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Supreme Court No. 100048-1  
Division III, No. 37588-9-III

IN THE  
SUPREME COURT  
OF THE  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

HUGH ALLEN PUTNAM,

Petitioner

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PETITION FOR REVIEW FOLLOWING  
APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CHELAN COUNTY

The Honorable Judge Lesley A. Allan

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PETITION FOR REVIEW

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### **A. IDENTITY OF PETITIONER**

Petitioner Hugh Allen Putnam asks this Court to accept review of Court of Appeals' decision that affirmed the denial of his CrR 7.8(b) motion for early release from incarceration.

### **B. DECISION FOR WHICH REVIEW IS SOUGHT**

The Court of Appeals, Division III, unpublished opinion, filed on July 13, 2021. A copy of this opinion is attached as Appendix A.

### **C. ISSUES PRESENTED FOR REVIEW**

Issue 1: Whether this Court should accept review under RAP 13.4(b)(2) and (b)(4), because the combination of COVID-19 and Mr. Putnam's current state of health is a reason justifying relief from the operation of the judgment, pursuant to CrR 7.8(b)(5).

### **D. STATEMENT OF THE CASE**

Following a jury trial held in 2003, a jury found Hugh Allen Putnam guilty of two counts of first degree assault and two counts of second degree assault. (CP 15-18, 58, 61, 63, 65, 75-82). The jury also found Mr. Putnam was armed with a firearm during the commission of each offense. (CP 59, 62, 64, 66). According to the facts presented at the jury trial, Mr. Putnam shot a gun in a Wenatchee Park, where four individuals were present. (CP 135-136). No injuries were sustained during this incident. (CP 135-136).

On January 29, 2003, the trial court entered a Judgment and Sentence on these offenses, sentencing Mr. Putnam to a term of confinement of 414 months. (CP 85-95, 97-98). At the time he was sentenced, Mr. Putnam had no criminal history. (CP 86). Mr. Putnam appealed, and this Court affirmed his convictions in an unpublished opinion issued on July 15, 2004. (CP 104-105, 133-144).

Subsequently, Mr. Putnam filed two personal restraint petitions, which were both dismissed by this Court. (CP 149-153, 160-285).

Mr. Putnam was born on August 2, 1956. (CP 15, 311). He suffers from several chronic illnesses and medical issues, including ulcerative colitis; type-1 diabetes; mediastinal adenopathy; high blood pressure; and Chronic Obstructive Pulmonary Disease (COPD). (CP 289-290, 311-314). In 1976, in order to control his ulcerative colitis, Mr. Putnam underwent ostomy surgery, and a stoma was installed, to divert his bodily waste into an ostomy bag. (CP 289-290, 312). In 2009, Mr. Putnam suffered a stroke. (CP 290, 313). His COPD diagnosis occurred in 2014. (CP 290, 313).

On February 29, 2020, Governor Jay Inslee declared a state of emergency in Washington State as a result of the novel coronavirus (COVID-19). *See* Proclamation by the Governor 20-05, <https://www.governor.wa.gov/sites/default/files/proclamations/20-05%20Coronavirus%20%28final%29.pdf> (last visited Aug. 3, 2021). The Governor’s proclamation defined COVID-19 as “a respiratory disease that can result in serious illness or death, is caused by the SARS-CoV-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person[.]” *Id.* The Governor’s proclamation noted that “[o]n January 21, 2020, the Washington State Department of Health confirmed the first case of the novel coronavirus (COVID-19) in the United States in Snohomish County, Washington.” *Id.*

On March 18, 2020, the Washington State Supreme Court issued an order, addressing the statewide response by the Washington state courts to the COVID-19 public health emergency. In the Matter of Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency, Amended Order No. 25700-B-607, <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Supreme%20Court%20Emergency%20Order%20re%20CV19%20031820.pdf>, (last visited Oct. 14, 2020). On February 19, 2021, the Washington State Court issued a fifth revised and extended order regarding court operations. In the Matter of Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency, Fifth Revised and Extended Order Regarding Court Operations No. 25700-B-658, <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/25700-B-658.pdf>, (last visited Aug. 3, 2021). The Order stated “the coordinated response from Washington courts to prevent the further spread of COVID-19 must be continued beyond the timeframes in this Court’s prior orders while allowing courts to operate effectively and maintain effective and equitable access to justice[.]” *Id.*

According to the Centers for Disease Control and Prevention (CDC), “the risk for severe illness from COVID-19 increases with age, with older adults at highest risk.” Older Adults, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited Aug. 3, 2021). According to the CDC, “[s]evere illness means that the person with COVID-19 may require



hospitalization, intensive care, or a ventilator to help them breathe, or they may even die.” *Id.*

The CDC has identified adults of any age, with certain medical conditions<sup>1</sup>, “can be more likely to get severely ill from COVID-19.” People with Certain Medical Conditions, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last visited Aug. 3, 2021).

