THE SUPREME COURT 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 STEVEN SINCLAIR, Secretary of the Washington State Department of Corrections, Respondents.	)	**ORDER ON MOTION** No. 98317-8

On April 9, 2020, the Court (Judge Lisa Worswick participated as a pro tem) received the "PETITIONER'S EMERGENCY MOTION TO ACCELERATE REVIEW, FOR APPOINTMENT OF A SPECIAL MASTER AND FOR IMMEDIATE RELIEF". On April 10, 2020, the Court received the Respondents' "RESPONSE TO PETITIONERS' EMERGENCY MOTION TO ACCELERATE REVIEW, FOR APPOINTMENT OF A SPECIAL MASTER, AND FOR IMMEDIATE RELIEF" and the Petitioners' "REPLY IN SUPPORT OF PETITIONERS' EMERGENCY MOTION TO ACCELERATE REVIEW, FOR APPOINTMENT OF A SPECIAL MASTER AND FOR IMMEDIATE RELIEF". After granting the request to accelerate consideration of the motion, the Court determined to enter the following order.

Now, therefore, it is hereby

ORDERED:

That the Petitioners' motion to accelerate review is granted, and the Petitioners' motion for immediate relief is granted in part as follows: The Court directs the Governor and Secretary Sinclair 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, and to report to the Court in writing no later than noon on Monday, April 13, 2020, all steps that have been taken and will be taken and their emergency plan for implementation. The underlying mandamus petition in this matter will be heard with oral argument as scheduled on April 23, 2020. Prior to that hearing, the Governor and Secretary Sinclair shall submit in writing no later than April 17, 2020 an updated report on steps taken and their plan for implementation, and the petitioners may respond to that report in writing no later than April 21, 2020.

DATED at Olympia, Washington this 10th day of April, 2020.

For the Court

Stephens, C.J.
CHIEF JUSTICE

Johnson, J.

Gordon McCloud, J.

Madsen, J.

Yu, J.

Owens, J.

Montoya-Lewis, J.

González, J.

Worswick, J.

No. 98317-8

GORDON McCLOUD, J. (concurring)—I agree with the majority that we should grant certain relief, and I agree with the relief that they require.

I would go further. The novel coronavirus (COVID-19) pandemic, currently wreaking havoc around the globe and in all aspects of life as we know it, presents unique challenges for our prisons and jails. We recently took considerable action, including suspending civil and criminal trials across our state, because our court facilities "are ill-equipped to effectively comply with social distancing and other public health requirements." Amended Order, No. 25700-B-607 (Wash. Mar. 20, 2020). It's difficult to believe that our prisons and jails are any better equipped to ensure public health. Indeed, we now know that COVID-19 has found its way inside our prisons. Press Release, Wash. Dep't of Corr., First Positive COVID-19 Test for Incarcerated Individual within Washington State Correctional Facility (Apr. 5, 2020).[1]

Petitioners, five residents at state correctional facilities, are understandably concerned and believe that the State is not doing enough to protect them. They seek relief under our constitution and state law. For instance, they claim that the

[1] https://www.doc.wa.gov/news/2020/04052020p.htm.

failure of state leaders "to mitigate the substantial risk of serious harm . . . violates Article I, § 14 of the Washington Constitution," which protects against cruel punishment. Pet. for a Writ of Mandamus at 56. Part of the requested relief is the immediate release of a subset of prisoners who are at higher risk given what we currently know about COVID-19. *Id.* at 3.

In response, the State argues that it is doing all that it can, given the unique circumstances and its limited resources, and that it is in compliance with the law.

This presents a disputed question of material facts. Adjudication of those facts requires more time than we have today. But the emergency motion correctly recognizes that the circumstances presented here are extraordinary, and I believe this court should act accordingly. I believe that several different sources of law give us the authority, and the duty, to release the five petitioners who filed this lawsuit now.

I. We can, and should, construe the petitioners filing as a personal restraint petition

Petitioners style their filing as a petition for writ of mandamus. But we may interpret the petition for writ of mandamus as seeking the more appropriate writ for the additional relief that I address here: habeas corpus; or, as known in the Washington appellate courts, a personal restraint petition. *See Toliver v. Olsen*,

109 Wn.2d 607, 609, 746 P.2d 809 (1987) ("In the *appellate courts*, the [habeas corpus] proceeding is now denominated a 'personal restraint petition' and the procedures are covered by the personal restraint petition rules.").[2] In the past, we have not hesitated to convert a petition for writ of mandamus into a personal restraint petition where appropriate to do so. *See Liptrap v. Acker*, No. 75114-5, Decision Terminating Review (Wash. June 17, 2004) ("I conclude that the best course is to convert the petition against state officers[3] into a personal restraint petition."); *In re Pers. Restraint of Liptrap*, 127 Wn. App. 463, 468-69, 111 P.3d 1227 (2005) ("The Supreme Court converted the [mandamus] action to a personal restraint petition and transferred it to this court for review."), *abrogated on other grounds by In re Pers. Restraint of Mattson*, 166 Wn.2d 730, 740-41, 214 P.3d 141 (2009).

[2] We have original jurisdiction over personal restraint petitions. *In re Pers. Restraint of Bell*, 187 Wn.2d 558, 562, 387 P.3d 719 (2017) ("Sometimes the Washington Supreme Court is 'the proper court' for a personal restraint petition: article IV, section 4 of the Washington Constitution vests this court with original jurisdiction in habeas proceedings, such that a petitioner could file a personal restraint petition directly in this court."); *see also* RAP 16.3(c) (explaining that we "have original concurrent jurisdiction in personal restraint petition proceedings" and "will ordinarily exercise [our] jurisdiction by transferring the petition to the Court of Appeals" but not mandating that we do so).

