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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' REPLY TO RESPONDENTS' RESPONSE TO
PETITIONERS' MOTIONS TO SUBMIT ADDITIONAL
EVIDENCE, TO EXPEDITE REVIEW, AND APPOINT AN
ER 706 EXPERT**

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TABLE OF CONTENTS

I. INTRODUCTION 2

II. ARGUMENT..... 3

A. The New Evidence Relating to Conditions at CRCC Relates to
Petitioners’ Claims Because It Demonstrates an Immediate and
Real Threat of Harm to People in All DOC Facilities. 3

B. The Decision in This Matter Is Not Final, So The Court May
Review Additional Evidence That Could Change Its Decision. 8

C. Appointment of an Expert Pursuant to ER 706 Is Appropriate
Given the Respondents’ Unilateral Control Over Access to
Information that Is Critical for the Court to Consider. 9

III. CONCLUSION 12

I. INTRODUCTION

Once again, Respondents' brief recycles the same information from high-level DOC officials who urge the Court to trust that the COVID-19 ("COVID") pandemic in the prisons is under control. This may have been persuasive months ago, when COVID had just entered the prisons. However, since then, new and relevant evidence has emerged showing that Respondents' COVID response plan has failed. Positive tests among staff and prisoners are rapidly increasing as prison conditions worsen. Meanwhile, DOC describes its lack of preparedness on matters of life and death involving COVID as a "learning experience."¹

Since Petitioners filed their Motion 12 days ago, an additional 111 people have tested positive at Coyote Ridge Corrections Center (CRCC).² There are now 242 confirmed cases of COVID among the incarcerated

¹ See Office of the Corrections Ombuds, OCO Monitoring Visit to Coyote Ridge Corrections Center, 1 (May 15, 2020), <https://oco.wa.gov/sites/default/files/OCO%20Monitoring%20Visit%20Report%20for%20CRCC%20with%20DOC%20Response.pdf>

² See Department of Corrections, COVID-19 Information, <https://www.doc.wa.gov/corrections/covid-19/data.htm>.

population in DOC (including two deaths),³ a staggering 2900% increase since April 23, the day the Court entered its Order.^{4 5}

Petitioners highlight these and other significant changes that have occurred since late April, to the detriment of Petitioners and all other persons in DOC prisons.⁶ Accordingly, the Court should accept the submission of Petitioners' evidence, reexamine its earlier Order and appoint an expert to investigate the current outbreak at CRCC.

I. ARGUMENT

A. **The New Evidence Relating to Conditions at CRCC Relates to Petitioners' Claims Because It Demonstrates an Immediate and Real Threat of Harm to People in All DOC Facilities.**

This Court has already recognized that Petitioners' claims are not limited to the facilities in which they are incarcerated. In April, Petitioners filed an emergency motion due to an outbreak at Monroe Corrections

³ *Id.*

⁴ Order, *Colvin v. Inslee*, Wash. Sup. Ct. No. 98317-8 (April 23, 2020) (hereinafter "April 23, 2020 Order") (emphasis added).

⁵ See also "A State-by-State Look at Coronavirus in Prisons," The Marshall Project, updated July 2, 2020 available at <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>. As of the end of the week of June 30, there have been at least 204 cases of coronavirus reported among prisoners in Washington, with 73 new cases reported the week of June 30. Known cases are 120 per 10,000 prisoners, which is 184% higher than in Washington overall. Based on this information, the week of June 30 saw an almost 4-fold increase in COVID cases from the previous week. 35% of reported cases in Washington prisons have been in the last week.

⁶ Respondents note that Ms. Colvin is back in prison, but they omit the fact that she is appealing DOC's determination that she violated a condition of release. The harm DOC's decision to arrest her, separate her from her two-month-old baby, and quickly reincarcerate her based on disputed evidence, demonstrates its lack of foresight into how this individual decision impacts their overall efforts to address COVID.

