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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

IN THE MATTER OF THE PERSONAL
RESTRAINT OF

TIMOTHY ROBERT PAULEY,

Petitioner.

No. 81370-6-I

PUBLISHED OPINION

PER CURIAM – Petitioner Timothy Robert Pauley, an inmate at the Monroe Correctional Complex (MCC), filed a personal restraint petition in our Supreme Court, claiming that his conditions of confinement violate article I, section 14 of the Washington Constitution, and the Eighth Amendment to the United States Constitution because of the risk of harm he faces from exposure to COVID-19. Pauley also contends his restraint is unlawful because the Department of Corrections (DOC) is violating a common law duty to protect inmates' health and safety. Pauley simultaneously filed a motion for the Supreme Court to retain jurisdiction, to accelerate review of his petition on the merits, and to order his immediate release pending review.

On April 21, 2020, the Supreme Court transferred the petition and the pending motion for accelerated review and immediate release to this court for resolution. On April 24, 2020, this court asked the State to respond to Pauley's

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motion for immediate release. The Indeterminate Sentence Review Board (ISRB) filed a response to Pauley's motion and the underlying petition on May 4, 2020.¹ Pauley submitted a reply on the merits of his petition on May 5, 2020. On May 7, 2020, the ISRB moved to supplement the record with the declaration of Phu Ngo, the certified physician assistant responsible for Pauley's medical care at MCC. Pauley did not oppose this motion and, on May 11, 2020, submitted a timely amended reply brief and a responsive declaration. On May 13, 2020, the ISRB moved for a second time to supplement the record with an updated declaration of Julie Martin, Deputy Secretary of DOC, dated May 8, 2020. Pauley did not oppose this motion on the condition the court accepted his second amended reply. We grant both motions to supplement the record and Pauley's request that we accept his amended and second amended reply briefs.

For the reasons set out below, this court grants Pauley's motion for accelerated review, denies his personal restraint petition, and denies his motion for immediate release.

FACTS

In 1981, Pauley pleaded guilty to three counts of first degree murder for his role in a robbery and triple homicide.² He was sentenced to three life terms which the ISRB subsequently revised to be consistent with the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. In 1992, the ISRB revised Pauley's sentence

¹ In December 2019, Pauley filed a personal restraint petition challenging a 2019 decision of the ISRB to increase the minimum term of his incarceration. In re Pers. Restraint of Pauley, No. 80895-8-I. The ISRB's response to that petition is now due June 11, 2020. The present petition does not raise any issues relating to the ISRB's decision regarding his sentence and focuses only on the conditions of Pauley's confinement due to the coronavirus pandemic.

² In re Pers. Restraint of Pauley, No. 76489-6-1, slip op. at 1 (Aug. 13, 2018).

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by setting a minimum term of 400 months on count III, 320 months on count IV, and 311 months on count V. In keeping with his original sentence, Pauley was to serve the term for count IV first, to be followed by concurrent terms for counts III and V.³ The ISRB paroled Pauley on count IV in April 1999 and he began serving the concurrent sentences on counts III and V. In May 2015, the ISRB reduced Pauley's minimum term on count III to 340 months.

In March 2016, the ISRB conducted a hearing and decided Pauley was not parolable and increased his minimum term on the two remaining counts by adding 240 months to count III and 269 months to count V, a decision this court reversed in 2018.⁴ We remanded Pauley's matter to the ISRB to conduct a new hearing in order to properly consider his rehabilitation efforts in accordance with ISRB procedures. According to the ISRB, on remand, the board added 84 months to Pauley's minimum term on count III and 113 months to count V. His earned release date is now July 2, 2022.

Pauley is now 61 years old and has been incarcerated since 1980. He is currently in detention in Unit C of the MCC, a prison operated by the Washington Department of Corrections (DOC). He lives in a single-occupancy cell, with access to his own sink and toilet, and he has unrestricted access to soap and warm water.

DOC operates 12 prisons, houses approximately 18,000 people, and employs over 5,000 staff. Since January 2020, DOC has been working to mitigate the risk of COVID-19 to incarcerated individuals who reside in, and its staff who

³ *Id.*, slip op. at 2.

⁴ *Id.*, slip op. at 6, fn. 7, and 10.

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work in, its facilities. The evidence submitted by the ISRB is largely uncontested by Pauley.

Each major prison, including MCC where Pauley resides, has medical facilities, with a physician director, doctors, physician assistants, nurse practitioners, and other health care providers. DOC implemented a Communicable Disease and Infection Prevention Program before the COVID-19 pandemic to prevent, educate about, identify, and treat infectious diseases. A board-certified infectious disease physician oversees this program and each prison facility has an Infection Prevention Nurse on staff. DOC screens all individuals for infectious diseases as they enter the system at one of two reception centers, the Washington Corrections Center in Shelton, and the Washington Corrections Center for Women in Purdy.

On January 24, 2020, DOC's Health Service sent a message to all staff explaining the novel coronavirus. On February 9, 2020, DOC opened an Emergency Operations Center to support its response to this infectious disease. It later activated Incident Command Posts (ICPs) at each prison. This ICP designation places responsibility for incident management on a single person with the authority to make decisions on a 24/7 basis.

