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No. 98317-8

SUPREME COURT OF THE STATE OF WASHINGTON

SHYANNE COLVIN, SHANELL DUNCAN, TERRY KILL, LEONDIS
BERRY, and THEODORE ROOSEVELT RHONE,

Petitioners,

v.

JAY INSLEE, Governor of the State of Washington, and STEPHEN
SINCLAIR, Secretary of the Washington State Department of Corrections,

Respondents.

**PETITIONERS' RESPONSE TO RESPONDENTS'
SUPPLEMENTAL REPORT ON THE DEPARTMENT OF
CORRECTIONS' COVID-19 RESPONSE**

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I. INTRODUCTION

In its Friday, April 10, 2020 Order, the Court directed Respondents “to immediately exercise their authority to take **all necessary steps** to protect the health and safety of the named petitioners **and** all Department of Corrections inmates in response to the COVID-19 outbreak.”¹ Likely recognizing the unprecedented emergency which prompted Petitioners to file this action, the Court ordered Respondents to provide it with a written report by noon on April 13 – the next business day – of “all steps that have been taken and will be taken” by the Governor and the Department of Corrections (DOC) to protect prisoners’ health and safety as well as “their emergency plan for implementation.” As permitted by the Court’s Order, Petitioners file this response to Respondents’ Supplemental Report on the Department of Corrections’ COVID-19 Response (Supp. Report).

II. RESPONSE

A. Respondents Failed to Take the Most Necessary Step to Protect People in Washington’s Prisons from COVID-19, Releases, Until the Court Issued its April 10 Order.

As the chronology of events demonstrates, Respondents unreasonably delayed taking necessary, meaningful action to protect

¹ Order on Motion, *Colvin v. Inslee*, Wash. St. Sup. Ct. No. 98317-8 (April 10, 2020) at 2 (emphasis added).

people in prison until the Court ordered them to do so on April 10,² and the limited actions they have taken since then are still not enough. The first known³ case of COVID-19 hit Washington State on January 21, 2020.⁴ The Governor took quick and decisive action to protect many people in our State. He closed schools, businesses and restaurants, and issued multiple emergency orders, taking “unprecedented steps...to protect Washingtonians[.]”⁵ Unfortunately, these “unprecedented steps” did not extend to those vulnerable Washingtonians living in DOC facilities. Although it is now common knowledge from all public health organizations and official agencies, including Petitioners’ medical and correctional health experts, that physical/social distancing is the most appropriate and necessary action to take to protect against the spread of COVID-19, Respondents delayed this necessary action.

It was only the Court’s April 10 order –79 days after the first Washington resident tested positive for COVID-19 on January 21– that spurred any admission from Respondents that release was necessary to

² *Id.*

³ Because no widespread testing has been done, there is no way to know if this was indeed the first case, or, just the first symptomatic, confirmed case.

⁴ *2019 Novel Coronavirus Outbreak (COVID-19)*, Washington State Department of Health, <https://www.doh.wa.gov/emergencies/coronavirus> (last updated Apr. 19, 2020).

⁵ Washington Governor Jay Inslee, Stay Home, Stay Healthy address transcript (Mar. 24, 2020), <https://www.governor.wa.gov/news-media/stay-home-stay-healthy-address-transcript>

protect Petitioners and other incarcerated people. At an April 15 press conference, Governor Inslee publicly acknowledged the Order and admitted that more action was needed: “[W]e do have a court order that has ordered the governor to produce a plan to [do] whatever is necessary to provide for the physical health of these inmates. And *the only way to do that is to reduce the population in these facilities so that there’s more distance to reduce the risk.*”⁶ This was the first time the Governor acknowledged that the State has a duty to protect the people living in Washington’s prisons, that the necessary means to do this was to reduce the population through release, and that the State had not yet met that duty.

B. Respondents’ Actions After the Court’s April 10 Order Belie Their Previous Insistence That Widespread Early Releases to Protect People from COVID-19 Would Be Extremely Difficult and Show That When Monitored and Held Accountable, Respondents Can Quickly Take Needed Action.

The discrepancies between what Respondents previously stated was unreasonable or impractical in terms of releases and what they have now done highlights that Respondents can take necessary protective action when the Court orders them to do so, but that they will only take such action when ordered by the Court.

⁶ *Governor Inslee Press Conference on COVID-19*, TVW (April 15, 2020) at 28:04-28:24, <https://www.tvw.org/watch/?eventID=2020041048> (emphasis added).

For example, on March 30, and then again on April 13, Respondents claimed that statutory requirements requiring approval of individuals' release plans and residences would prevent releases from being implemented in a short time frame.⁷ On April 15, however, five days after the Court's Order, the Governor's order waived multiple statutory provisions requiring approval of residence and release plans.⁸

Similarly, in an April 1 declaration, Susan Leavell, a Senior Administrator in DOC's Reentry Division, asserted that because public service offices were offering limited services and increased wait times, releasing people from prison and providing them with access to benefits would be difficult.⁹ Five days after the Court's Order, DOC announced that it had entered into a temporary agreement with the Department of Social and Health Services to expedite access to public benefits for individuals released as part of the rapid reentry program.¹⁰

And, most significantly, Respondents asserted as late as April 10 that RCW 9.94A.728 and RCW 9.94A.729 prohibited individuals from

⁷ See, e.g., Declaration of Mac Pevey at 3, ¶¶ 7-9, attached as Appendix E to Index of Respondents' Court Record (March 30); Brief of Respondents on the Merits at 13 (April 13).

