

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

JOHN BAXLEY, JR., et al.,

Plaintiffs,

v.

**Civil Action No. 3:18-cv-01526
(Chambers, J.)**

BETSY JIVIDEN, et al.,

Defendants.

**DEFENDANTS' SUPPLEMENT TO RESPONSE IN OPPOSITION TO
MOTION TO UNSEAL COURT RECORDS**

NOW COME the Defendants, Betsy Jividen, Commissioner of West Virginia Division of Corrections and Rehabilitation (“WVDCR”), and Carl Aldridge, Superintendent of the Western Regional Jail and Correctional Facility, by counsel, and hereby supplement their response to a motion filed by the intervenor, American Civil Liberties Union of West Virginia (“ACLU-WV”), to unseal certain court records (Doc. 188). In support thereof, Defendants aver:

1. As part of their initial response, Defendants offered to provide to the Court for *in camera* review redacted versions of two affidavits, one of Marvin Plumley (Sealed Exhibit 2) and one of Debbie Hissom (Sealed Exhibit 3).

2. Defendants are currently involved in the defense of a Petition for Writ of Habeas Corpus filed by the intervenor before the Supreme Court of Appeals of West Virginia styled *Donald Miller, et al. v. Betsy Jividen, et al.* (Appeal No. 20-0259).

3. On April 21, 2020, Defendants filed an Answer and Motion to Dismiss Petition for Writ of Habeas Corpus in *Miller*. A redacted version of the Plumley Affidavit was made a part of the Supplemental Appendix in conjunction with that filing, and the redactions are the same ones

that Defendants intend to proffer the Court for *in camera* review in this case. See redacted Plumley Affidavit attached hereto as Exhibit 1.

4. Now that the redacted Plumley Affidavit has been filed in *Miller*, Defendants wish to inform the Court that they have no objection to the Plumley Affidavit, in the redacted form set forth in Exhibit 1, being unsealed.

5. Defendants respectfully reserve all other objections previously stated including their objections to an unredacted version of the Plumley Affidavit being unsealed.

**Respectfully submitted on behalf of all
Defendants by:**

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ATTORNEY GENERAL**

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CERTIFICATE OF SERVICE

I, Webster J. Arceneaux, III, co-counsel for all Defendants, do hereby certify that on this 22nd day of April 2020, I electronically served a copy of the foregoing “**DEFENDANTS’ SUPPLEMENT TO RESPONSE IN OPPOSITION TO MOTION TO UNSEAL COURT RECORDS**” via the CM/ECF system that will send notification to the following counsel of record:

Lydia C. Milnes, Esq.
Jennifer S. Wagner, Esq.
Mountain State Justice
Counsel for Plaintiffs

Loree Beth Stark, Esq.
ACLU of West Virginia Foundation
Counsel for American Civil Liberties Union of West Virginia Foundation

/s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III, State Bar #155

EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
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AFFIDAVIT OF MARVIN PLUMLEY

**STATE OF WEST VIRGINIA
COUNTY OF RANDOLPH, To-wit:**

I, Marvin Plumley, being first duly sworn upon my oath, hereby come forth and state as follows:

1. I have worked at what is now known as the Division of Corrections and Rehabilitation, (“DCR”) since January, 2001. I started as a Correctional Counselor and then I advanced through the ranks to hold Superintendent and other administrative/security positions. I am now employed by DCR as the Assistant Commissioner for the Bureau of Prisons and Jails.

2. Pursuant to the Court’s April 3, 2020 Order (Doc 179) I am responding to the following subparagraphs of ¶ 18 of Dr. Venters’ declaration:

- a. Each WV DCR facility should complete the worksheet set forth in its policy, and provide those to the Court and the parties, to ensure that all necessary measures are being uniformly adopted and followed in all facilities.

The worksheets were all timely completed for each prison and jail following the March 20, 2020 COVID-19 Policy Directive and I have them on file. The worksheets contain security sensitive information such as employee/staffing information, medical screening information, inmate information, and transport information. Therefore, these completed worksheets are highly confidential documents not subject to public disclosure.

- b. An individual in each facility be tasked with reporting daily on implementation of the WV DCR COVID-19 response.

I receive daily reports from each facility in the morning from the Superintendents and/or other supervisory employees regarding COVID-19 plan implementation, compliance, situations, questions, and equipment. Additionally, other DCR staff members, such as Debbie Hissom who is the Director of Correctional Healthcare receives and provides myself and others relevant information from the medical contractors (PrimeCare of West Virginia and Wexford Health Sources) and other external sources, such as the WV State Epidemiologist, Center for Disease Control, World Health Organization, DHHR, and others. Any prison or jail facility that has questions or experiences an out-of-the-ordinary event, such as someone being quarantined or demonstrating symptoms, may immediately report those situations to me and/or Lance Yardley, Chief of Operations, via phone, text or email.

