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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
MOTION TO AMEND**

Nicholas Allen, WSBA #42990
Nicholas B. Straley, WSBA #25963
Janet S. Chung, WSBA #28535
COLUMBIA LEGAL SERVICES
101 Yesler Way, Suite 300
Seattle, WA 98104
Telephone: (206) 464-1122
Attorneys for Petitioners

I. INTRODUCTION

When Petitioners initially filed their Petition, DOC had not confirmed any cases of COVID-19 in prison. However, in the three weeks since that filing, 12 people in prison and 16 DOC staff have tested positive for the virus.¹ These numbers almost certainly underestimate the actual number of both staff and incarcerated people who have been exposed.²

Yet to date, this Court's Order has been the only measure that has spurred Respondents to begin to take *all* necessary steps to protect people in prisons, namely release.³ Further Court action is needed to require DOC to fully address the current and future risk of harm to Petitioners and others through additional, meaningful reduction of the population.

Accordingly, the Court should grant Petitioners' Motion to Amend. Respondents' overly strict approach to writ and personal restraint petition (PRP) procedures fails to recognize the Court's inherent equitable authority to fashion practical remedies when confronted with an unprecedented and unique set of circumstances. This Court has authority to hear and decide this Petition, whether as a writ or a PRP, and to order relief as it sees fit to address the harms raised by Petitioners.

¹ <https://doc.wa.gov/news/covid-19.htm>, last accessed April 18, 2020.

² See Brief of *Amici Curiae* Public Health and Human Rights Experts at 14 (explaining that true extent of outbreak in Washington prisons "may be far worse" due to insufficient testing and screening procedures).

³ Order on Motion, No. 98317-8 (Wash. April 10, 2020).

II. ARGUMENTS IN REPLY

A. Respondents will not be prejudiced by an amendment allowing the Court to consider this action as a PRP.

Petitioners' amended Petition does not prejudice Respondents. "Appellate decisions permitting amendments have emphasized that the moving parties in those cases were merely seeking to assert a new legal theory based upon the same circumstances set forth in the original pleading." *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 166, 736 P.2d 249 (1987) (citing *Caruso v. Local Union 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983) (amendment merely stated alternative theory for recovery so plaintiff "ought to be afforded an opportunity to test his claim on the merits.")). Petitioners' amendments seek to do just that: Ask the Court to construe the Petition *in the alternative* as a PRP.⁴ The amendments do not raise new issues or new material facts as the basis for the relief; nor do they seek to "change course and instead pursue habeas relief," as Respondents claim. Response to Petitioners' Motion to Amend Petition (Resp'ts' Br.) at 3. Rather, the Petition, as amended, will give the Court the best opportunity to "facilitate a proper decision on the merits." *See Herron*, 108 Wn.2d at 165.

⁴ Petitioners have always asked for relief on behalf of themselves and others in DOC custody. See Petition for Writ of Mandamus at 57-67, ¶¶ 1-3.

Moreover, the Court gave Respondents notice in its April 10th Order that this action may be heard as a PRP.⁵ The concurrence explained that the Court has the authority to convert a writ of mandamus to a PRP.⁶ Consequently, even prior to Petitioners' Motion to Amend, Respondents spent considerable space arguing against converting this action to a PRP. *See* Brief of Respondents (Resp'ts' Br.) at 44-50.

Given the urgency of the matter, the legitimate concerns raised, and the relief requested, the Court should be able to consider every alternative basis for the relief, where the facts underlying the claim are the same – particularly where the situation has so quickly developed and the Motion to Amend was filed on the first day possible following the Court Order suggesting an alternative theory of relief.⁷

B. The Court has broad equitable powers and can grant the relief the Petitioners seek, including relief that impacts others, either through a writ of mandamus or a PRP.

This Court ordered Respondents 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.” Order on

⁵ Order on Motion, No. 98317-8 (Wash. April 10, 2020).

⁶ *Id.*

⁷ Moreover, under normal circumstances, a party may amend a pleading once as a matter of course before a responsive pleading is served. CR 15(a). Had the schedule not been accelerated, this motion to amend would have been timely even without leave. But these are no ordinary circumstances; thus, the Court should heed the principle behind motions to amend, that “leave shall be freely given when justice so requires.” *Id.*

Motion at 2. Yet the record shows Respondents' response to the Order has been inadequate,⁸ so additional Court action is necessary. The Court may exercise its authority to order the requested equitable relief under the procedural vehicles of a writ of mandamus and a PRP.