On March 4, 2020, DOC authorized the use of alcohol-based hand sanitizers, usually a contraband item, in its facilities for staff and others working in the prisons.

On March 5, 2020, DOC's Chief Medical Officer created a team to develop guidelines specific to the COVID-19 coronavirus. The guidelines detail protocols

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for screening, testing, and infection control, including isolation and quarantine of confirmed and suspected COVID-19 patients.

On March 12, 2020, the DOC restricted access to MCC to DOC employees, contract staff and legal professionals. A DOC staff member tested positive for the coronavirus that same day. MCC then implemented an active screening process for all staff before they are allowed to enter the premises.

On March 15, 2020, DOC implemented enhanced screening processes for all staff, contract staff, contractors and volunteers. These enhanced screenings, including taking temperatures, have been conducted every day since March 16, 2020. On March 18, 2020, DOC issued guidelines for risk mitigation practices at units for special populations, including infirmaries at all facilities. And on March 20, 2020, DOC implemented social distancing protocols in the prisons. It has since provided direction on how to follow social distancing practices for kitchen workers and during meals. It subsequently provided additional guidance about cleaning and sanitizing products approved for COVID-19 in order to comply with guidelines issued by the Centers for Disease Control and Prevention (CDC).

On March 23, 2020, the CDC issued a guidance document specific to corrections facilities. DOC has been working since that date to reach substantial compliance with these guidelines.

On March 20, 2020, the MCC superintendent issued a memo to inmates setting out risk mitigation practices, such as social distancing, hygiene, environmental cleanliness, and the use of recreational facilities. After Governor Inslee issued the Stay Home—Stay Healthy order on March 23, 2020, the superintendent issued another memo on social distancing within the facility.

The DOC has modified its COVID-19 guidelines over the course of the pandemic but the current version, Washington State DOC COVID-19 Screening, Testing, and Infection Control Guideline, Version 17 (updated May 6, 2020),⁵ sets out detailed screening procedures for all new intakes, requirements for the use of full personal protective equipment, and recommendations for any inmates considered to be at “high risk” – defined by the DOC as anyone with an underlying condition and those aged 50 years or older. Id. For any inmate identified as high risk, the DOC recommends that he:

- Wear an issued face covering when out of his cell or when within 6 feet of others
- Perform frequent hand hygiene
- Clean his cell frequently throughout the day
- Avoid contact with high-touch surfaces
- Limit movement in the facility
- Stay at least 6 feet from others in the day room, the yard, the gym, the dining hall, and the medication line, as well as any other areas where the population congregates.

All incarcerated individuals must now wear DOC-provided face coverings. Id.

According to DOC’s Martin, it has now implemented a plan for a 14-day quarantine of all incoming individuals to the male reception center at the Washington Corrections Center in Shelton and the female reception center at the Washington Corrections Center for Women in Purdy, as recommended by the CDC. And a Health Services “strike team” has begun working at the Shelton facility to perform intake physicals to avoid a backlog of individuals awaiting transfer to their assigned facilities. To minimize the risk of transmission while transferring

⁵ <https://www.doc.wa.gov/news/2020/docs/wa-state-doc-covid-19-screening-testing-infection-control-guideline.pdf>

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inmates, DOC has implemented protocols to disinfect transport vehicles before and after each transport, as well as at the end of each day.

DOC is now in substantial compliance with the majority of CDC's recommendations on personnel practices, operations and supplies, prevention, cleaning and disinfection practices, hygiene, screening, management of staff, medical isolation of confirmed and suspected cases, the disinfecting of spaces inhabited by positive COVID-19 inmates, the quarantining of those in contact with a COVID-19 positive inmate, and the management of asymptomatic and symptomatic inmates. Pauley does not present evidence to create a question of fact as to DOC's substantial compliance with CDC guidance for prisons.

DOC acknowledges that as of now, it is unable to obtain sufficient test kits to allow it to test all inmates and staff for COVID-19. As a result, it has implemented a testing protocol under which a health care practitioner will test those with COVID-19 symptoms or those who have had contact with a suspected COVID-19 positive individual. But as of May 7, 2020, DOC has 983 test kits in prison facilities, 200 test kits at its headquarters, 950 test kit vials at headquarters, awaiting receipt of 10,000 swabs and 2,000 test kit vials, both of which have been ordered. It now has sufficient test kits to administer tests in accordance to Washington Department of Health guidelines. And DOC's testing criteria appear consistent with the recommendations of the CDC: priorities for COVID-19 testing are those exhibiting symptoms and who are either hospitalized or working in

healthcare facilities or congregate living settings, or living in long-term care facilities or congregate living settings, such as prisons.⁶

There is no evidence that Pauley has any symptoms of COVID-19 or that he has had contact with anyone who has tested positive for the coronavirus. His concern is that, because of his personal circumstances, he is at substantial risk of contracting the disease. Over the course of his 40-year incarceration, Pauley has experienced different medical issues. In 2002, he contracted hepatitis C and recovered from that condition after taking medication. In 2006, he tested positive for tuberculosis and was on medication for that condition for 9 months. He has had two hip replacements, one in 2006 and a second one in 2012. Between the fall of 2018 and the summer of 2019, he experienced respiratory problems and was prescribed an inhaler with albuterol that improved his condition.