The Washington Department of Corrections (DOC) developed a guidance document “to allow the [DOC] to better respond to the emerging COVID-19 outbreak.” WA State DOC COVID-19 Screening, Testing, and Infection Control Guideline, Version 27, <https://www.doc.wa.gov/corrections/covid-19/docs/screening-testing-infection-control-guideline.pdf> (last visited Aug. 3, 2021). Vaccines are now available to inmates in DOC facilities. COVID-19 Vaccine Administration, <https://www.doc.wa.gov/corrections/covid-19/data-vaccines.htm> (last visited Aug. 3, 2021).

On April 16, 2020, Mr. Putnam filed an emergency motion and memorandum for early release, requesting the trial court order DOC to release him pending the decision of the Clemency Board in his case. (CP 287-342). Mr. Putnam alleged that

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<sup>1</sup> These medical conditions are: cancer, chronic kidney disease, chronic lung diseases, including COPD, dementia or other neurological conditions, type 1 or type 2 diabetes, down syndrome, heart conditions, HIV infection, immunocompromised state, liver disease, overweight and obesity, pregnancy, sick cell disease of thalassemia, current or former smoking, solid organ or blood stem cell transplant, stroke or cerebrovascular disease which affects blood flow to the brain, and substance use disorders. People with Certain Medical Conditions, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last visited Aug. 3, 2021).

because of the COVID-19 pandemic, he is at grave risk of death if and when COVID-19 gets into the Coyote Ridge Corrections Center (Coyote Ridge) where he was housed at the time. (RP 20). He alleged he has risk factors for COVID-19 complications and a probability of death. (CP 383-384; RP 20). Mr. Putnam argued the trial court had authority to amend his sentence pursuant to CrR 7.8(b)(2) or CrR 7.8(b)(5). (CP 381-391, 395-397; RP 18-20, 27).

On May 1, 2020, the trial court held a hearing on Mr. Putnam's motion. (RP 17-30). The trial court denied Mr. Putnam's motion for release. (CP 403-404; RP 27-29). The trial court stated the following with respect to CrR 7.8(b)(5):

[T]his is in essence asking that this Court to step in [sic] and become a clemency board or grant furloughs to people who are in prison or in some way commute sentences, none of which you've provided a basis for this Court to do. I don't know whether Mr. Putnam should be released or not.

. . .

And so, your motion is for me to order DOC to release Mr. Putnam pending hearing by the clemency board and that motion is denied. I don't believe that I have the jurisdiction or authority to do that . . . .

(RP 28-29).

The trial court issued written findings of fact and conclusions of law. (CP 403-404).

Mr. Putnam appealed. (CP 405-407). The Court of Appeals affirmed the denial of his CrR 7.8(b) motion for early release from incarceration. *See* Appendix A. The Court of Appeals stated "[w]e readily agree with the literature presented by Putnam and amici and assume the danger from the pandemic continues despite the development of vaccinations. Nevertheless, we conclude that the judicial branch

lacks authority to release one on medical or epidemiology grounds.” *See* Appendix A, pg. 5.

Mr. Putnam now seeks review by this Court. At this time, Mr. Putnam is housed at the Washington State Penitentiary. There are been 995 confirmed cases of COVID-19 at this prison; including 4 new positive cases confirmed within the last 30 days. COVID-19 Data, <https://www.doc.wa.gov/corrections/covid-19/data.htm#confirmed> (last visited Aug. 3, 2021).

### E. ARGUMENT

A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

**Issue 1: Whether this Court should accept review under RAP 13.4(b)(2) and (b)(4), because the combination of COVID-19 and Mr. Putnam’s current state of health is a reason justifying relief from the operation of the judgment, pursuant to CrR 7.8(b)(5).**

Review by this Court is merited because the Court of Appeals’ decision conflicts with decisions of the Court of Appeals authorizing relief from a judgment and sentence under CrR 7.8(b)(5), based upon extraordinary circumstances that could not have been anticipated at the time of sentencing. *See*

*State v. Smith*, 159 Wn. App. 694, 699-702, 247 P.3d 775 (2011); *State v. Klump*, 80 Wn. App. 391, 397, 909 P.2d 317 (1996); RAP 13.4(b)(2).