1. This Court can release individuals under its equitable powers.

Respondents propose rigid interpretations of the Court's authority to issue writs of mandamus and grant PRPs, failing to recognize that both actions are equitable remedies. *See SEIU 775 NW v. Gregoire*, 168 Wn.2d 593, 601, 229 P.3d 774 (2010) ("A mandamus action lies in equity."); *Boumediene v. Bush*, 553 U.S. 723, 779, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008) ("common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending on the circumstances."); *Schlup v. Delo*, 513 U.S. 298, 319, 115 S. Ct. 851, 130 L.Ed. 2d 808 (1995) (habeas "is, at its core, an equitable remedy.").

Thus, mandamus and habeas are vehicles intended to give the court the flexibility it requires to mete out justice. Historically, going back as far as the Magna Carta, the function of the courts was to provide justice: "To no one will we sell, to no one deny or delay right or justice." Magna Carta, Article 40 (1215 version). And a concomitant and similarly longstanding

⁸ The specifics of these deficiencies are detailed in Petitioners' Reply Brief, filed April 16, 2020, and in the forthcoming Petitioners' Response to Respondents' Implementation Report, to be filed on April 21, 2020.

principle is a requirement that there be a remedy for all wrongs. E. Coke, *Second Institute*, 55-56 (4th ed. 1671) (highly influential treatise in colonial America construing the meaning of “justice”). This Court has recognized that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803)). See also *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991), cited in *Putnam* (right of access to courts is “the bedrock foundation upon which rest all the people's rights and obligations”).

Therefore, this Court should not be stymied in granting Petitioners the requested relief by stilted interpretations of procedural vehicles that would prevent access to justice in this extraordinary case. Whether the Petition is considered as a mandamus action or a PRP, the same equitable principles apply. Applying these principles, the Court can use either procedural vehicle to provide the broad relief that is necessary.

2. A PRP is appropriate because the conditions at DOC facilities impose an unlawful restraint.

Respondents continue to assert that Petitioners do not meet the requirements under RAP 16.4 authorizing relief via a PRP because they

cannot challenge underlying judgments and sentences in this proceeding. *See* Resp'ts' Brief at 7-8. This argument misconstrues Petitioners' claims.

Under RAP 16.4, "a person is under restraint if the petitioner has limited freedom because of a court decision in a...criminal proceeding, the petitioner is confined...or the petitioner is under some other disability resulting from a judgment and sentence in a criminal case." RAP 16.4(b) (internal quotations omitted). As noted by the concurrence to this Court's Order on Motion, each Petitioner is "clearly 'under a restraint'"⁹ under 16.4(b); they are confined within the DOC.

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." RAP 16.4(c)(6), *cited in* Order on Motion at 8 (Gordon McCloud, J., concurring). As previously noted by Petitioners, the source of the unlawful restraint is the conditions within the prison. Petition at 57-67. *See also* Brief of *Amici* Korematsu Center, et al. at 17 (personal restraint petition based on conditions under RAP 16.4(c)(6) "recognizes that, as here, sentences lawful when imposed become unlawful if prisoners' health and safety are put at grave risk where they are confined.").

3. This Court can grant release to remedy unconstitutional conditions.

⁹ *See* Order on Motion at 8 (Gordon McCloud, concurring) (internal quotation marks omitted).

While rarely used, courts do have the power to order release to remedy unconstitutional conditions within prisons. *See Brown v. Plata*, 563 U.S. 493, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2010); *Ortuno v. Jennings*, No. 20-cv-02064-MMC (N.D. Cal. Apr. 8, 2020) (ordering release of immigration detainees who are at particular risk of harm from COVID-19 due to conditions in detention facilities).¹⁰ *See also* RAP 16.15 (allows for release of petitioners pending the decision of the court, without regard to the type of unlawful restraint alleged). The COVID-19 pandemic presents the same type of unconstitutional conditions that existed in those cases, and, thus, warrant release of Petitioners and other prisoners here.

In *Plata*, the governor of California declared a state of emergency, stating that “immediate action is necessary to prevent death and harm caused by California’s severe prison overcrowding.” *Plata*, 563