Other than his age, Pauley has not identified any serious underlying medical conditions that put him on the CDC's list of people at higher risk for severe illness from COVID-19.⁷ Physician Assistant, Certified (PAC) Phu Ngo has testified that the CDC considers individuals over the age of 65 to be at a higher risk of developing severe illness due to COVID-19, but not for contracting the disease in the first place. But under DOC policy, inmates over 50 years of age are considered to be at higher risk. For this reason, all inmates over the age of 50 have been instructed to wear a face covering when leaving their cells. They are also instructed to perform frequent hand hygiene, to clean their cell frequently throughout the day, to avoid contact of high-touch surfaces, and to limit their

⁶ <https://www.cdc.gov/coronavirus/2019-nCoV/hcp/clinical-criteria.html>.

⁷ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

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movement in the facility. They are also instructed to stay at least 6 feet from others in the day room, yard, gym, dining halls, religious services, the medication line, and any other areas where the population congregates.

According to PAC Ngo, Pauley is not currently taking any medication for the respiratory problems he experienced in mid-2019. Ngo stated Pauley has a mild form of asthma which, based on CDC guidance, does not place him at an elevated risk of developing severe illness due to COVID-19 or at a higher risk of contracting the disease. PAC Ngo also testified that there is no evidence Pauley still has latent TB or any advanced liver disease associated with his hepatitis C condition and treatment in the early 2000s. PAC Ngo stated that “[t]he various intestinal and joint problems referenced by Mr. Pauley have all been addressed medically years ago and are not known to the CDC or the DOC to place him currently at an elevated risk for developing severe illness due to COVID-19. They are currently also not known to place him at a higher risk for contracting COVID-19.” Jason Neely, the DOC Correctional Unit Supervisor for Unit C at MCC, testified that Pauley has not requested any accommodations for any physical vulnerabilities.

In a declaration dated April 17, 2020, Pauley alleges that he has not been provided hand sanitizer for use in his cell. The ISRB confirmed this fact. The DOC does not provide alcohol-based hand sanitizer in inmate cells because it contains alcohol and there have been abuses by inmates. The CDC guidelines for prisons provide that hand sanitizer only be used if soap and warm water are not available. The DOC does not provide Pauley with hand sanitizer in his cell because he has unrestricted access to soap and warm water.

Pauley also alleges he is provided two different cleaning materials for use in his cell, a red colored liquid which he has been told is a disinfectant and a green colored liquid he has been told is a detergent. He questions the effectiveness of these cleaning agents. Dianna Rule, a Legal Liaison Officer at MCC, and Neely, Pauley's unit supervisor, confirmed that DOC provides Pauley and all other inmates a red disinfectant cleaner, known as Hepastat 256, to spray on hard surfaces. She also confirmed that DOC provides a green-colored general cleaner called "CorrectPact Germicidal Cleaner." There is no evidence that inmates lack adequate quantities of cleaning agents or that the chemicals provided to Pauley do not in fact work.

Also in his April 17 declaration, Pauley testified that he has a mask from a cleaning job he previously held and uses that mask. But he claims when he asked for another mask to protect himself from COVID-19, he was told to "speak to medical" and "[m]edical has not been forthcoming with masks." He initially contended that most inmates in his unit do not have masks. But DOC provided evidence that on April 17, DOC instructed all inmates that face coverings were mandatory and has, since Pauley submitted his declaration, provided all inmates with face mask kits. The kits include two cloth bandanas, rubber bands, coffee filters and a guide for how to make the masks. When one of the bandanas is being laundered, the inmate has a second one to use. Pauley admitted in his May 4, 2020 declaration that "[w]ashable masks have now been distributed to inmates."

While Pauley acknowledges DOC has implemented social distancing policies, he alleges it is "impossible" to follow social distancing requirements in showers and the yard, while working on computers in the law library, while eating

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in the dining hall, when visiting the communal gym or the day room, when using the communal telephones or J-Pay kiosks, when submitting a kite to staff, or when performing the cleaning duties as a shift porter. He also complains that many inmates are not wearing their masks or are putting them on incorrectly.

The ISRB reports that “[s]taff are aware of the deficiencies in cleaning and social distancing due to inmate non-compliance with mandatory rules.” But the DOC staff are cleaning showers, gyms and dining areas “at an increased frequency” and are constantly reminding inmates of the social distancing rules. Neely testified that tier representatives, individuals selected through a voting process in each unit, have posted “6 Feet” signs everywhere in the unit and carry clipboards bearing the sign. They, like DOC staff, encourage the inmates to distance themselves as much as possible. The ISRB describes inmate cooperation as “generally good, with exceptions,” but DOC staff are trying to direct and remind inmates as often as possible regarding their role in preventing the spread of the virus. There is no evidence that the DOC is ignoring inmate noncompliance with its risk mitigation policies or that it is encouraging its staff to overlook such noncompliance.

To further reduce congestion, the DOC has placed limits on the number of inmates who may gather in common areas at any one time. The DOC has allowed inmates to use the gym, with a normal capacity of 150, but has instituted limits so that no more than 50 individuals can be present at one time. The gym equipment is disinfected regularly and there are disinfectant spray bottles and paper towels at every exercise station. Monroe employs inmates as recreation porters to clean the equipment. The day room, with a normal capacity of 57, has been limited to

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only 26 inmates at a time, with only 2 people to a table. The staff have limited the number of chairs in the TV room to ensure distancing.