- d. WV DCR should provide a detailed staffing plan setting forth how it plans to surge nursing/health coverage and security staff coverage to address the inevitable outbreak.

Staffing plans are consistently and constantly being analyzed in order to redistribute resources, including correctional officers, should any facility (prison or jail), need additional officers in order to properly staff a facility. The strategy in place includes, but is not limited to, temporarily reassigning current correctional officers, and utilizing qualified and trained central office employees (such as the regional directors, assistant commissioners) and training officers to fill staffing gaps, if needed. Staffing plans in place were established long before the COVID-19 pandemic will utilized, updated, and revised as needed generally. Staffing plans cannot be made available due to the security implications and dangers disclosure of this information has on individual facilities and the DCR system at-large.

- g. WV DCR should create and provide a PPE plan for both staff and patients.

Personal Protective Equipment (PPE) plans for both staff and patients are in place per the March 20, 2020 COVID 19 Pandemic Response Plan and March 26, 2020, Memorandum Adopting CDC Correctional Recommendations. Furthermore, PPE such as latex gloves are used daily for a multitude of reasons/uses outside of medical/COVID-19 uses and are adequately stocked at all facilities. Other PPE items, such as surgical masks and N95 respirator masks are currently stocked in various quantities at all regional jail and prison facilities throughout the State of West Virginia with additional quantities being both on order from outside vendors and being manufactured by Correctional Industries of West Virginia.



Finally, the Division of Administrative Services, Correctional Industries, and individual facilities have ordered from outside vendors additional latex gloves, soap, toilet tissue, hand sanitizer, germicides, bleach, surgical masks, and N95 respirator masks, in addition to other PPE and items, to continue to build PPE stores to be utilized consistent with CDC guidelines.

- i. WV DCR should take immediate steps to ensure that all portions of its plan are being implemented, including the provision of free adequate supplies to inmates and staff.

Supervisory staff at each facility, such as Superintendents, Majors, and Captains as well as Central Office staff, such as myself, Commissioner Jividen, and Deputy Commissioner Michael Coleman, are conducting site visits to audit and facilitate compliance with DCR's COVID-19 Response Plan and work through individual facility needs. Daily documentation is being submitted to DCR as noted above and medical contractors are in close communication with DCR Superintendents at each facility.

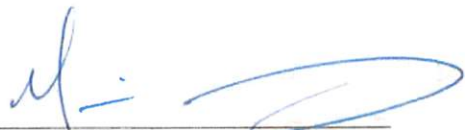
Additionally, local health departments are on-site as needed for consultation and testing evaluation as well as each superintendent is having ongoing contact and conversations with local health departments regarding COVID-19 issues. Debbie Hissom, Director of Correctional Healthcare, is in contact with the State Epidemiologist, DHHR, and industry groups to facilitate further policy evaluation and development as conditions continue to change across the State of West Virginia.

Inmates have been apprised through verbal announcements in housing sections by correctional officers, posters hung in conspicuous places in housing sections, policy information available on jail kiosks, ticker alerts on jail kiosks, and individual hand-outs in prisons and jails of some steps taken to combat the risks of COVID-19. For example, posters were hung in all housing units in jails and prisons announcing the suspension of medical copays for sick call visits and encouraging increased hygiene/handwashing by inmates; inmates at some prisons have been "rewarded" for extra cleaning efforts facility-wide through DCR placing additional funds in inmate trust accounts to allow for more 'free' video calls for inmates to loved ones; and increased volume of cleaning supplies, including bleach, have been provided to inmates throughout DCR's systems.

Finally, Commissioner Jividen is in contact with stakeholders, such as public defender organizations, prosecutors, West Virginia Department of Military Affairs and Public Safety, Governor Justice's Office, and law enforcement officials, regarding population reduction strategies, transportation issues, releases of inmates, work release programs, etc.

3. The COVID-19 Pandemic is not a static situation, but one DCR staff members at all levels are analyzing and adapting to on a constant basis. DCR policies will continue to evolve so long as the situation on the ground both in and outside of DCR facilities continues to change; however, DCR has been meeting the challenges of this pandemic with all resources available to reasonably protect those inmates in its care, custody, and control during these uncertain times.

Further the affiant sayeth naught.


Marvin Plumley

STATE OF WEST VIRGINIA

COUNTY OF RANDOLPH,

Signed and sworn before me this 3rd day of April, 2020, by Marvin Plumley.

My commission expires August 26, 2022.


Notary Public