⁸ *Proclamation by the Governor Amending Proclamation 20-05 Reducing Prison Population*, attached as Attachment 6 to Supp. Report at 3.

⁹ Declaration of Susan Leavell at 4 ¶ 7, attached as Appendix A to Index of Respondents' Court Record.

¹⁰ *DOC Memorandum Regarding Expedited Access to Public Benefits for Rapid Reentry*, attached as Attachment 11 to Supp. Report.

being released before the end of their sentences in accordance with what Petitioners requested.¹¹ Five days after the Court’s Order, the Governor waived some sections of both statutes to permit early release.¹²

C. Respondents’ Actions Fall Short of “All Necessary Steps” to Protect the Health and Safety of People in DOC Custody.

1. Social Distancing in the Prisons Is Impossible Without Further Reducing the Prison Population Through A More Targeted and Extensive Release Plan.

As Petitioners’ expert Dr. Robert Greifinger, an expert in correctional health, has explained, DOC facilities “are not prepared to prevent the spread of COVID-19, treat those who are most medically vulnerable, and contain any outbreak.”¹³ Dr. Greifinger reviewed the April 13 and April 17 reports that Respondents filed, and he still believes this to be the case. While Dr. Greifinger considers releasing 1,100 people a “good first step,” he believes that “releasing such a small number will not allow for the appropriate social distancing to be achieved, unless other releases can be identified.”¹⁴

As in the community, social distancing is absolutely necessary to prevent the spread of COVID-19. But it is impossible to properly practice

¹¹ Response to Petitioners’ Emergency Motion to Accelerate Review, for Appointment of a Special Master, and for Immediate Relief, at 11.

¹² *Supra* note 8.

¹³ Greifinger Decl. at PSD 202, ¶ 17.

¹⁴ Greifinger Supp. Decl. at PSD 724, ¶¶ 10, 12-13.

social distancing in an overcrowded institution. The crowded nature of prisons and physical layouts of the facilities make it extremely difficult, if not impossible to implement and enforce meaningful social distancing guidelines.¹⁵ People share dining halls and other common areas, bathrooms, kiosks, and telephones. Doorways and hallways are not designed to allow for distance between people, and many people are housed in dormitory settings.¹⁶ The problems posed by shared facilities in close quarters are made worse when prisons are overcrowded.¹⁷ And it is undisputed that many of Washington’s prisons are currently over capacity; as of March 2020 (the most recent data available), DOC reported overcrowding at four large prisons: Washington Corrections Center (Shelton), Washington Corrections Center for Women, Monroe Correctional Complex, and Airway Heights Corrections Center.¹⁸ At Shelton, a facility with capacity of 1,398, that is the reception center for people who will be housed at the “men’s” prisons, the average daily population last month was 1,865.¹⁹

¹⁵ Brief of Amici Curiae Public Health and Human Rights Experts (Public Health Experts Amicus Br.) at 9; Pacholke Supp. Decl. at PSD 729-30, ¶ 6.

¹⁶ See Altice Decl. at PSD 227, ¶ 15; Public Health Experts Amicus Br. at 11.

¹⁷ Altice Decl. at PSD 227 ¶ 15.

¹⁸ Department of Corrections, Average Daily Population of Incarcerated Individuals, Fiscal Year 2020, <https://www.doc.wa.gov/docs/publications/reports/400-RE002.pdf> (last visited April 19, 2020); see also Amicus Curiae Brief of Disability Rights Washington at 2. (noting that WCC and WCCW, DOC’s reception centers, are so crowded that newly-arrived people often sleep on the floor, as the third person in a two-person cell).

¹⁹ *Id.*

The overcrowding of DOC facilities is self-evident from the pictures submitted with the Office of the Corrections Ombuds' (OCO) report of the OCO's monitoring visit to Monroe Correctional Complex. These photographs apparently show what "physical distancing" looked like at Monroe's Minimum Security Unit (MSU) on April 10, two days after multiple individuals in the facility had tested positive:²⁰



Supp. Report, Attachment 1 (April 17 OCO Monitoring Report), Photo I at 12 ("Housing unit in MSU")

²⁰ Office of the Corrections Ombuds, *April 17, 2020 Monitoring Report of April 10, 2020 visit to Monroe Correctional Complex*, attached as Attachment 1 to Supp. Report, at 12-13. In order, the photographs are captioned: Housing unit in MSU; Individuals at phones in MSU; and Incarcerated individuals crowded at doorway in MSU.