¹⁰ Th authority is discussed as the court’s power to “enlarge” a prisoner. “There is precedent, including a direction by the Supreme Court, that affirms the authority of a federal court to grant bail to a state prisoner prior to ruling on the prisoner’s petition for habeas corpus.” *Landano v. Rafferty*, 970 F.2d 1230, 1239 (3d Cir. 1992) (citing *In re Shuttlesworth*, 369 U.S. 35, 82 S.Ct. 551, 7 L.Ed.2d 548 (1962) (per curiam) and *In re Wainwright*, 518 F.2d 173, 174 (5th Cir.1975) (per curiam) (“In spite of the lack of specific statutory authorization, it is within the inherent power of a District Court of the United States to enlarge a state prisoner on bond pending hearing and decision on his application for a writ of habeas corpus.”)). Other courts have also recognized that federal courts in habeas actions have the authority to order release. *See e.g., Woodcock v. Donnelly*, 470 F.2d 93, 95 (1st Cir. 1972) (“a district court entertaining a petition for habeas corpus has inherent power to release the petitioner pending determination of the merits”); *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) (habeas challenge to INS detention, reviewing other cases and stating, “Today we reaffirm these cases and hold, once again, that the federal courts have inherent authority to admit to bail individuals properly within their jurisdiction.”); *See also In re Medley*, 134 U.S. 160, 10 S. Ct. 384, 33 L. Ed. 8 (1890) (under traditional habeas jurisdiction, release was the only remedy, even for conditions challenges).

U.S. at 503. Among the severe consequences created by overcrowding were “increased, substantial transmission of infectious illness.” *Id.* To address continuing serious constitutional violations, the court ordered the State to release a number of people before their full sentences had been served. The court did not order the State to achieve this reduction in any particular manner. *Id.* at 510. Instead, the State was ordered to create a plan for compliance and submit its plan for approval by the court. *Id.*

In affirming the judgment ordering release, the U.S. Supreme Court stated, “When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison’s population. *Id.* at 511. Further, the Court held that “[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.” *Id.*

While release would be an rarely used remedy to correct conditions within DOC due to COVID-19, it would not be inappropriate. In this utterly unprecedented situation, it is the only option for correcting the current lack of opportunity for proper social distancing.¹¹

¹¹ Petitioners have already briefed the issue of group relief under either a writ of mandamus or a habeas / PRP. *See* Petitioners’ Motion to Amend at 7-17 (filed Apr. 13, 2020). As discussed in that brief, class or group habeas actions have been reviewed by courts addressing conditions in correctional facilities. *See Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct 1861, 60 L. Ed. 2d 447 (1979) (class habeas brought on behalf of pretrial detainees challenging conditions at federal detention facility). Likewise, courts have granted broad relief to prisoners in the form of release, based on unconstitutional conditions in prison. *See Plata*, 563 U.S. at 532 (Order to release prisoners “not

4. Appointment of a Special Master Is Appropriate.

Petitioners request the Court appoint a special master to “ensure that the Respondents appropriately protect the health and safety of the Petitioners and all other people held in Washington’s prisons or other facilities under the DOC’s control throughout the current emergency.” *See* Pet’rs’ Mot. to Amend, Exh. A at 69-70, ¶ 4. The Court has the authority to appoint a special master for the purpose of gathering facts. *See, e.g.*, RAP 16.2(d) (commissioner can refer question to a master); RAP 1.2(c) (court may waive or alter provisions of any rules in order to serve the ends of justice).

In Respondents’ seemingly abandoned argument against a special master, the opposition was that the request was “improper at this stage,” and that *McCleary* was an appeal from a declaratory judgment, rather than an original action for mandamus. *See* Resp. to Emerg. Mot. at 10. Now, however, the Court has already ordered that Respondents take affirmative action. As discussed in Petitioners’ Reply Brief, this Court *does* have the authority to ensure that another branch of government cease unconstitutional actions by retaining jurisdiction, requiring reports, and

overbroad because it encompasses the entire prison system, rather than separately assessing the need for a population limit at every institution.”). *See also Hoptowit v. Spellman*, 753 F.2d 779 (9th Cir. 1985) (judge “must order the correction of specific violations” (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1257 (9th Cir.) (affirming in part, reversing in part district court decision that prison was constitutionally deficient and awarding injunctive relief)).

overseeing any relief ordered. This is no different from other situations where a court finds a constitutional or other violation and requires monitoring. For example, in an earlier case holding that conditions at the Washington State Penitentiary were so poor they constituted “cruel and unusual punishment,” the Ninth Circuit stated that not only should the court order the correction of specific violations, “[t]he court can, and perhaps should, monitor what is being done in response to the order.” *Hoptowit v. Spellman*, 753 F.2d at 785.

Here, a special master is imperative given the Respondents’ failure to act until they were ordered by the Court and the likely need to continue to gather facts – not to determine whether there is a violation in the first place, but to best implement any orders entered by this Court. While there is an immediate need to act in this matter, the COVID-19 pandemic will not resolve any time soon. Conservative estimates speculate that a vaccine is 12-18 months away. Ongoing Court involvement of some kind is necessary to ensure that Respondents prospectively fulfill their duties to protect people in DOC custody.