Review by this Court is also merited because this case involves an issue of substantial public interest that should be determined by this Court, whether an incarcerated person can seek relief from the operation of a judgment, as a result of both the COVID-19 pandemic and health conditions. RAP 13.4(b)(4).

The trial court erred in denying Mr. Putnam's motion for release pursuant to CrR 7.8(b)(5). COVID-19 and Mr. Putnam's current state of health is a reason justifying relief from the operation of the judgment under this rule. This Court should reverse the trial court and order Mr. Putnam's release from confinement. In the alternative, this court should reverse the trial court and remand for the trial court to determine whether Mr. Putnam's CrR 7.8(b)(5) motion should be granted on the merits.

CrR 7.8(b) authorizes relief from a final judgment or order under the following circumstances:

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) The judgment is void; or
- (5) *Any other reason justifying relief from the operation of the judgment.*

CrR 7.8(b)(emphasis added).

In general, “[o]nce a trial court has entered a judgment and sentence of confinement longer than one year, jurisdiction over the defendant passes to the DOC.” *State v. Hale*, 94 Wn. App. 46, 54, 971 P.3d 88 (1999); *see also In re Postsentence Review of Cage*, 181 Wn. App. 588, 593, 326 P.3d 805 (2014). However, “[a] court has jurisdiction to amend a judgment to correct an erroneous sentence, where justice requires, under CrR 7.8.” *State v. McGuire*, 12 Wn. App. 2d 88, 94, 456 P.3d 1193 (2020) (quoting *State v. Hardesty*, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996)). “Final judgments in both criminal and civil cases may be vacated or altered only in those limited circumstances where the interests of justice most urgently require.” *State v. Shove*, 113 Wn.2d 83, 88, 776 P.2d 132 (1989) (citing RCW 9.94A.150; RCW 9.94A.260; CrR 7.8(b); CR 60(b)); *see also Cage*, 181 Wn. App. at 594 (acknowledging this holding).

Although the Sentencing Reform Act of 1981(SRA) prohibits early release, “it does not, or at least does not appear to, prohibit the traditional discretion extended to a sentencing judge to correct a sentence *based on unforeseen circumstances . . .*” 159 Wn. App. at 699 (emphasis added).

“A vacation under section (5) is limited to extraordinary circumstances not covered by any other section of the rule.” *State v. Cortez*, 73 Wn. App. 838, 841–42, 871 P.2d 660 (1994); *see also Smith*, 159 Wn. App. at 700. “Extraordinary circumstances must relate to irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings.” *State v. Aguirre*, 73 Wn. App. 682, 688, 871 P.2d 616, 619 (1994) (citations omitted) (internal quotation marks omitted); *see also Smith*, 159 Wn. App. at 700 (holding that “[e]xtraordinary

circumstances include fundamental and substantial irregularities in the court's proceedings or irregularities extraneous to the court's action.").

CrR 7.8(b)(5) does not apply when the circumstances used to justify relief existed at the time the judgment was entered. *See McGuire*, 12 Wn. App. 2d at 93; *see also Cortez*, 73 Wn. App. at 842 (stating "[t]here is no reason in law or policy which suggests that a conviction should be vacated for circumstances existing at the time the judgment is entered."). In order for CrR 7.8(b)(5) to apply, there must be a circumstance that was "unforeseeable and unanticipated" at the time of sentencing. *Smith*, 159 Wn. App. at 701. Accordingly, "[a] sentence following a criminal conviction can be subsequently modified only for extraordinary circumstances that could not have been anticipated at the time of sentencing." *Smith*, 159 Wn. App. at 696.

A trial court's ruling on a CrR 7.8 motion is reviewed for an abuse of discretion. *State v. Quintero Morales*, 133 Wn. App. 591, 596, 137 P.3d 114 (2006); *see also Aguirre*, 73 Wn. App. at 686. "A trial court abuses its discretion when it exercises discretion in a manner that is manifestly unreasonable or based upon untenable grounds or reasons." *Id.* (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). In addition, the failure to exercise discretion is an abuse of discretion. *See, e.g., In re Det. of Mines*, 165 Wn. App. 112, 125, 266 P.3d 242 (2011).