The yard, which has a capacity of 350, is now limited to 150 people at a time. Individuals eating in the dining hall are encouraged to social distance as well. The floors have been marked at 6-foot intervals. During the daytime and evenings, the DOC disinfects dining tables, doorknobs, and other high-touch areas through the facility. It deep cleans common areas regularly throughout the day.

To keep other areas clean, the DOC staff has asked shower porters to clean the showers at least twice a day and more frequently as needed. And the staff have asked unit porters to clean the phones and J-Pay kiosks regularly as well. DOC has attempted to leave cleaning bottles in communal locations for inmates to use as they see fit, but the bottles kept disappearing so DOC ceased leaving the cleaning agents unattended by staff or porters.

In addition to these practices and protocols inside DOC facilities, Governor Inslee has taken steps to reduce the overall prison population to facilitate social distancing. On April 15, 2020, Governor Inslee issued two emergency proclamations. The first proclamation included an emergency commutation for offenders who meet certain criteria. The second allows the DOC to release certain prisoners to community custody, partial confinement or home detention. As of April 30, 2020, the DOC had released over 550 individuals from prison and work release as a result of these proclamations. According to the DOC "Significant Events Timeline" from May 14, 2020, DOC has released 422 incarcerated individuals through the commutation process and 450 incarcerated individuals through the

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rapid reentry process, and has granted furlough to 66 individuals from the work release into the community.⁸

The first inmate housed at Monroe to test positive occurred on April 5, 2020. He was placed in isolation and his housing unit was placed on quarantine. Contact tracing led staff to identify two additional inmates already on the isolation unit who tested positive for COVID-19. On April 8, 2020, DOC dispatched an Emergency Response Team to MCC when approximately 100 inmates engaged in a demonstration in the recreation yard.⁹ DOC believed the demonstration occurred as a result of the positive COVID-19 tests.¹⁰

According to the DOC, as of April 30, 2020, there were 18 confirmed COVID-19 cases in its inmate population across the state and no deaths. According to the DOC website, as of May 12, 2020, DOC has completed 375 tests, with 340 returning negative. There have been 26 positive results and another 9 pending lab results.¹¹ It has 53 inmates housed in isolation and 422 individuals in quarantine.¹² Of the 26 positive cases, there are 16 confirmed cases at MCC, and one confirmed case at the Washington Corrections Center, one at the Washington State Penitentiary, and one receiving treatment at a community medical center.¹³ The remaining 7 positive cases are reported from the Reynolds Work Release program.¹⁴ All of the incarcerated individuals who tested positive were placed in

⁸ <https://www.doc.wa.gov/news/2020/docs/daily-situation-report.pdf>

⁹ <https://www.doc.wa.gov/news/2020/04082020p.htm>

¹⁰ Id.

¹¹ <https://www.doc.wa.gov/news/covid-19.htm#status>

¹² Isolation separates a symptomatic patient from all other patients. Quarantine separates a patient from individuals who are asymptomatic but have been exposed to a person confirmed to have COVID-19.

¹³ <https://www.doc.wa.gov/news/covid-19.htm#status>

¹⁴ Id.

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isolation and inmates from their housing unit were placed into quarantine. The death toll remains at zero.

In late March 2020, five Washington prisoners filed a petition for a writ of mandamus in the Supreme Court, Colvin v. Inslee, No. 98317-8.¹⁵ The lawsuit alleged that Governor Inslee and the Secretary of the DOC were violating several provisions of the Washington constitution, including the prohibition on cruel or unusual punishment, in their response to the COVID-19 emergency. On April 23, 2020, the Supreme Court issued an order dismissing the petition, concluding that “Petitioners have not shown that the Respondents are currently failing to perform a mandatory, nondiscretionary duty in addressing the COVID-19 risk at the Department of Corrections facilities, nor shown other constitutional or statutory grounds for the relief they request.” The court also ruled that “on the record presented, the Petitioners have not shown the Respondents’ actions constitute deliberate indifference to the COVID-19 risk at the Department of Corrections facilities, and thus cannot establish unlawful restraint.” Id. at 2.

ANALYSIS

Accelerated Review

RAP 18.12 allows this court to set any matter for accelerated disposition. Generally, requests for accelerated disposition in our court are not granted unless the issue presented on appeal would be mooted by the normal time periods for appeals. Puget Sound Power & Light Co. v. Pub. Util. Dist. No. 1 of Chelan County, 17 Wn. App. 861, 862, fn. 1, 565 P.2d 1221 (1977).

¹⁵ Pauley was not a party to the Colvin lawsuit but provided a declaration in support of it. He filed this petition two days before the Supreme Court dismissed the petition in Colvin.

Here, placing Pauley's PRP on a normal calendar would possibly moot the conditions of confinement arguments he is raising. The time period for resolving a personal restraint petition normally entails a period of time for the court to conduct a preliminary review of the petition's merits under RAP 16.8.1, a 60-day period for receiving a response from the State under RAP 16.9, and another 30-day period for receiving a reply from the petitioner under RAP 16.10. Once the briefing is completed, the Chief Judge or his designee then determines whether the issues presented in the petition are frivolous or whether the matter should be referred to a panel of judges for determination on the merits with or without oral argument. RAP 16.11(b). This court typically resolves 75 percent of its pending case load within 600 days of filing. If we were to refer this PRP to a panel of judges and not accelerate our review of its merits, we might not be able to issue a decision until the end of 2021. According to the ISRB, Pauley currently has an earned release date of July 2, 2022. This factor weighs in favor of accelerating review.