Supp. Report, Attachment 1 (April 17 OCO Monitoring Report), Photo J at 12 ("Incarcerated individuals crowded at doorway in MSU")



Supp. Report, Attachment 1 (April 17 OCO Monitoring Report), Photo K at 13 ("Individuals at phones in MSU")

One of OCO's key findings is that MCC **“is unable to effectively impose social distancing due to facility structure and population size. Both staff and incarcerated individuals asked for a release of individuals to create greater space and smaller cohorts of individuals,** which would also reduce stress on staff.”²¹ The OCO further explained that “[s]taff may make isolated attempts to impose social distancing in chow halls or other designated areas, **but incarcerated individuals physically cannot social distance in the hallways of housing units, around phones, in lines, and other areas.**”²²

Respondents claim to have reduced density at several minimum security camps between April 10 and April 13, and they have stated in response to the OCO's report that they are taking steps to “encourage physical distancing among the incarcerated population,” but it is unclear to what extent this has been effective in making distancing a reality rather than an “encouragement.”²³ And Respondents have made no such claims with respect to other DOC facilities.

2. Respondents' Limited Release Plan Does Not Protect the Health and Safety of the Most Vulnerable Incarcerated People: Older People and People with Serious Medical Conditions.

²¹ *Id.* at 2 (emphasis added).

²² *Id.* (emphasis added).

²³ Department of Corrections, DOC Response to OCO Report on Monroe Correctional Complex Visit on April 10, 2010 at 6, <https://oco.wa.gov/sites/default/files/DOC%20MCC%20COVID%20Response.pdf>;

DOC's release plan is, for the most part, based on the nature of the person's offense and the length of the sentence rather than on the public health criteria outlined by Petitioners' experts and the public health experts who submitted an amicus brief. In particular, the release plan does not effectively address the needs of people who are aging and/or medically vulnerable – people who are a significant percentage of the population in Washington's prisons. As Dr. Greifinger states, "In my opinion, based on my knowledge, experience, and education, the Governor and WADOC's current release plan does not ensure that the health and safety of these highly vulnerable people will be protected."²⁴

Washington's prison population is aging, with 20 percent of incarcerated people in Washington over the age of 50, including approximately 200 people over the age of 70.²⁵ That number is increasing every year because, as Amicus Disability Rights Washington notes, Washington State has no parole or systemic post-conviction review.²⁶ In addition, DOC's medical system has long been unable to meet the needs

²⁴ Greifinger Supp. Decl. at PSD 725, ¶ 13.

²⁵ See Amicus Curiae Brief of Disability Rights Washington (DRW Amicus Br.) at 7 (citing DOC statistics). As DOC notes, the "National Institute of Corrections recognizes that incarcerated population ages 50 and above are considered elderly." WA State DOC COVID-19 Screening, Testing, and Infection Control Guideline Version 14, Attachment 5 to Supp. Report at 5.

²⁶ DRW Amicus Br. at 8.

of incarcerated people – significant numbers of whom have serious medical conditions.²⁷ In many cases, DOC has provided subpar care that posed a threat to individuals’ overall health and safety even before the COVID-19 pandemic.²⁸

The situation at MCC is but one of many examples. MCC – the prison health care center of DOC – has a long history of failing to provide adequate medical care to those housed in its facilities.²⁹ Just last year, the head doctor at Monroe was fired for misconduct, including improper and negligent care for at least six individuals, three of whom died.³⁰ The doctor had been hired to oversee the care of thousands of individuals at Monroe, even though she lacked a DOC-approved medical residency and

²⁷ Approximately 25 percent of people in Washington’s prisons have one of the medical conditions that the CDC has found put people at high risk for COVID-19 infection. *See* Declaration of David D. Luxton, Ph.D., M.S., at 3, attached as Appendix C to Index of Respondents’ Court Record; Centers for Disease Control and Prevention, *What You Can do if You are at Higher Risk of Severe Illness from COVID-19*, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/COVID19-What-You-Can-Do-High-Risk.pdf>

²⁸ *See* DRW Amicus Br. at 2, 13; Brief of Amici Curiae of Seattle Chapter of the National Lawyers Guild, Washington Defender Association, and Washington Association of Criminal Defense Lawyers (NLG/WDA/WACDL Amicus Br.) at 10-11 (referencing DOC’s Health Plan for prisoners and noting that “[u]nder ordinary circumstances, DOC struggles to provide appropriate health care diagnosis and treatment to its residents”).

²⁹ Pacholke Supplemental Declaration at PSD 730, ¶ 8.