However, CrR 7.8 does not provide a definition for "[a]ny other reason justifying relief from the operation of the judgment." CrR 7.8(b)(5). "Whether and how a court rule is applied is a question of law," reviewed de novo. *Quintero*

*Moralos*, 133 Wn. App. at 596. Appellate courts “apply standards of statutory construction to court rules and interpret them as if they were statutes.” *Id.* (citing *In re Pers. Restraint of Stenson*, 153 Wn.2d 137, 146, 102 P.3d 151 (2004)). “If the language of a criminal rule is susceptible to more than one meaning, the rule of lenity requires that we strictly construe it against the State and in favor of the accused.” *Id.* (citing *State v. Gore*, 101 Wn.2d 481, 485–86, 681 P.2d 227 (1984)).

Accordingly, the question of whether COVID-19 constitutes “[a]ny other reason justifying relief from the operation of the judgment” under CrR 7.8(b)(5) is strictly construed against the State and in favor of Mr. Putnam, and is subject to de novo review. *See Quintero Moralos*, 133 Wn. App. at 596.

In *Smith*, the Court of Appeals found that under CrR 7.8(b)(5), “[e]xtraordinary circumstances include fundamental and substantial irregularities in the court’s proceedings or *irregularities extraneous to the court’s action*.” *Smith*, 159 Wn. App. at 700 (emphasis added). This Court further found “CrR 7.8(b)(5) will not apply when the circumstances used to justify the relief existed at the time the judgment was entered.” *Id.* (citing *Cortez*, 73 Wn. App. at 842).

In *Klump*, the Court of Appeals also found, where the alleged circumstance occurred after the judgment was entered, it qualified as an “extraordinary circumstance” justifying relief under CrR 7.8(b)(5). *Klump*, 80 Wn. App. at 397.

This case law permits relief from judgment under CrR 7.8(b)(5) where there are extraordinary circumstances, extraneous the court’s action, that did not exist at the time the judgment is entered. Mr. Putnam meets these criteria.

The trial court had authority to release Mr. Putnam under CrR 7.8(b)(5). The combination of COVID-19 and Mr. Putnam's specific risk for severe illness from COVID-19 is an extraordinary circumstance under CrR 7.8(b)(5), justifying relief from the operation of the judgment. These circumstances are an irregularity that is extraneous to the sentencing court's action. *See Aguirre*, 73 Wn. App. at 688; *see also Smith*, 159 Wn. App. at 700; *Klump*, 80 Wn. App. at 397.

COVID-19 did not exist in 2003 at the time Mr. Putnam's sentence was entered. (CP 85-95, 97-98); *see also McGuire*, 12 Wn. App. 2d at 93. The first case of COVID-19 in the United States was in our State, on January 21, 2020. *See* Proclamation by the Governor 20-05, <https://www.governor.wa.gov/sites/default/files/proclamations/20-05%20Coronavirus%20%28final%29.pdf> (last visited Aug. 3, 2021). COVID-19 was unforeseen and unanticipated at Mr. Putnam's 2003 sentencing. *See Smith*, 159 Wn. App. at 701.

Because of COVID-19, the interests of justice urgently require Mr. Putnam's Judgment and Sentence to be altered to allow for his release. *See Shove*, 113 Wn.2d at 88; *see also Cage*, 181 Wn. App. at 594. Given his age and medical conditions, Mr. Putnam faces great danger due to his incarceration and COVID-19. (CP 15, 311, 289-290, 311-314).

The World Health Organization (WHO) states that people who are incarcerated and otherwise deprived of their liberty are generally more vulnerable to disease and illness. Preparedness, prevention and control of COVID-19 in prisons and other places of detention, Interim guidance 15 March 2020, *available at*



[https://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf](https://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf) (last visited Oct. 14, 2020).

The WHO states “[t]he very fact of being deprived of liberty generally implies that people in prisons and other places of detention live in close proximity with one another, which is likely to result in a heightened risk of person-to-person and droplet transmission of pathogens like COVID-19.” *Id.* at pg. 2.

COVID-19 remains a threat to Mr. Putnam. At this time, Mr. Putnam is housed at the Washington State Penitentiary. There are been 995 confirmed cases of COVID-19 at this prison; including 4 new positive cases confirmed within the last 30 days. COVID-19 Data, <https://www.doc.wa.gov/corrections/covid-19/data.htm#confirmed> (last visited Aug. 3, 2021). In addition, the CDC has identified four notable variants of the COVID-19 virus in the United States. About Variants of the Virus that Causes COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html> (last visited Aug. 3, 2021). According to the CDC, “[t]hese variants seem to spread more easily and quickly than other variants, which may lead to more cases of COVID-19. An increase in the number of cases will put more strain on healthcare resources, lead to more hospitalizations, and potentially more deaths.” *Id.* In addition, even if an individual is vaccinated against COVID-19, according to the CDC, “[v]accine breakthrough cases are expected.” COVID-19 Vaccine Breakthrough Case Investigation and Reporting, <https://www.cdc.gov/vaccines/covid-19/health-departments/breakthrough-cases.html> (last visited Aug. 3, 2021).