In addition, Pauley argues his life is currently in jeopardy because of DOC's failure to adequately mitigate the risks he faces from COVID-19. There has been high-profile litigation before our Supreme Court and in courts across the nation in which parties have raised similar concerns about the risks of the pandemic spreading throughout this country's jails, prisons, and immigration detention facilities. See Colvin et al. v. Inslee et al., No. 98317-8 (Washington Supreme Court order denying inmates' petition for writ of mandamus and denying motion to amend petition because inmates failed to establish deliberate indifference to

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COVID-19 risk at DOC facilities);¹⁶ Basank et al. v. Decker et al., 2020 WL 1953847 (S.D.N.Y. 2020) (order preliminarily enjoining Immigration & Customs Enforcement officials from detaining petitioners in county jails, finding risk of serious illness or death); People ex rel. Stoughton v. Brann, 2020 WL 1679209 (N.Y. Supreme 2020) (ordering temporary release of some vulnerable pretrial detainees from Rikers Island prison due to unprecedented risk presented by COVID-19); Mays v. Dart, 2020 WL 1812381 (N.D. Ill. 2020) (granting limited relief to persons detained in Cook County jail, prohibiting group housing of detained persons except for those in quarantine or isolation, those in need of medical or mental health treatment where single cells pose a risk of suicide or self-harm, or those in units at less than 50 percent capacity where adequate social distancing can occur).

Although we recognize that our understanding of this novel coronavirus is deepening as time passes and that a race is on to discover treatments and a vaccine for it, it appears unlikely to us that an effective treatment or vaccine will be identified any time soon.¹⁷ These factors similarly weigh in favor of accelerated review.

Finally, the factual and legal issues Pauley presents in his motion for immediate release are identical to the factual and legal issues he presents in his underlying petition. The ISRB and Pauley have thoroughly briefed the issues. We

¹⁶<http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/983178PublicOrder042320.pdf>

¹⁷ "There are no drugs or other therapeutics presently approved by the U.S. Food and Drug Administration (FDA) to prevent or treat COVID-19." <https://www.cdc.gov/coronavirus/2019-ncov/hcp/therapeutic-options.html>. See also "The Race for Coronavirus Vaccines: A Graphical Guide," Nature, April 28, 2020 ("[r]esearchers . . . hope to have a vaccine ready in 18 months").

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conclude that further delay in resolving the merits of Pauley's petition would not benefit the parties or this court. We therefore grant Pauley's motion for accelerated review and will address the merits of his petition.

Standard of Review

To obtain judicial relief through a personal restraint petition, an inmate raising a state law or constitutional challenge to the conditions of his confinement must show he is being unlawfully restrained under RAP 16.4. In re Pers. Restraint of Gentry, 170 Wn.2d 711, 714, 245 P.3d 766 (2010). There is no dispute that Pauley is being restrained by DOC. The only issue is whether that restraint is unlawful. RAP 16.4(c)(6) makes a restraint unlawful when the conditions or manner of the restraint "are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington."

The petitioner bears the burden of proving, by a preponderance of evidence, that his restraint is unlawful. Matter of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petition must be supported by factual evidence, rather than on conclusory allegations. In re Pers. Restraint of Gronquist, 138 Wn.2d 388, 396, 978 P.2d 1083 (1999). Inadmissible hearsay, speculation and conjecture are insufficient to support a challenge to an inmate's conditions of confinement. Id. As an evidentiary prerequisite, the petitioner must demonstrate he has competent, admissible evidence to establish facts that entitle him to relief. In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

Once the petitioner makes this threshold showing, the court will then examine the State's response, which must answer the allegations and identify any material disputed questions of fact. Rice, 118 Wn.2d at 886, citing RAP 16.9. To

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define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence. Id. If the parties' materials establish the existence of material disputed issues of fact, then we may direct the superior court to hold a reference hearing to resolve these factual disputes. Id. at 886-87.

With these principles in mind, we turn to the merits of Pauley's petition.

Cruel Punishment Claim

Pauley first contends his conditions of confinement constitute cruel punishment in violation of article I, section 14 of the Washington constitution and the Eighth Amendment to the United States Constitution.

The Eighth Amendment protects individuals from cruel and unusual punishment. U.S. Const. amend. VIII. Article I, section 14 of the Washington Constitution bans cruel punishment. State v. Bassett, 192 Wn.2d 67, 77, 428 P.3d 343 (2018). Although article I, section 14 has been deemed more protective than the Eighth Amendment in certain cases, Pauley does not argue that the duties these two provisions impose on DOC differ in any material way here. Both Pauley and the ISRB agree that DOC has a duty to protect inmates from inhumane or unsafe prison conditions and the test set out in Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) applies.