³⁰ Jim Brunner, *The head doctor at Monroe prison was fired over alleged negligent care. Now seven inmate deaths are under investigation*, Seattle Times (Feb. 26, 2020), <https://www.seattletimes.com/seattle-news/the-head-doctor-at-monroe-state-prison-was-fired-over-alleged-negligent-care-now-seven-deaths-are-under-investigation/>

board certification which were stated qualifications for the job.³¹ The DOC's own investigation concluded that the doctor had "failed to advocate for these patients and delayed emergency medical care, which was essential to life and caused significant deteriorations in patients' medical conditions."³² The Washington Medical Commission subsequently opened its own investigation into seven deaths at MCC.³³

The OCO's 2019 annual report identified health services as the "largest area of concern."³⁴ Moreover, the report highlights "very disturbing allegations" regarding DOC deaths due to inadequate medical care.³⁵ For example, the OCO report noted egregious medical case examples where delays in cancer treatment at Monroe have resulted in death.³⁶ Given the substandard level of medical care that has been

³¹ Seattle Times Editorial Board, *Inmate Deaths at State Prisons are Unconscionable*, Seattle Times (July 23rd 2019 at 2:39PM, updated July 24th 2019 at 8:49 AM), <https://www.seattletimes.com/opinion/editorials/reform-washingtons-department-of-corrections/>

³² Jim Brunner, *The head doctor at Monroe prison was fired over alleged negligent care. Now seven inmate deaths are under investigation*, Seattle Times (Feb. 26, 2020), <https://www.seattletimes.com/seattle-news/the-head-doctor-at-monroe-state-prison-was-fired-over-alleged-negligent-care-now-seven-deaths-are-under-investigation/>

³³ *Id.*

³⁴ Office of the Corrections Ombuds, Annual Report 2019 Office of the Corrections Ombuds, 14, 19 (Nov. 1, 2019), <https://oco.wa.gov/sites/default/files/public/Annual%20Report%202019%20Final.pdf>

³⁵ *Id.* at 19.

³⁶ *Id.* at 20-21; *see also* Matthias Gyde, OCO Investigation Report, Office of the Corrections Ombuds, 1-8 (Nov. 15, 2019), https://oco.wa.gov/sites/default/files/MCCC%20Death%20Report%20Final_0.pdf; Jim Brunner and Joseph O'Sullivan, *As the Washington Department of Corrections struggles with health care, cancer patients say they suffer*, Seattle Times (February 24, 2020),

documented at Monroe Correctional Complex (MCC) under normal conditions, Petitioners cannot be expected to receive proper care at that facility for treatment of COVID-19 in an emergency situation during a global pandemic.

In addition, as Disability Rights Washington notes in its amicus brief, “the solitary-like conditions” of people in isolation and quarantine units “result in permanent harm to incarcerated people.”³⁷ Indeed, even DOC’s Director of Psychiatry, Dr. Bruce Gage, acknowledges that isolation in response to COVID-19 is potentially harmful.³⁸

3. Respondents’ Supplemental Report Does Not Explain How Their Release Plan Will Significantly Reduce the Prison Population in a Way That Will Protect People from COVID-19.

Respondents’ limited release plan – a plan which only releases approximately 6% percent of the prison population,³⁹ and which was only

<https://www.seattletimes.com/seattle-news/politics/as-the-washington-department-of-corrections-struggles-with-healthcare-cancer-patients-say-they-suffer/>

³⁷ See DRW Amicus Br. at 14-19 (detailing conditions imposed in DOC COVID-19 isolation units; noting that conditions are worse than in solitary confinement and citing authorities confirming “[t]here is a general consensus within the medical and legal community that solitary confinement, commonly defined as locking a person in their cell for more than 22 hours per day, is psychologically harmful”).

³⁸ See *id.* at 16, citing Dr. Bruce Gage, Supplemental Report Regarding COVID-19 Risks in Riverside County Jails, submitted as Exhibit K in March 31, 2020 Emergency Motion to Enforce or, in the Alternative, Modify Consent Decree in *Gray v. Cty. of Riverside*, EDCV 13-00444-VAP, 2014 WL 5304915, at *1 (C.D. Cal. Sept. 2, 2014), available at <https://prisonlaw.com/wp-content/uploads/2020/04/20.04.06-Doc-178-1-Exhibits-A-K-to-Norman-Decl..pdf> (last visited April 21, 2020).

³⁹ See Supp. Report at 14-15, ¶¶ 3, 5. Respondents state that the Rapid Reentry program from the Governor’s Emergency Proclamation will be 665 individuals and the

announced after the Court’s April 10 order (over two weeks after this case was filed) is not sufficient to avoid court oversight. In contrast, efforts by local and county governments have reduced Washington’s jail population to 6,000 as of April 3, 2020, half of the historical average population, and as the Washington Association of Sheriffs and Police Chiefs explains in its amicus brief, “reduction efforts remain in full force.”⁴⁰ Additionally, according to Respondents’ own data, 7,893 individuals are within 18 months of release from DOC custody.⁴¹ Of those 7,893, 3,397 have no thirty-day victim notification requirement.⁴² Respondents have not explained why those individuals cannot be released quickly.

Respondents have not proven that these releases will protect the health and safety of all people in Washington’s prisons now or in the future. They have submitted no expert testimony, or even their own calculations, to show that the numbers of people releasing from each facility are sufficient to allow for social distancing. They have not, and cannot, counter the stark evidence of the photographs included with the

Emergency Commutation will be 461 individuals. This totals 1,126, Respondent has most recently stated the DOC population is approximately 18,000. Respondent’s Report on DOC’s COVID-19 Response at 2.