III. CONCLUSION

Based on the foregoing, the Court should grant Petitioners’ Motion to Amend.

RESPECTFULLY SUBMITTED this 20th day of April, 2020.

COLUMBIA LEGAL SERVICES

/s/ Nicholas Allen

Nicholas Allen, WSBA #42990

Nicholas B. Straley, WSBA #25963

Janet S. Chung, WSBA #28535

101 Yesler Way, Suite 300

Seattle, WA 98104

Telephone: (206) 464-1122

Attorneys for Petitioners

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BY SUSAN L. CARLSON
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CERTIFICATE OF SERVICE

I certify that on the date below, I electronically filed Petitioners' Reply to Respondents' Response to Motion to Amend, 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:

DAdreBCunningham@gmail.com
John.Samson@atg.wa.gov
PCpatcecf@piercecountywa.gov
andrea@smithalling.com
caedmonc@gmail.com
changro@seattleu.edu
correader@atg.wa.gov
cwallace@perkinscoie.com
dadre@defensenet.org
djohnson@paulweiss.com
dkimballstanley@paulweiss.com
dvasquez@karrtuttle.com
heatherm@dr-wa.org
hhatrup@karrtuttle.com
hsebens@co.skagit.wa.us
janet.chung@columbialegal.org
jaufderh@co.kitsap.wa.us
jmidgley@aclu-wa.org
jstarr@perkinscoie.com
kcpaciv@co.kitsap.wa.us
leeme@seattleu.edu
ltsuji@perkinscoie.com
mmc@smithalling.com
nblock@co.skagit.wa.us
nf@neilfoxlaw.com
nick.allen@columbialegal.org
nick.straley@columbialegal.org
nikkita.oliver@gmail.com
pleadings@aclu-wa.org
rachaels@dr-wa.org
rtyler@perkinscoie.com
sbuergel@paulweiss.com
talner@aclu-wa.org

tdavis@aclu-wa.org
teresa.chen@piercecountywa.gov
tim.lang@atg.wa.gov

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

EXECUTED this 20th day of April 2020, at Tacoma, WA.

s/ Maureen Janega
MAUREEN JANEGA, Paralegal
Columbia Legal Services
101 Yesler Way, Suite 300
Seattle, WA 98104
206-287-9662
maureen.janega@columbialegal.org

COLUMBIA LEGAL SERVICES, INSTITUTIONS PROJECT

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- caedmon.cahill@seattle.gov
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- cindy.bourne@pacificlawgroup.com
- correader@atg.wa.gov
- cwallace@perkinscoie.com
- dadre@defensenet.org
- dawn.taylor@pacificlawgroup.com
- denise@aysattorneys.com
- djohnson@paulweiss.com
- dkimballstanley@paulweiss.com
- dvasquez@karrtuttle.com
- elizabethh@nwjustice.org
- evangeline@aysattorneys.com
- greg@seaemplaw.com
- heatherm@dr-wa.org
- hhatrup@karrtuttle.com
- hsebens@co.skagit.wa.us
- jamie.lisagor@pacificlawgroup.com
- janet.chung@columbialegal.org
- jaufderh@co.kitsap.wa.us
- jmidgley@aclu-wa.org
- jstarr@perkinscoie.com
- julia.bladin@columbialegal.or
- kcpaciv@co.kitsap.wa.us
- kim.gunning@columbialegal.org

- laurel.simonsen@columbialegal.or
- leeme@seattleu.edu
- ltsuji@perkinscoie.com
- matthew.segal@pacificalawgroup.com
- mmc@smithalling.com
- nblock@co.skagit.wa.us
- nf@neilfoxlaw.com
- nick.straley@columbialegal.org
- nikkita.oliver@gmail.com
- pamloginsky@waprosecutors.org
- pleadings@aclu-wa.org
- rachael@dr-wa.org
- riddhi@svlawcenter.org
- rtyler@perkinscoie.com
- sara@seaemplaw.com
- sarah.jackson@kingcounty.gov
- sbuergel@paulweiss.com
- talner@aclu-wa.org
- tdavis@aclu-wa.org
- teresa.chen@piercecounywa.gov
- tim.lang@atg.wa.gov
- tony.gonzalez@columbialegal.org

Comments:

Sender Name: Maureen Janega - Email: maureen.janega@columbialegal.org

Filing on Behalf of: Nicholas Brian Allen - Email: nick.allen@columbialegal.org (Alternate Email: nick.allen@columbialegal.org)

Address:

Columbia Legal Services, Institutions Project
101 Yesler Way, Suite 300
Seattle, WA, 98104
Phone: (206) 287-9662

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