Under Farmer, an Eighth Amendment challenge to the conditions of confinement has two components, one objective and one subjective. Swain v. Junior, ___ F.3d ___, 2020 WL 216317, *4 (11 Cir. May 5, 2020). First, to satisfy the objective component, the prisoner must show "an objectively intolerable risk of harm." Id. He must show that the challenged conditions are extreme and present an unreasonable risk of serious damage to his future health or safety. Id.

Second, to satisfy the subjective component, the prisoner must demonstrate that prison officials acted with deliberate indifference to the inmate's health and safety. Swain, at *4. This component requires evidence that the officials know of and disregard an excessive risk to inmate health and safety. Farmer, at 837. The U.S. Supreme Court has equated deliberate indifference with recklessness. Id at 836. But prison officials are not liable for known risks if they have responded reasonably to the risk, "even if the harm ultimately was not averted." 511 U.S. at 844.

Risk of Contracting COVID-19

In the last several months, COVID-19 has swept across the world and been declared a global health pandemic by the World Health Organization. Williams v. Barr, 2020 WL 2193448 *1 (M.D. Penn. May 6, 2020). Because the disease is caused by a novel type of coronavirus, humans have no immunity to the virus and, currently, there is no cure, vaccine, or known anti-viral treatment for it. Id. The virus is highly contagious and is spread through respiratory particles of moisture and mucous that are transmitted through the air or which fall on surfaces that are later touched by an individual. Id. The primary method used to combat the spread of COVID-19, social distancing, seeks to maintain enough distance between individuals to break the chain of transmission, generally at least six feet. Id.

Most individuals infected with COVID-19 develop mild or moderate respiratory symptoms and recover with no medical intervention. Approximately 20 percent of the cases, however, require hospitalization, with 2-3 percent of affected individuals dying from the virus. Williams, at *1. Those with certain identified underlying medical conditions, such as chronic lung disease, moderate to severe

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asthma, serious heart conditions, compromised immune systems, severe obesity, diabetes, or liver disease, are more susceptible to developing serious illness than others. Id.

The ISRB does not argue the risk of contracting COVID-19 is insignificant. Indeed, the risk is recognized as so significant that Governor Inslee has issued orders requiring non-essential employees to stay at home rather than expose themselves to the coronavirus and the disease it causes.¹⁸ In doing so, Governor Inslee has recognized that COVID-19 “remains a significant health risk to all of our people.”¹⁹ Public health experts appear to agree that incarcerated individuals are at special risk of infection, given their living situations and may be less able to participate in proactive measures to keep themselves safe.²⁰ Prisoners are more likely than the general population to report experiencing infectious diseases, indicating that these individuals face a heightened risk during this pandemic. United States v. Kennedy, 2020 WL 1493481, at *1-2 (E.D. Mich. March 27, 2020).

We will thus assume, for purposes of this analysis, that Pauley has satisfied the first, objective prong of his Eighth Amendment claim.

Deliberate Indifference

The ISRB argues that Pauley has not demonstrated that DOC has recklessly ignored the risk of inmates contracting COVID-19 or recklessly failed to address any particular vulnerability Pauley faces. On this record, we agree.

¹⁸ https://www.governor.wa.gov/sites/default/files/20-25.3%20-%20COVID-19%20Stay%20Home%20Stay%20Healthy%20-%20Reopening%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery

¹⁹ Id.

²⁰ “Achieving A Fair And Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State and Local Leaders from Public Health and Legal Experts in the United States,” (Mar. 2, 2020), at <https://bit.ly/2W9V6oS>

Pauley has no evidence DOC has ignored the risk COVID-19 presents to Washington prison inmates. In Helling v. McKinney, 509 U.S. 25, 33, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993), the Supreme Court recognized that government authorities may be deliberately indifferent to an inmate's current health problems where they "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering in the next week or month or year," including "exposure of inmates to a serious, communicable disease." Id.

Pauley cannot challenge the fact that DOC has implemented a number of policies, from reducing the overall prison population, to mandating social distancing, implementing aggressive cleaning of common areas, establishing protocols for screening and testing inmates, isolating those testing positive and quarantining those with contact to positive cases, limiting the number of inmates in any common area at any one time, to supplying face coverings—all to mitigate the risk of COVID-19 in its facilities. Pauley is not required to share a cell, a toilet, or a sink with any other individual. He has unrestricted access to warm water and soap in his cell with which to wash his hands, he has access to cleaning supplies with which to clean his cell, and he has a face covering to use in situations where social distancing is not feasible.

Pauley also contends that DOC's failure to provide any hand sanitizer to inmates in common areas or in their cells demonstrates deliberate indifference. We disagree. The CDC recommends the use of alcohol-based hand sanitizer only if soap and water are not readily available. Williams, at *3.²¹ The undisputed

²¹ See "How to Protect Yourself & Others," available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

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evidence shows that Pauley has unrestricted access to soap and water with which to wash his hands frequently before and after eating in the dining hall or touching surfaces such as dining room tables, J-Pay kiosks, telephones, or doors.

Pauley, in his May 5, 2020 declaration, contends that his ability to practice social distancing is impossible because of the number of inmates in the facility's halls and common areas. The CDC's guidance for managing COVID-19 in correctional facilities recommends the implementation of social distancing strategies to increase the physical space between incarcerated persons, "ideally 6 feet between all individuals, regardless of the presence of symptoms." The CDC recognizes, however, that these strategies "will need to be tailored to the individual space in the facility" and that "[n]ot all strategies will be feasible in all facilities."