⁴⁰ See Memorandum of Amicus Curiae Washington Association of Sheriffs and Police Chiefs at 15.

⁴¹ Declaration of David D. Luxton, PhD, M.S. at 3-4, ¶¶ 7-9, attached as Appendix C to Index of Respondents’ Court Record.

⁴² *Id.* David Luxton identifies 7,893 individuals within 18 months of release and notes that 4,496 of those have a 30-day victim notice requirement. Presumably the remainder of individuals in that category do not.

OCO's report regarding its visit to MCC, which show not only that social distancing is not occurring now, but also that the physical structure of the prison, exemplified in the photographs of the men crowding in the doorway and at the telephones, make it impossible to create the appropriate distance between individuals without significant reduction of the population. They have not attempted to rebut the testimony of Petitioners and other incarcerated people who report that protective measures inside the prison are limited if not non-existent, and in some cases, impossible.⁴³

Respondents have not articulated any overarching strategy related to their release plan.⁴⁴ There does not appear to be a clear goal for reducing the prison population at each facility to the level necessary for meaningful social distancing or any data to show that DOC is moving towards that goal.⁴⁵ As Petitioners' expert and former DOC Secretary Dan Pacholke notes, DOC "ha[s] not described how releases will reduce density in minimum facilities, or how releases will result in a reduction of

⁴³ See, e.g., Supplemental Declaration of Theodore Rhone at PSD 709, ¶ 11 (April 15, 2020); Declaration of Patrick O'Brien at PSD 702, ¶ 12 (April 15, 2020); Second Supplemental Declaration of Petitioner Terry Kill at PSD 693, ¶¶ 8-14 (April 15, 2020); Supplemental Declaration of Shanell Duncan at PSD 716, ¶¶ 18-19 (April 16, 2020). As the dates indicate, these declarations are dated April 15 and 16, 2020.

⁴⁴ Pacholke Supp. Decl. at PSD 730-31, ¶ 9.

⁴⁵ *Id.*

double bunking in major facilities.”⁴⁶ Nor has DOC “articulated whether reductions in the work release population are being made to move more individuals from camps into work release, or that release will result in more single celling in other facilities.”⁴⁷

Indeed, as former Secretary Pacholke explains, the current release plan will likely not reduce the overall prison population in Washington State because many of the people on the release lists were individuals who were already likely to have been scheduled for release in the next several days or weeks.⁴⁸ Nor has DOC indicated that they have postponed or stopped movement into DOC facilities from the county jails.⁴⁹ In Mr. Pacholke’s opinion, “[t]he practice of receiving people from county jails should end because it frustrates the goal of reducing the population but also increases the likelihood that an outside source will bring COVID-19 into the prisons.”⁵⁰ In sum, Respondents appear not to recognize, and the release plan does not reflect, that the goal should not simply be release, it

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at PSD 731, ¶ 11.

⁴⁹ *Id.*

⁵⁰ *Id.* at PSD 732, ¶ 12. Former Secretary Pacholke recommends at least a 60-day moratorium on movement of people from county jails to DOC. *Id.*

should be reduction of the prison population to permit the necessary social distancing that fighting COVID-19 requires.⁵¹

4. Respondents Have Failed to Provide the Widespread Testing Necessary to Identify the Extent of the Problem and Protect Incarcerated People.

To date, DOC has only tested 293 incarcerated people.⁵² There is no mention in the Supplemental Report or DOC’s current guidelines of testing anyone besides those who show symptoms of COVID-19 and the screening process for individuals entering the facility does not automatically include testing.⁵³ Comprehensive testing of people in prison is needed immediately; this is the only way to identify the true scope of the problem and isolate all individuals who are infected, not just those who show symptoms.⁵⁴ As DOC admits, however, as of April 12, 2020, they only had 588 COVID-19 test kits in their inventory, likely leaving a

⁵¹ *Id.* at PSD 731, ¶ 11. Mr. Pacholke recommends that DOC “should set a population reduction goal based on what would be necessary to increase social distancing in all facilities, which should be measured in the decrease in population mid-March [2020] rather than [by] the number released.” *Id.*

⁵² See DOC, *COVID-19 Information: Testing among Incarcerated Housed in Facilities*, <https://www.doc.wa.gov/news/covid-19.htm#testing> (last visited April 21, 2020).

⁵³ See generally Supp. Report; see also WA State DOC COVID-19 Screening, Testing, and Infection Control Guideline, Version 14, Attachment 5 to Supp. Report, at 1-2 (no mention of mandatory testing as part of screening process).