Center (MCC).⁷ In response, the Court ordered Respondents to report back on steps they were taking to protect Petitioners **and all people in DOC custody** from COVID.⁸ Respondents now discount evidence of a far larger and more severe outbreak by couching this as an issue of standing, arguing that Petitioners cannot use evidence of conditions at CRCC to challenge their own conditions of confinement,⁹ or challenge the conditions at a prison where they are not confined.¹⁰ These are misguided efforts to obfuscate the relevance of Petitioners’ new evidence.

While Petitioners do seek relief that would benefit people at CRCC, it is the same relief they seek for the harms they are experiencing: DOC’s failure to protect them from COVID. The cases Respondents cite do not support their claim that Petitioners lack standing to seek such relief. *See East Gig Harbor Imp. Ass’n v. Pierce Cty*, 106 Wn.2d 707,710, 724 P.2d 1009 (1986) (addressing standing of “nonprofit corporation[s], citizens’ group[s], or similar association[s]”); *Whitmore v. Arkansas*, 495 U.S. 149, 150, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990) (death row inmate lacked standing to challenge validity of death sentence imposed on

⁷ See Petitioners’ Emergency Motion to Accelerate Review, For Appointment of a Special Master and For Immediate Relief (Apr. 9, 2020).

⁸ Order, *Colvin v. Inslee*, Wash. Sup. Ct. No. 98317-8 (April 10, 2020) (emphasis added).

⁹ Respondents’ Response to Petitioners’ Motion to Submit Additional Evidence, to Expedite Review and to Appoint an ER 706 Expert at 14 (hereinafter “Respondents’ Response”).

¹⁰ *Id.* at 18-19.

another defendant who waived right to appeal to Arkansas Supreme Court because petitioner's argument that outcome of the other case might impact his own potential future federal claim was too speculative).

Here, Petitioners challenge current, ongoing conditions at all DOC facilities. By contrast, in the cases Respondents cite, plaintiffs lacked standing to seek injunctive and declaratory relief on claims based on discrete acts they had experienced at prisons where they no longer housed, where the court found they could not show a threat of immediate harm. *See Stewart v. McGinnis*, 5 F.3d 1031, 1038 (7th Cir. 1993) (prisoner lacked standing to challenge procedures relating to property seizure because he was transferred from the prison where the harm occurred, and thus could not show threat of immediate harm); *Darring v. Kincheloe*, 783 F.2d 874, 875, 877 (9th Cir. 1986) (plaintiff lacked standing to challenge prison-specific policy, when he had since been transferred to another prison); *Martin v. Sargent*, 780 F.2d 1334, 1337 (8th Cir. 1985) (plaintiff lacked standing to challenge conditions at prison he was transferred from).

In contrast, Petitioners' claims are not speculative, nor are DOC's COVID policies confined to individual facilities or incidents. Rather,

Respondents' mishandling of the crisis at CRCC poses an immediate threat of physical and psychological¹¹ harm to all people in DOC prisons.

That the Eighth Amendment protects against future harm to inmates is not a novel proposition. . . It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.

Helling v. McKinney, 509 U.S. 25, 33, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993).

Respondents' response to CRCC's COVID outbreak is the blueprint for their response to future outbreaks. They refuse to consider meaningful reduction of the prison population and cannot change the prisons' physical design, so their only remaining options are to utilize severe cell restriction and transfer sick patients to other prisons. DOC's current COVID response "plan" subjects CRCC residents to appalling conditions. Respondents' description of the limitations placed on people in

¹¹ See Order Granting Defendant's Emergency Motion for Compassionate Release, *United States v. Baron*, No. 2:06-CR-02095-SAB-1 (E.D. Wash. June 16, 2020) (Court ordered compassionate release of defendant at federal prison because of risk of harm from COVID, noting that petitioner "suffered and continues to suffer significant psychological trauma from awaiting infection, being infected, and dealing with the aftereffects of infection."). See also Office of Corrections Ombuds (OCO), "OCO Follow-up Monitoring Visit to Coyote Ridge Corrections Center" (June 12, 2020) available at: <https://oco.wa.gov/sites/default/files/CRCC%20Rapid%20Monitoring%20Visit%20June%2012%202020.pdf> (People in prisons shared concerns with OCO about legal access and interrupted legal calls occurring at CRCC) (Noting that the overall atmosphere of the incarcerated individuals was extremely stressed emotionally and mentally).

the prison as “restricted movement”¹² vastly understates the severity of the conditions there – **conditions that Respondents do not dispute, and which may violate the Eighth Amendment.**¹³ DOC cannot lawfully respond to this crisis by creating unconstitutional conditions.