[3] A petition for a writ of mandamus is a petition against a state officer. RAP 16.2(a).

Other jurisdictions have also liberally interpreted motions or petitions for writs as the appropriate petition or procedural vehicle that the petitioner should have filed. *See, e.g.*, *Lenser v. McGowan*, 191 S.W. 3d 506, 508 (Ark. 2004) ("This court has the discretion to treat a petition for writ of prohibition as if it were properly filed as a petition for a writ of certiorari. We will proceed as if Petitioners had filed a petition for writ of certiorari." (internal citation omitted)); *State v. Starks*, 2013 WI 69, ¶ 31, 349 Wis. 2d 274, 833 N.W.2d 146 (treating an appellate motion as a petition for writ of habeas corpus, which the party should have filed, so as to reach the "difficult legal questions presented" in an "unusual procedural posture").

I would treat the petitioners' filing as a personal restraint petition, to the extent necessary to address their motion for immediate release.

II. These petitioners need not make any threshold showing of prejudice before we reach the merits of their claims

The prerequisites to relief for a personal restraint petition that raises the post-conviction conditions-of-confinement challenges raised here are far less stringent than the prerequisites to relief for a personal restraint petition that challenges the conviction or sentence itself. When a personal restraint petitioner challenges conditions of confinement, the petitioner "need not make any threshold

showing of prejudice; he [or she] must show only that he [or she] is under an unlawful restraint as defined by RAP 16.4." *In re Pers. Restraint of Stuhr*, 186 Wn.2d 49, 52, 375 P.3d 1031 (2016) (*citing In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 214, 227 P.3d 285 (2010)). Under RAP 16.4, we "will grant relief to a petitioner if the petitioner is under a 'restraint' . . . and the petitioner's restraint is unlawful." RAP 16.4(a).

These petitioners, confined at state correctional facilities, are clearly "under a 'restraint.'" RAP 16.4(b). And if their allegations are true, then that restraint is unlawful. *E.g.*, RAP 16.4(c)(6) (stating that a restraint is unlawful if "[t]he conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or law of the State of Washington"); *Farmer v. Brennan*, 511 U.S. 825, 828, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) ("A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." (citing *Helling v. McKinney*, 509 U.S. 25, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993); *Wilson v. Seiter*, 501 U.S. 294, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991); *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); U.S. CONST. amend. VIII).

None of the rule's restrictions apply to the petitioners' claims. RAP 16.4(d) (discussing time bars, alternative remedies, and limitations on number of petitions

absent good cause). This case, which was filed at the early stages of the global pandemic, is timely, and even if the petitioners had sought similar relief before, which is doubtful, they have good cause—a global pandemic—to file a subsequent petition now. Finally, other remedies might not be as readily available and thus not as adequate as the remedies available to personal restraint petitioners in our court. *Cf. In re Pers. Restraint of White*, 25 Wn. App. 911, 612 P.2d 10 (1980) ("'[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.'" (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973))).

The petitioners' claims for release, like their other claims, are properly before us.

III. We may release petitioners pending final resolution of the claims

The petitioners' allegations, if proven, would clearly support relief. Of course, the petitioners must prove those allegations. This takes time, and unfortunately, we don't have much of that. But we have prepared for situations in which time is of the essence. Under RAP 16.15(b), we "may release a petitioner on bail or personal recognizance before deciding the petition, if release prevents

further unlawful confinement and it is unjust to delay the petitioner's release until the petition is determined."[4] I can think of no situation more appropriate for our exercise of that rule, particularly for those petitioners at the greatest risk.

Consider petitioners Theodore Roosevelt Rhone and Leondis Berry, for example. Rhone is 62 years old and diabetic. Pet'rs' Set of Docs. Submitted for the R. (PSD) at 323. Berry is 46 years old, has suffered multiple heart attacks, and is on a pacemaker. PSD at 312, 315. He claims that he has had four surgeries on his heart over the past 12 years. PSD at 316. Berry detailed just how crowded his living conditions are and expressed fear that not enough is being done to prepare for the virus's spread. PSD at 312-16. Given their underlying health conditions, both Rhone and Berry are very concerned about contracting COVID-19. PSD at 316, 323.

Petitioner Shyanne N. Colvin perhaps presents the most compelling case for immediate release. She is 21 years old, on preventative seizure medication, and is seven months pregnant. PSD at 287, 289. She claims that she is in a cell with two other women. PSD at 288. Two of the women sleep on a bunk bed; the other sleeps on the ground. *Id.* The three women share a sink and a toilet, which are

[4] The availability of this remedy is another reason why other remedies might not be adequate under the circumstances presented by COVID-19.

located in the cell. *Id.* She claims that she is "exposed to a crowd of about 50 women six times a day," PSD at 289, including women who recently arrived from outside jails, PSD at 287. Colvin is worried about her pregnancy and the "impacts of coronavirus on pregnant women and unborn children." PSD at 290. She claims that this is her first criminal offense, that her early release date is January 2021, and that she would immediately move in with her mother and father upon release. PSD at 287, 290. I believe that under these circumstances, it is unjust to delay Colvin's release.

I would order the release of each of the petitioners in this action under RAP 16.15(b).

Gordon McCloud, J.

González, J.

Montoya-Lewis, J.