⁵⁴ Public Health Experts Amicus Br. at 11 (noting difficulties in identifying people infected with COVID-19 who are asymptomatic or have only minor symptoms and that “correctional facilities typically do not have the ability to perform the kind of systematic testing that would be required to ensure that the virus does not enter the facility”); *id.* at 10 (observing that “hundreds of COVID-19 diagnoses have been confirmed at local, state, and federal correctional facilities” but that “[g]iven the dearth of testing, these numbers understate (and likely dramatically understate) the problem”).

limited number remaining after the 293 people tested to date, and with DOC reporting that as of April 10, 2020, there were 161 people in isolation and 912 people in quarantine, it is clear there simply are not enough test kits available to test even that population, much less do the required comprehensive testing.⁵⁵ The lack of widespread testing in correctional facilities, including DOC, means that the numbers of prisoners testing positive for the virus are “understate[d] (and likely dramatically understate[d])[.]”⁵⁶ At Marion Correctional Institution in Ohio, once widespread testing was introduced, 1,828 prisoners tested positive, along with 109 staff.⁵⁷ An Ohio Department of Rehabilitation and Correction spokesperson explained that “[b]ecause we are testing everyone – **including those who are not showing symptoms** – we are getting positive test results on individuals who otherwise would have never been tested because they were asymptomatic[.]”⁵⁸

D. Respondents’ Release Plan Exacerbates Racial Disproportionality and Perpetuates Systemic Racial Inequities that Already Permeate Washington’s Criminal Justice System, Including Our Prisons.

⁵⁵ Respondents’ Report on the Department of Corrections’ COVID-19 Response, April 13, 2020, at 4, 11.

⁵⁶ Public Health Experts Amicus Br. at 10.

⁵⁷ *More than 1,800 inmates at Marion prison test positive for coronavirus*, <https://www.nbc4i.com/community/health/coronavirus/more-than-1800-inmates-at-marion-prison-test-positive-for-coronavirus/> (April 20, 2020).

⁵⁸ *Id.* (emphasis added)

Neither DOC nor the Governor have apparently considered the impact their belated and insufficient attempts to address the threat COVID-19 poses to incarcerated people of color who have already experienced, and continue to experience, the effects of centuries of systemic discrimination. Respondents' release plan draws distinctions between individuals based on the nature of their offenses as well as the length of their remaining sentences. The people who are not eligible for release include people who are serving long, and in some cases, life, sentences – individuals who are disproportionately people of color.⁵⁹ In addition, the release plan's inclusion of only those who are serving sentences for “nonviolent” offenses will leave a disproportionate number of people of color in the prisons, less protected from COVID-19, because White people are routinely undercharged in comparison to people of color.⁶⁰ Black people are more likely to be sentenced to prison for the same crimes for which White people do not end up serving prison time,

⁵⁹ See Katherine Beckett and Heather Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State*, American Civil Liberties Union of Washington, February 2020, at 27-30, available at <https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state> (last visited April 19, 2020). *see also* NLG/WDA/WACDL Amicus Br. at 13-17 for an extended discussion of how the failure to reduce the prison population has a disparate impact on Black and Native people in particular)

⁶⁰ The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System 7* (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> (last visited April 19, 2020).

and, even when White people are sentenced to a prison term for the same offenses as Black people, Black people serve longer sentences than their White counterparts.⁶¹ The result is a prison population where Black people (and Native people) are over-represented in the ranks of those serving the longest sentences, including life sentences, and thus, the population of older people in Washington’s prisons is also disproportionately Black and Native people.⁶² Further, Black and Native people disproportionately suffer from many of the health conditions that put them at a higher risk for serious illness after contracting COVID-19.⁶³ Compounding these disparities is the growing recognition that, as one physician explained in a leading medical journal last week, “[p]eople who are African American or black are contracting SARS-CoV-2 at higher rates and are more likely to die.⁶⁴ Thus, a release plan that does not immediately address the particular vulnerability of people with chronic health problems that put them at increased risk of serious illness and death from exposure to COVID-19 will

⁶¹ The Court has already taken judicial notice of the “implicit and overt racial bias against black defendants in this state.” *State v. Gregory*, 192 Wn.2d at 22 (citing Task Force on Race & the Criminal Justice System, Research Working Group, *Preliminary Report on Race and Washington’s Criminal Justice System* 7 (2011) (“Task Force on Race Report”)); *see also* Task Force on Race Report at 7.

⁶² *See* Beckett and Evans, *supra* note 59, at 27-28.

⁶³ *See* NLG/WDA/WACDL Amicus Br. at 13 (citing statistics regarding higher prevalence and greater morbidity from asthma and diabetes among some communities of color).

⁶⁴ Clyde W. Yancy, MD, MSc, *COVID-19 and African Americans*, JAMA, published online April 15, 2020, <https://jamanetwork.com/journals/jama/fullarticle/2764789> (last visited April 21, 2020).

likely result in negative outcomes that compound the racial disparities that already permeate the criminal justice system and our state’s prisons.

