the community. As such, the impacted class members are so numerous that it is impractical to bring all of them before the Court.

Finally, since the incarcerated class members are located in an established prison unit, they are easy to identify and contact to keep informed of developments in Court. Based upon the above

discussion, the salient *Faulkenbury* factors which the Plaintiffs must satisfy have been met and strongly favor the granting of class certification. Instead of relying upon and evaluating the relevant *Faulkenbury* factors, the trial court over-analyzed and misinterpreted the test which the Plaintiffs were required to satisfy in order to establish a legally viable class. Instead, the Trial Court's opinion addressed legal issues, facts and concerns which should be reserved for a determination of the merits of Plaintiffs' claims. The determination of the merits by the Trial Court has no relevance when deciding whether class certification is appropriate. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974).

History of Denying Class Certification

Trial courts in NC have broad discretion in determining whether to certify a class. This discretion "is not limited to consideration of matters expressly set forth in Rule 23." *Crow* 319 N.C. at 284.

When rendering decisions that have the potential to address issues such as the devastating impact of solitary confinement, Courts should exercise particular caution to ensure that implicit biases do not stand in the way of delivering justice as history has demonstrated.

Historically class action suits, such as *Brown v. Board* paved the way for civil rights victories, particularly for minorities across the US. When revising Federal Rule 23, the Rules Advisory Committee's "motivation, in significant part, was to create a receptive procedural vehicle for the explosion of civil rights cases that followed the Supreme Court's seminal 1954 decision in

Brown v. Board of Education …."); [2]Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative,* 64 Emory L.J. 293,294 (2014).

However, despite this momentous decision, courts and legislatures immediately began developing legal strategies and implementing policies designed to limit the reach of the decision in *Brown*. "These replacement policies made dissimilarities within a potential class of African American students theoretically relevant to the class-certification analysis, and thus defeated requests for class treatment." David Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action,* 63 Fla. L. Rev. 657 (2011). This added layer of analysis by which the court emphasizes the dissimilarities within a class have permitted courts to deny class certification. This shift in analysis of class certification strategically constrained the scope of future class action suits limiting widespread success for African Americans and other minority groups that challenged civil rights violations.

The trial court in this matter, had the opportunity to address a detrimental civil rights issue that continues to plague an innumerable sector of the African American community, yet failed to do so by utilizing the decades old strategy of denying class certification. Similar to the replacement policies mentioned above, the trial court in this matter over emphasized the focus of minor dissimilarities within the Plaintiffs and denied the class certification, ignoring long standing precedent that Rule 23 may be satisfied even when class members have differences.

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[2] S*ee also* Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment ("Illustrative [of situations to which **Rule 23**(b)(2) would apply] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.").

CONCLUSION

The trial court gravely erred by failing to issue class certification to the Plaintiffs, and this Court should reverse that decision. The Court must address the inhumane nature of the psychological and social torture that hundreds across the state face and will continue to suffer from, not only on an individual basis, but rather as a class as to ensure that this tantamount injustice is addressed for all of those who suffer.

Respectfully submitted this 2nd day of July, 2021.

North Carolina Conference of the NAACP

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