It is undisputed that inmates at MCC cannot maintain six feet of separation from each other 100 percent of the time. In an April 17, 2020, Monitoring Report, the Office of Correction Ombuds (OCO)²² determined, in investigating the protest at MCC and DOC's actions to prevent the spread of COVID-19, that the MCC "is unable to effectively impose social distancing due to facility structure and population size."²³ DOC has therefore taken other risk mitigation steps recommended by the CDC in such situations, including removing chairs in common areas to increase the physical space between inmates, rearranging seating in the dining hall to make sure there is more space between inmates, providing meals inside cells, and limiting the size of groups occupying the exercise

²² Under RCW 43.06C.050, OCO has reasonable access to all state correctional facilities to monitor compliance with the rights and safety of incarcerated individuals.

²³ <https://oco.wa.gov/sites/default/files/public/OCO%20Monitoring%20Visit%20to%20Monroe%20Correctional%20Complex.pdf>

yard, the day room, and TV room. And as Pauley admits, DOC has distributed washable masks to inmates. The CDC recommends wearing face coverings “where other social distancing measures are difficult to maintain.”²⁴ OCO reported in its April 17 report that all units it observed appeared clean and containers of appropriate disinfectants were available for use by inmates. The inability of Pauley to social distance at all times he is outside his cell may be true, but he has not demonstrated DOC has been deliberately indifferent to the risk he faces when he must navigate through the facility in close proximity to other inmates or to staff.

Pauley argues that DOC is not consistently enforcing the social distancing. But in Swain v. Junior, ___ F.3d ___, 2020 WL 216317, *4 (11 Cir. May 5, 2020), the U.S. Court of Appeals for the Eleventh Circuit rejected the argument that a jail’s inability to achieve meaningful social distancing evinced deliberate indifference to the COVID-19 risk. Without evidence that the defendants were “ignoring or approving the alleged lapses in enforcement of social-distancing policies,” the inconsistency in enforcement did not establish the defendants were deliberately indifferent. Id. at *5. Instead, jail officials had “adopted extensive safety measures such as increasing screening, providing protective equipment, adopting social distancing when possible, quarantining symptomatic inmates, and enhancing cleaning procedures,” making it likely the detainees would be unable to show that defendants’ actions amounted to deliberate indifference. Id.

We find this case analogous. While it will be difficult to achieve 100 percent compliance with all of DOC’s COVID-19 policies, Pauley has presented no

²⁴ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>

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admissible evidence that any DOC officials are ignoring violations of its policies or approving lapses in the enforcement of the policies. COVID-19 presents a serious medical issue in any prison facility but they can nevertheless curb the introduction or spread of COVID-19 and contain and treat those infected with the virus. Williams, at *7. The record shows that DOC has taken the threat of COVID-19 seriously and taken reasonable and appropriate steps to mitigate the risk to incarcerated individuals.

The effectiveness of these actions is reflected in the statistics. DOC is not facing rising numbers of COVID-19 cases. It does not have infection rates greater than the state as a whole. And as of yet, there have been no deaths in any DOC facility caused by this disease.

Pauley contends that even with face coverings, he cannot protect himself from staff who come near him to take his temperature and conduct mandatory inmate counts on a daily basis. But on April 10, 2020, DOC mandated the use of face coverings for all employees entering a DOC facility. On April 14, 2020, it issued a personal protective equipment (PPE) matrix, setting out guidance to DOC staff for the use of different types of PPE when interacting with inmates in different settings. Under the current version of this matrix, all staff working in DOC locations must wear an approved face covering while on duty.²⁵ If they have contact with any quarantined inmates, they must wear gowns, gloves and surgical masks unless they are merely passing items to the inmate through a cuff port without any face-to-face contact, in which case they need only wear gloves and a face

²⁵ <https://www.doc.wa.gov/news/2020/docs/ppe-covid-19-matrix.pdf>

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covering.²⁶ If they have contact with anyone symptomatic and in isolation, they must wear an N95 mask, in addition to eye protection, gloves and a gown, if they have any close contact with the individual.²⁷ DOC has clearly taken steps to protect Pauley from contracting COVID-19 from DOC staff members when they take his temperature or conduct an inmate count on his unit.

Finally, Pauley argues that he faces greater risks “as a 61-year-old man with respiratory ailments.” But Pauley has not demonstrated he actually suffers from any respiratory ailments. As PAC Ngo testified, Pauley may suffer from mild asthma, but that condition does not make him particularly vulnerable to contracting COVID-19 or suffering a serious illness were he to do so. It is only his age that places him in a different risk category. DOC has taken significant steps to mitigate the risk to Pauley—including screening everyone entering the facility for symptoms, mandating that staff wear a mask or face covering at all times, providing face coverings for inmates to wear whenever they are unable to social distance, providing unrestricted access to soap and water, implementing PPE requirements for staff when working with symptomatic inmates, reducing the number of inmates congregating in any one common area, isolating people who have confirmed or suspected COVID-19, quarantining those who had contact with confirmed or suspected COVID-19 cases, and increasing the frequency of cleaning common areas. Pauley has not demonstrated why all these safety precautions are inadequate steps to prevent, to the extent possible, the spread of infection in the MCC.