Cell confinement remains in place for nearly 24 hours per day,¹⁴ resulting in harsh restrictions on bathroom access. People are relegated to shameful and unsanitary options for relieving themselves.¹⁵ The Office of Corrections Ombuds (OCO) was informed “that the population had no choice but to urinate and defecate in their...food storage containers.”¹⁶ Residents also have gone weeks without access to exercise or fresh air.¹⁷

¹² See Respondents’ Response at 29.

¹³ Poor conditions similar to these have been held to be Eighth Amendment violations. For example, lack of adequate bathroom facilities has been held to be a violation of the prohibition against cruel and unusual punishment. See, e.g., *Flakes v. Percy*, 511 F. Supp. 1325, 1332 (W.D. Wis. 1981) (“when the Eighth Amendment is operative, its ban is violated by locking a person, for any significant period of time, in a cell lacking a flush toilet and a washbowl.”); *U.S. ex rel. Wolfish v. Levi*, 439 F. Supp. 114, 141 (S.D. N.Y. 1977), *aff’d in part, rev’d in part on other grounds*, 573 F.2d 118 (2d Cir. 1978), *judgment rev’d on other grounds*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). Likewise, courts have held that lack of adequate exercise or activity can be an Eighth Amendment violation. See, e.g., *Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000) (denial of outdoor exercise for six and a half weeks sufficient to meet objective requirement for Eighth Amendment claim); *Spain v. Procnier*, 600 F.2d 189, 199–200 (9th Cir. 1979) (outdoor exercise required when prisoners otherwise confined in small cells).

¹⁴ See also Petitioners’ Motion to Submit Additional Evidence In Support of Petition for a Writ of Mandamus, Motion to Expedite Review, and Motion for Appointment of ER 706 Expert at 14-16 (hereinafter “Petitioners’ Motion”).

¹⁵ *Id.*

¹⁶ See *supra* note 11 (June 12 OCO Report); see also Petitioners’ Motion at 13-14.

¹⁷ See Petitioners’ Motion at 14.

DOC's current transfer policy increases the likelihood that Petitioners will be exposed to COVID. Transfers of people between facilities continue to regularly occur. 55 people who tested positive for COVID at CRCC are currently housed in isolation at MCC, where Petitioner Terry Kill resides.¹⁸ The transfers are troubling given how they have contributed to COVID's spread in other prisons throughout the country, including a recent COVID "explosion" at California's San Quentin Prison, which was directly attributed to the transfer in late May of 122 inmates from another prison.¹⁹ Before the transfer there were no positive cases among the prison population;²⁰

today, there are more than 600 cases, and the numbers are rapidly increasing.²¹ People transferred to San Quentin were not tested before their transfer.²² DOC's current intra- and inter-facility transfers appear to be the same.²³

B. The Decision in This Matter Is Not Final, So The Court May Review Additional Evidence That Could Change Its Decision.

¹⁸ See Respondents' Response at 10.

¹⁹ See Eric Westervelt, "Shocking, Heartbreaking Coronavirus Outbreak in Calif. Prison Alarms Health Experts," NPR (June 27, 2020) *available at* <https://www.npr.org/2020/06/27/884149444/shocking-heartbreaking-coronavirus-outbreak-in-ca-prison-alarms-health-officials>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See Respondents' Response, Ex. 1 at 20. DOC notes that protocols for transfers of individuals into and within the prison system. Notably absent, however, is any testing protocol, meaning asymptomatic individuals could be transferred between facilities.

RAP 9.11 contemplates an appellate court reviewing a record on appeal, and does not squarely align with this case, brought as an original action. Respondents ignore this, and instead apply a rigid interpretation of the rule to argue that Petitioners have not met its requirements.