One specific example of this disparity is pregnancy. As amici noted, incarcerated pregnant people are already at risk for poor pregnancy outcomes; even when not incarcerated, Native Americans are twice as likely as White individuals to die from complications of pregnancy or childbirth, and Black individuals are three times more likely to die from complications of pregnancy or childbirth than White individuals.⁶⁵

Respondents assert in their Response Brief that the risk to pregnant women from COVID-19 remains an “unknown possibility,”⁶⁶ and further repeats this point to the Court in their supplemental report.⁶⁷ However, DOC’s own internal “Screening, Testing, and Infection Control Guideline” indicates that the DOC considers pregnant individuals as being at high risk for severe effects from COVID-19.⁶⁸ Since at least March 27, DOC has indicated in their own internal infection control documents that “pregnancy” is a high risk factor for COVID-19, and it is contained in all

⁶⁵ NLG/WDA/WACDL Amicus Br at 13-15 (internal citations omitted).

⁶⁶ Respondents’ Response Brief at 49 n.8.

⁶⁷ Supp. Report at 12, ¶¶ 3-4.

⁶⁸ *WA State DOC COVID-19 Screening, Testing, and Infection Control Guideline Version 13*, Respondents’ Report on the Department of Corrections’ COVID-19 Response, Attachment 2 at 4 (“Patients at High Risk for Severe COVID-19” lists “Pregnancy or the immediate post-partum period.”); *WA State DOC COVID-19 Screening, Testing, and Infection Control Guideline Version 14*, Attachment 5 to Supp. Report at 4 (updated version of same document from April 15, 2020 stating the same).

versions of their guidelines in the record before this Court.⁶⁹ Thus Respondents cannot dispute the high risk posed to people who are pregnant when they themselves have deemed it “high risk.” Although the DOC maintains in their supplemental report that they are “evaluating” some pregnant individuals for rapid release and “likely will be transferring shortly” others to the Community Parenting Program,⁷⁰ they present no timeline for this transfer, in spite of their own internal guidance that these individuals are at high risk from exposure to COVID-19. Refusing to release and protect vulnerable pregnant individuals when the DOC believes they are at risk is not only unconscionable, it is inequitable.

E. Respondents Have Not Met Their Heavy Burden to Show That Their Limited Release Plan and COVID-19 Guidelines Are Sufficient to Protect the Health and Safety of Thousands of People in Their Care, and Appointment of a Special Master Is Warranted.

The record in this case demonstrates that the Court cannot, and must not, take Respondents at their word that their limited action is enough. When a party attempts to change or reform its bad practices only

⁶⁹ Version 11 of the Screening, Testing, and Infection Control Guideline (March 27, 2020) lists individuals who are pregnant or in the immediate post-partum period as “should be considered at high risk.” Index of Respondents’ Court Record, Appendix D, Declaration of Julie Martin, Exhibit 3 at 4. Versions 13 (April 7, 2020) and Version 14 (April 15, 2020) which are supplied in the reports to this Court have the same language on pregnancy. *Supra* note 68.

⁷⁰ Supp. Report at 20, ¶¶ 14.

after a lawsuit has been instituted, that party bears a “heavy burden” to the Court of demonstrating that they have sufficiently met their legal duties and that they will not repeat what they have done wrong.⁷¹ A voluntary change in “behavior” or “official stance” resolves an action only when it is “absolutely clear” to the court that unconstitutional activity complained of will not “recur” and that this voluntary change is not merely an attempt to evade judicial review.⁷² Further, textual changes to a policy are generally not enough to moot a case absent evidence the policy has become “entrenched” or permanent.⁷³ The DOC has continued to list a number of policies and reference back to them in their reports.⁷⁴ However – and this point cannot be emphasized enough – Respondents have not presented any evidence or testimony to show how or whether these policies are actually

⁷¹ The Respondents have the burden to demonstrate that what they have done is sufficient to meet their duty and that it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Washington State Comm’n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 204-206, 293 P.3d 413 (2013) (internal citation and footnote omitted); *see also Braam ex rel. Braam v. State*, 150 Wn. 2d 689, 709, 81 P.3d 851, 862 (2003) (courts must “beware of efforts to defeat injunctive relief by protestations of reform.”) (quoting *State v. Ralph Williams’ N. W. Chrysler Plymouth, Inc.*, 82 Wash. 2d 265, 272, 510 P.2d 233, 238 (1973); *Ralph Williams’ N.W. Chrysler Plymouth* at 272 (“A heavier burden is placed on parties alleging abandonment of practices where the practices are discontinued subsequent, rather than prior, to institution of suit”).

⁷² *Id.*; *see also United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952) (“it is the duty of courts to beware of efforts to defeat relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.”).

⁷³ *See, e.g., White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000).