²⁶ Id.

²⁷ Id.

We conclude Pauley has not presented sufficient evidence to create a genuine issue of disputed fact that DOC has acted with deliberate indifference in tackling COVID-19.²⁸ We deny his Eighth Amendment claim.

In his reply, Pauley argues that even if DOC has not acted with deliberate indifference, we should nevertheless hold that “conditions of confinement which require Mr. Pauley to be in constant proximity to fellow inmates and staff and which fail to adhere to effective hygiene requirements violate the prohibition against cruel punishment” under our state constitution. It appears he is arguing that we abandon the deliberate indifference standard altogether and instead apply something akin to a negligence standard under article I, section 14. While there have been cases in which our Supreme Court has interpreted article I, section 14’s cruel punishment clause more broadly than the Eighth Amendment, see Bassett, 192 Wn.2d at 82 (in context of juvenile sentencing, state constitution’s cruel punishment clause provides greater protection than Eighth Amendment), Pauley has not identified a case in which any court in this state has adopted a negligence test, rather than the deliberate indifference standard, in a challenge to prison conditions.

And Pauley has not demonstrated factually that he actually is in “constant proximity to fellow inmates and staff.” He has his own cell and his own protective face coverings, as do all other inmates at MCC. Staff also must wear face coverings when interacting with Pauley. Nor has he demonstrated that DOC staff

²⁸ Pauley’s reliance on Wilson v. Williams, ___ F. Supp. 3d ___, 2020 WL 1940882 (N.D. Ohio Apr. 22, 2020) is misplaced. In that case, prisoners housed in dormitory units at the Eklton Federal Correctional Institution brought an Eighth Amendment challenge to the conditions of their confinement. The federal district court judge found that the facility had continued to house inmates in 150-inmate dormitory-style units, completely failing to follow the social distancing recommendations of the CDC. Id. at *1, 3. The record before this court does not reveal conditions in any DOC facility akin to the Eklton federal facility.

are not adhering to effective hygiene requirements. We therefore reject his article 1, section 14 claim as well.

Substantive Due Process

Pauley next maintains that DOC has violated his substantive due process right “to be free from unreasonable risk of harm.” Citing Braam ex rel. Braam v. State, 150 Wn.2d 689, 81 P.3d 851 (2003), and DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989), he contends that when a state restrains an individual’s liberty, that person has a substantive due process right to be provided with basic human needs, including medical care and “reasonable safety.” He argues that DOC’s deliberate indifference to his risk of harm to COVID-19 violates these due process rights.

But Braam involved a class action brought against the Department of Social and Health Services seeking to force that agency to reduce the number of times it moved foster children while in the agency’s care. 150 Wn.2d at 693. Its holding was limited to whether foster children have substantive due process rights:

We hold that foster children have a constitutional substantive due process right to be free from unreasonable risks of harm and a right to reasonable safety. To be reasonably safe, the State, as custodian and caretaker of foster children must provide conditions free of unreasonable risk of danger, harm or pain, and must include adequate services to meet the basic needs of the child.

Id. at 700. The case did not address whether a prison inmate has a substantive due process right, separate and apart from his right to be free from cruel punishment, to be protected from the spread of an infectious disease. It is therefore inapposite.

DeShaney is similarly inapplicable here. In that case, the mother of a child abused by his father sued a county social agency for failing to remove the child from his father's custody. 489 U.S. at 191. The U.S. Supreme Court held that the State had no due process obligation to protect any individual from private violence. 489 U.S. at 197.

Pauley has not cited any authority for the proposition that the Fourteenth Amendment's substantive due process protections apply to this case. In County of Sacramento v. Lewis, 523 U.S. 833, 842, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), the Supreme Court stated that when "a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." Because the Eighth Amendment provides explicit protection to Pauley, no separate analysis under substantive due process is appropriate. We therefore reject Pauley's substantive due process claim.

Common Law Duty to Protect Inmates

Finally, Pauley argues DOC is violating a common law duty it owes to ensure his health, welfare and safety. In Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 635, 244 P.3d 924 (2010), the Washington Supreme Court held that jailers owe a special common law duty to protect the health and safety of inmates because of the special relationship that results when a custodian has complete control over someone deprived of their liberty. The standard of care is one of ordinary, reasonable care, under the circumstances of each particular case. Kusah v. McCorkle, 100 Wash. 318, 323, 170 Pac. 1023 (1918).

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Pauley has not presented evidence to demonstrate that DOC has failed to exercise reasonable care in formulating and implementing screening, prevention, and treatment policies to mitigate COVID-19 risks. We therefore deny this claim as well.

Pauley's Motion for Immediate Release

Pauley sought an order from this court requiring the ISRB to release him from DOC custody under RAP 16.15(b). That rule provides:

(b) Release by Appellate Court of Person in Custody. The appellate court 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. The appellate court or the superior court in its decision on the merits, or by separate order after a decision on the merits, may release a petitioner on bail or on personal recognizance. The appellate court may direct the release of petitioner with the conditions of release to be determined by a trial court.

Because Pauley has not demonstrated he is being unlawfully confined, there is no basis for this court to order his release. His motion is therefore denied.

Andrus, A.C.J.

Dwyer, J.

Appelwick, J.