In July 2020, this Court acknowledged that COVID-19 poses an extraordinary danger to inmates in Washington’s prisons. *See Colvin v. Inslee*, 195 Wn.2d 879, 884, 467 P.3d 953 (2020). At this time, the Court acknowledged:

The current widely reported medical evidence suggests that the COVID-19 risks of serious complications or death are highest for offenders over age 50 and those with certain preexisting medical conditions, but it can also be serious for younger people and those in good health. And serious outbreaks have occurred at other prisons and jails nationwide. Concerns about COVID-19 are all the more serious because our understanding of this public health threat is evolving and incomplete. The virus’s virulence and severity are unclear because there has been insufficient time to develop accurate, reliable, and widespread testing both for the virus and the presence of its antibodies. Without doubt, the prison system faces a daunting challenge from a serious public health threat.

*Id.* at 885.

Mr. Putnam is now 65 years old. (CP 15, 311). He suffers from several chronic illnesses and medical issues. (CP 289-290, 311-314). Due to both his age and his medical issues, he is identified by the CDC as at-risk for severe illness from COVID-19. *See Older Adults*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> (last visited Aug. 3, 2021); *see also People with Certain Medical Conditions*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last visited Aug. 3, 2021).

The trial court erred in denying Mr. Putnam’s motion for release pursuant to CrR 7.8(b)(5). The trial court erred in concluding that it lacked authority to grant Mr. Putnam’s motion; that CrR 7.8(b)(5) did not apply; and that COVID-19 is not “any other reason justifying relief from the judgment.” (CP 403). The trial court failed to exercise its discretion when it declined to consider the merits of Mr.


Putnam's CrR 7.8 motion, which itself constitutes an abuse of discretion. (CP 403-404; RP 28-29); *see also, e.g., Mines*, 165 Wn. App. at 125. Relief from Mr. Putnam's sentence is legally permitted under CrR 7.8(b)(5), and given the facts, relief from his sentence is warranted, in the interests of justice.

This Court should reverse the trial court and order Mr. Putnam's release from confinement. In the alternative, this court should reverse the trial court and remand for the trial court to determine whether Mr. Putnam's CrR 7.8(b)(5) motion should be granted on the merits.

#### **F. CONCLUSION**

For the reasons stated herein, Mr. Putnam respectfully requests that this Court grant review pursuant to 13.4(b)(2) and (b)(4).

Respectfully submitted this 3rd day of August, 2021

  
\_\_\_\_\_  
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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

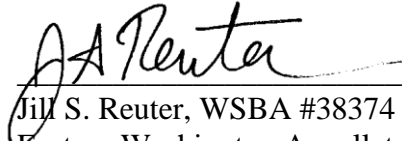
STATE OF WASHINGTON ) COA No. 37588-9-III  
Plaintiff/Respondent )  
vs. ) Chelan Co. No. 02-1-00388-6  
)  
HUGH ALLEN PUTNAM )  
)  
) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on August 3, 2021, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the attached Petition for Review to:

Hugh Allen Putnam, DOC No. 737268  
Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

Having obtained prior permission from the Okanogan County Prosecutor's Office, I also served the Respondent State of Washington at [prosecuting.attorney@co.chelan.wa.us](mailto:prosecuting.attorney@co.chelan.wa.us) using the Washington State Appellate Courts' Portal.

Dated this 3rd day of August, 2021.

  
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# APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 37588-9-III
Respondent,	)	
	)	
v.	)	
	)	UNPUBLISHED OPINION
HUGH ALLEN PUTNAM,	)	
	)	
Appellant.	)	

FEARING, J. — Hugh Putnam, pursuant to CrR 7.8(b)(b), seeks early release from confinement at the Department of Corrections’ (DOC) Coyote Ridge Corrections Center. Putnam emphasizes his age and medical condition as a basis for release. Although we sympathize with Putnam’s circumstances, we agree with the superior court that the judicial branch lacks authority to grant early release. Putnam’s request for relief must be addressed to the executive branch. We affirm the superior court’s denial of Putnam’s motion.

FACTS

Appellant Hugh Putnam was born August 2, 1956. Putnam underwent an ostomy surgery to control ulcerative colitis in 1976 at the age of 19. The surgery resulted in a

stoma, an opening on the abdomen connected to Putnam's digestive system to allow waste to exit the body. The opening requires constant medical attention.