⁷⁴ *See, e.g., Supp. Report* at 5-9 (referencing new face covering policies, density reduction measures, and distancing memos).

being implemented in the prisons. Rhetoric from headquarters and DOC leadership is not enough when people's lives are at stake.⁷⁵

This Court must act to ensure that Respondents comply with their duties to protect the vulnerable people in DOC custody. This is not only evident from the Supplemental Report, but also from the attendant delay that Respondents took to begin limited releases. Respondents waited 85 days after the first case of COVID-19 in Washington State was made public to announce a plan for releasing a small number of individuals.⁷⁶ And this plan was announced 30 days after Petitioners, families, community members, and advocates urged them to take immediate and necessary action based on unambiguous public health guidelines.⁷⁷ Ultimately, it took this Court's Order, over two weeks after Respondents

⁷⁵ OCO recently highlighted this problem more generally, noting in its 2019 Annual Report that DOC is a "siloed bureaucracy...information out of DOC is often conflicting or inaccurate, and there can be great variation between how policy is implemented between facilities," and that "[DOC] staff at the administrative level often assume that they know how things operate when in fact the situation on the ground may be much different." Office of the Corrections Ombuds, Annual Report 2019 Office of the Corrections Ombuds, 4 (Nov. 1, 2019),

<https://oco.wa.gov/sites/default/files/public/Annual%20Report%202019%20Final.pdf>

⁷⁶ *Supra* note 8. Governor Inslee issued his Proclamation for Reducing the Prison Population on April 15th, 85 days after the first January 21 case of COVID-19 in Washington State. Office of the Governor, Proclamation of the Governor Amending Proclamation 20-05 (Apr. 15, 2020), https://www.governor.wa.gov/sites/default/files/20-50%20-%20COVID-19%20Reducing%20Prison%20Population%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery;

⁷⁷ Petitioners and other organizations sent letters to Respondents on March 16th urging immediate action. PSD 105-118, Declaration of Counsel, Nicholas B. Straley, Attachments 2-5.

were undoubtedly aware of many circumstances necessitating releases from Petitioner's filing,⁷⁸ for Respondents to take measures that should only be the first step towards fulfilling their duties to protect the people in their care.

Petitioners request the Court appoint a special master to ensure that Respondents take all necessary steps to protect the health and safety of the Petitioners and all other people in DOC's custody, until the COVID-19 emergency is over. The necessity for appointment of a special master to gather facts so the Court can be regularly apprised of how Respondents are complying with its order is clear: Respondents did not come forth with any release plan until ordered to do so by the Court, their current plan is insufficient, and they have not explained how release of the individuals they have designated will actually reduce the prison population to allow for adequate social distancing in each facility.⁷⁹ In the past, as former Secretary Pacholke notes, court involvement has been necessary to ensure

⁷⁸ Petitioners appreciate that the Court granted the emergency motion and issued this ruling as quickly as possible, within a day of the motion's filing.

⁷⁹ Former Secretary Pacholke agrees that appointment of a special master "or some kind of ongoing court involvement is necessary in this case." Pacholke Supp. Decl., PSD 733-34, ¶ 15. He states, "I have no doubt that DOC employees are working long hours; they are respected professionals and I would expect no less of them. What is unclear to me is whether DOC leadership is providing direction and strategy outside of that mandated by the court. I am concerned that without ongoing support from the court or a special master, DOC leadership will lack focus and vigilance and fail to take all necessary steps to address COVID-19 over the next several months." *Id.*

DOC implements necessary policy changes, and the same concern presents itself here.⁸⁰

The Court has legal authority to appoint a special master.⁸¹ After the release of Petitioners and those individuals who fall into the category of vulnerable individuals based on their age or medical conditions and are within 18 months of their release, a special master could then work with DOC to analyze the capacity of each prison to determine the number of individuals who must be released to allow for adequate social distancing and placements in each facility; to determine subsequent releases; and, to allow those who are in vulnerable categories but not released to be housed in the least restrictive and safest manner that ensures protection from COVID-19. DOC has provided some of the information required, including the numbers of individuals who fall into the vulnerable categories, and their release dates, so gathering that information would not be difficult.⁸²

⁸⁰ See Pacholke Supp. Decl., PSD 733-34, ¶¶ 15-16 (describing court involvement in other cases where DOC was required to address overcrowding, including *Hoptowit v. Ray*, as well as court involvement in *Hallet v. Payne*, "where ongoing court involvement was necessary for DOC to take appropriate action to ameliorate constitutional violations related to healthcare at the women's prison").

⁸¹ See Petitioners' Reply to Respondents' Response to Motion to Amend at 9-10.

⁸² See generally *supra* note 41 (Luxton Declaration).

III. CONCLUSION

While Respondents have made some progress in the last week to address the COVID-19 pandemic that threatens thousands of people in DOC custody (and DOC staff), more can and must be done. For the reasons set forth above and in Petitioners' briefing, declarations, and evidence previously submitted to the Court in this proceeding, Petitioners respectfully request the Court grant their Petition and require DOC to fully address not only the current harm to incarcerated people but the inevitable future harm that will arise if no more action is taken.

DATED this 21st day of April, 2020.

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CERTIFICATE OF SERVICE

I certify that on the date below, I electronically filed **Petitioners' Response to Respondents' Supplemental Report on Department of Corrections COVID-19 Response**, with the Clerk of the Court using the electronic filing system, which will send notification of filing to all parties of record at their email addresses as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 21st day of April 2020, at Tacoma, WA.

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