Respondents also argue that Petitioners cannot meet RAP 9.11's requirements because a decision has been entered. But the Court's April 23 order did not end the case. On May 6, Petitioners filed a motion for extension of time to file their motion for reconsideration.²⁴ In response, the Clerk noted that a motion for reconsideration was improper at that time because the April 23 Order did not "terminate review unconditionally."²⁵ Thus, Petitioners are precluded from filing a motion for reconsideration until the opinion is issued. Given these circumstances, and the importance of the evidence Petitioners seek to file with the Court, submission of additional evidence is appropriate now.²⁶

C. Appointment of an Expert Pursuant to ER 706 Is Appropriate Given the Respondents' Unilateral Control Over Access to Information that Is Critical for the Court to Consider.

There is no prohibition to this Court's appointment of an ER 706 expert. While Respondents argue that ER 706 does not apply to original

²⁴ See Petitioners' Motion to Expedite Consideration and Motion for Extension of Time to File Motion for Reconsideration (May 6, 2020).

²⁵ See Letter from Deputy Clerk (May 8, 2020).

²⁶ See Petitioners' Motion at 19, 20 (Petitioners further requested that the Court apply RAPs 1.2 and 18.8 to serve the ends of justice).

actions, ER 101 states that the evidence “rules govern proceedings in the courts of the state of Washington to the extent and with the exceptions stated in rule 1101.” ER 1101, in turn, does not exempt original actions in appellate courts.

For the Court to receive an accurate description of the conditions at DOC facilities and the steps DOC is taking to protect people from COVID, it must appoint an expert. This is because Respondents control all the information coming out of DOC. Yet, Respondents criticize the fact that Petitioners’ new evidence consists of three declarations from people living at CRCC, “who simply complain about the general conditions at CRCC.”²⁷ Declarants’ statements, however, illustrate conditions resulting from Respondents’ poor response to COVID. More important, these declarations are the only **prisoner** accounts of conditions in DOC prisons.

Respondents have also failed to explain to the Court how their misguided response to the outbreak has severely restricted access to legal calls at CRCC.²⁸ Petitioners do not claim these declarations alone are sufficient to fully convey prison conditions. Rather, they serve to demonstrate the vast difference between the policies on paper, and the way they are experienced by real people.

²⁷ See Respondents’ Response at 16.

²⁸ See Petitioners Motion, Ex. 1, ¶ 6 (restrictions at CRCC has significantly affected counsel for Petitioners’ ability to hold legal calls with residents of CRCC).

The only evidence Respondents offer to describe CRCC conditions comes from one declaration from a member of DOC's Executive Strategy Team.²⁹ No CRCC staff has provided any evidence of the conditions there or the steps Respondents are taking to address COVID. No one has answered key questions such as how COVID got into the facility and why over 200 people have been infected.

Finally, if Respondents' argument that this Court lacks authority to order Respondents to compensate an ER 706 expert was correct,³⁰ then the government could never be ordered to pay for an expert where it is a party to an action. The cases Respondents cite are inapposite. In *In re Gentry*, 137 Wn.2d 378, P.2d 1250 (1999), the petitioner requested the court appoint an expert and authorize the cost of further investigation. *Id.* at 390. The Court denied his request because he could not show a substantial likelihood that evidence would compel relief. *Id.* at 392.

Moore v Snohomish Cty., 112 Wn.2d 915, 774 P.2d 1218 (1989) is also inapposite. There, the court held that public funds could not be spent without statutory authority, and none existed to guarantee the county pay for a court-appointed expert when the parties do not pay. Here, Petitioners

²⁹ See Respondents' Response, Ex. 1 (Declaration of DOC Deputy Secretary Julie Martin).

³⁰ See Respondents' Response at 19.

are not asking the Court to serve as a guarantor of the payment of expert fees, only that an ER 706 expert will be paid as outlined in the rule.

III. CONCLUSION

The Court should grant Petitioners' Motion to Submit Additional Evidence, Expedite Review, and Appoint an Expert Pursuant to ER 706.

RESPECTFULLY SUBMITTED this 6th day of July 2020.

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s/ Nicholas Allen

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CERTIFICATE OF SERVICE

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