On January 14, 2003, the State of Washington charged Hugh Putnam, then age 46, with two counts of attempted murder while armed with a firearm for firing his gun at two boys at a Wenatchee park. The State also charged Putnam with four counts of first degree assault with a firearm, because Putnam also fired a gun in the direction of a couple visiting the park.

In 2003, a Chelan County jury found Hugh Putnam guilty of two counts of first degree assault and two counts of second degree assault. The jury returned special verdicts for each of the convictions finding that Putnam was armed with a firearm for each count.

The trial court sentenced Putnam to 414 months. In 2004, this court affirmed the convictions in an unpublished opinion. This court has since denied two personal restraint petitions filed by Putnam.

In addition to suffering from ulcerative colitis and maintaining a stoma, Putnam now suffers from type-1 diabetes, mediastinal adenopathy, high blood pressure, and chronic obstructive pulmonary disease. In 2009, he suffered a stroke.

On November 20, 2019, then age 63, Hugh Putnam filed a clemency petition in which he requested that the Washington State Clemency and Pardons Board commute his sentence and permit him to live the rest of his sentence at home where he could care for

his own medical needs. In the petition, Putnam emphasized his age and medical conditions. Months later the COVID-19 pandemic struck Washington State, the United States, and the world.

#### PROCEDURE

On April 16, 2020, Hugh Putnam, still 63 years old, filed, with the superior court, an emergency motion for early release from Coyote Ridge Corrections Center pending the outcome of his clemency petition before the Clemency and Pardons Board. In the motion, he emphasized his medical conditions. Putnam contended that, because of the coronavirus pandemic, he faces a grave risk of death because of those health conditions and his age. He alleged a violation of his right to equal protection and rights shielding him from cruel and unusual punishment. Putnam mentioned that the Clemency and Pardons Board would conduct a hearing in the fall of 2020. He asked, however, that the superior court grant him release pending his clemency hearing or a medical furlough until an effective vaccine is developed for COVID-19.

In response to Hugh Putnam's motion for release, the State of Washington responded that Hugh Putnam cited no law that authorized the superior court to entertain his motion for early release based on medical grounds. The State argued that the only court rule allowing relief from a criminal judgment and sentence, CrR 7.8, did not authorize granting of Putnam's motion. The State contended that, after entry of a judgment and sentence, the sentencing court's jurisdiction over the offender ends. The



State also challenged the merits of Putnam's request for release. After the State's response to his motion, Hugh Putnam cited CrR 7.8(b)(2), which addresses newly discovered evidence, and CrR 7.8(b)(5), which mentions any other reasons justifying relief, as the authority under which the trial court could grant him early release.

On May 1, 2020, the superior court conducted a hearing on Hugh Putnam's motion for early release. The trial court questioned whether it held authority to change a sentence entered eighteen years earlier. Defense counsel argued that CrR 7.8 bestowed such authority on the superior court. Defense counsel also informed the court that DOC was currently considering the potential of an extraordinary medical placement for Putnam. Otherwise, because of the violent nature of Putnam's offense, he did not qualify for any other early release programs adopted by DOC for the pandemic. Defense counsel informed the court that three staff members at Coyote Ridge Corrections Center recently tested positive for COVID-19.

During the motion hearing, the State challenged application of the newly discovered evidence rule, CrR 7.8(b)(2), because the rule applied to evidence related to the conviction not to pandemics occurring during administration of the sentence. According to the State, only evidence impacting the guilt or innocence of the offender qualified as newly discovered evidence under the rule's subsection. The State also argued that CrR 7.8(b)(5) was not so broad as to grant the court jurisdiction of a request

for early release. Instead, according to the State, CrR 7.8(b)(5) only applied to errors or defects in the trial or sentencing process.

The superior court agreed with the State and denied Hugh Putnam’s motion for early release because the clemency board, not the court, possessed the authority to grant the release. The superior court also reasoned that CrR 7.8(b)(5) does not apply because COVID-19 and Putnam’s state of health are not “‘any other reason justifying relief from the judgment.’” Clerk’s Papers at 403.

#### LAW AND ANALYSIS

On appeal, Hugh Putnam, now age 64, and amici curiae sketch, in their respective briefs, the danger of the COVID-19 pandemic and its impact on inmates nationally, in Washington State, and Coyote Ridge Detention Center, Putnam’s locus of incarceration. The literature presented emphasizes the danger to older inmates and those with preexisting ailments. We readily agree with the literature presented by Putnam and amici and assume the danger from the pandemic continues despite the development of vaccinations. Nevertheless, we conclude that the judicial branch lacks authority to release one on medical or epidemiology grounds. One Washington statute removes from the sentencing court the ability to grant community custody or early release for an offender. No court rule grants such authority. Putnam must present his cause to the executive branch of Washington State government.

RCW 9.94A.728 controls Hugh Putnam’s appeal. The statute declares, in part:

(1) No person serving a sentence imposed pursuant to this chapter and committed to the custody of the department [of corrections] shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except as follows:

••••

(c)(i) The secretary may authorize an extraordinary medical placement for an offender when all of the following conditions exist:

(A) The offender has a medical condition that is serious and is expected to require costly care or treatment;

(B) The offender poses a low risk to the community because he or she is currently physically incapacitated due to age or the medical condition or is expected to be so at the time of release; and

(C) It is expected that granting the extraordinary medical placement will result in a cost savings to the state.

Note that the statute only authorizes the secretary of DOC to grant a medical release.

On April 15, 2020, as a result of the pandemic and based on his emergency powers, Washington Governor Jay Inslee allowed for the early release of offenders who did not commit a violent offense. Proclamation by Governor Jay Inslee, No. 20-50 (Wash. Apr. 15, 2020), <https://www.governor.wa.gov/sites/default/files/proclamations/20-50%20-%20COVID-19%20Reducing%20Prison%20Population.pdf>, related to the COVID-19 State of Emergency. Putnam committed a violent offense.

Before the superior court, Hugh Putnam, despite RCW 9.94A.728, argued that CrR 7.8(b) (2) and (5) authorized the superior court to grant him early release due to the combination of COVID-19, his age, and his medical conditions. This rule declares in pertinent part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

.....

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;

.....

(5) Any other reason justifying relief from the operation of the judgment.

(Boldface omitted.) On appeal, Putnam advances only subsection (5). He contends that trial courts retain the power to revisit sentences imposed on medically vulnerable individuals due to the unforeseen circumstance of a worldwide pandemic. The State responds that a trial court may grant relief under subsection (5) only when a judgment is invalid or the imposed sentence may not be executed as conceived by the court. We agree with the State.

On entry of a final judgment and sentence of imprisonment for longer than one year, legal authority over the accused passes by operation of law to DOC and the Washington State Clemency and Pardons Board, and those agencies of the executive branch bear full responsibility for executing the judgment and sentence or granting parole pursuant to statutes. *State v. Hale*, 94 Wn. App. 46, 54, 971 P.3d 88 (1999); *January v. Porter*, 75 Wn.2d 768, 773-74, 453 P.2d 876 (1969). The Washington State Supreme Court has emphasized this transfer of jurisdiction. Under Washington's system of punishment, the judicial process does not extend to the granting or denial of parole.

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*January v. Porter*, 75 Wn.2d 768, 773. The judiciary's functions ends with either a verdict of acquittal or the final entry of a judgment and sentence. *January v. Porter*, 75 Wn.2d at 773. The courts have long recognized this division of power. *January v. Porter*, 75 Wn.2d at 774.

Notwithstanding this transfer of jurisdiction from the judicial to the executive branch, final judgments in both criminal and civil cases may be vacated or altered by the sentencing court in those limited circumstances when the interests of justice most urgently require. *State v. Shove*, 113 Wn.2d 83, 88, 776 P.2d 132 (1989) (citing RCW 9.94A.150, RCW 9.94A.260, CrR 7.8(b), CR 60(b)). Nevertheless, relief under CrR 7.8(b)(5) is limited to extraordinary circumstances not covered by any other section of the CrR 7.8. *State v. Smith*, 159 Wn. App. 694, 700, 247 P.3d 775 (2011). An extraordinary circumstance includes "fundamental and substantial irregularities in the court's proceedings or irregularities extraneous to the court's action." *State v. Smith*, 159 Wn. App. at 700.

The limited number of decisions in which a Washington court has granted relief under CrR 7.8(b)(5) involve either a defect with the judgment and sentence or an inconsistency or inability for the sentence to be served as conceived by the sentencing court. *State v. Klump*, 80 Wn. App. 391, 909 P.2d 317 (1996); *State v. Smith*, 159 Wn. App. 694, 247 P.3d 775 (2011). In *State v. Klump*, the superior court imposed a valid sentence on Ronald Max Klump, which sentence referred to a previously imposed federal

sentence. The federal sentence was later reversed. Klump sought relief under CrR 7.8(b)(5) from his state sentence, and this court granted the relief because the federal sentence, to which the state sentence referred, was later invalidated. The state sentence therefore became invalid on its face.

In *State v. Smith*, 159 Wn. App. 694 (2011), the sentencing court sentenced four offenders to nine months' of partial confinement. The county of incarceration then eliminated its partial confinement program due to budget restraints. The original sentencing judge concluded that this change in confinement policy constituted an extraordinary circumstance under CrR 7.8(b)(5). On resentencing, the court shortened the sentences to six months, which shortening led to the immediate release of the offenders. This court affirmed because of the unforeseeable circumstance of loss of county funds for partial confinement at the time of the initial sentencing. The sentencing judge emphasized that the alternatives to incarceration served an important role in the sentences he imposed. This court observed that the availability of partial confinement served as a fundamental underpinning of the judge's sentencing decision and the change in county policy undermined the sentencing court's objective.

In *State v. Smith*, this court, in dicta, mentioned that the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, did not permit the judicial branch to release an offender before the expiration of his or her sentence pursuant to RCW 9.94A.728. This court wrote that, while the effect of the four offenders' resentencing by the superior court

included early release, such result constituted an indirect impact of the resentencing and did not serve as the resentencing court's basis for the modification. Instead, the resentencing court imposed a sentence that the court would have initially imposed had the court known of the subsequent termination of the partial confinement programs. This court reasoned that, although the SRA prohibits early release by the judicial branch, that prohibition did not prevent a judge from correcting a sentence based on unforeseen circumstances.

Hugh Putnam contends that CrR 7.8(b)(5) does not limit relief to a defect in the underlying conviction or sentence, nor is the rule limited to a sentence that cannot be executed as conceived. Instead, the resentencing court may, according to Putnam, grant relief on extraordinary circumstances extraneous to the court's action that did not exist at the time of entry of the judgment and sentence. Putnam relies on *State v. Cortez*, 73 Wn. App. 838, 871 P.2d 660 (1994).

In *State v. Cortez*, the trial court granted Jose Cortez's motion to vacate his judgment and sentence for possession of a controlled substance. At the time Cortez filed the motion, he faced deportation proceedings and could not gain relief from deportation due to his conviction. On appeal, the State argued that the trial court erred in granting the motion because relief under CrR 7.8(b)(5) was limited to a legal defect relating to the underlying conviction. The State contended that no legal defect existed, and, therefore, relief from the operation of the judgment could not be granted. This court agreed that no

legal defect existed but clarified that, even had one existed, it would constitute an “irregularity” or “mistake” within the meaning of CrR 7.8(b)(1) rather than an “extraordinary circumstance” under CrR 7.8(b)(5). *State v. Cortez*, 73 Wn. App. at 841. This court then addressed CrR 7.8(b)(5) and ruled that no alleged extraordinary circumstances existed because the circumstances on which Cortez sought vacation, the potential for deportation, existed at the time of the sentencing.

Hugh Putnam emphasizes *State v. Cortez*’s mention of conditions existing at the time of sentencing and then highlights that his sentencing court never expected or considered the circumstances of a pandemic wreaking havoc in the prison system and threatening the life of one of Putnam’s age and medical condition. Nevertheless, Putnam fails to show an exceptional circumstance that undermines his specific sentence and judgment as opposed to extraordinary circumstances that impact Washington’s administration of justice and punishment system as a whole. All offenders under DOC incarceration face threats due to the coronavirus and some of the offenders are as old as Putnam and have medical conditions that render them susceptible to the pandemic.

In *State v. Klump*, the sentence could not be completed because of its invalidity. In *State v. Smith*, the sentence could not be effectuated because the county terminated the partial confinement program. Hugh Putnam’s judgment and sentence remains valid, and DOC may still administer the sentence.



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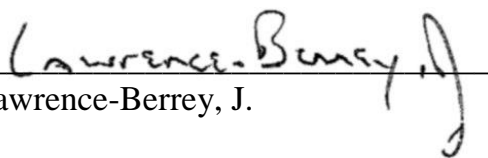
CONCLUSION


We affirm the superior court's denial of Hugh Putnam's CrR 7.8 motion for early release from incarceration.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
\_\_\_\_\_  
Fearing, J.

WE CONCUR:

  
\_\_\_\_\_  
Lawrence-Berrey, J.

  
\_\_\_\_\_  
Pennell, C.J.

**NICHOLS AND REUTER, PLLC / EASTERN WASHINGTON APPELLATE LAW**

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