

FILED
SUPREME COURT
STATE OF WASHINGTON
4/10/2020 11:51 AM
BY SUSAN L. CARLSON
CLERK

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.

**REPLY IN SUPPORT OF PETITIONERS' EMERGENCY
MOTION TO ACCELERATE REVIEW, FOR APPOINTMENT OF
A SPECIAL MASTER AND FOR IMMEDIATE RELIEF**

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

The Respondents assert throughout their response that the Court has no role to play in ensuring the health and safety of people living in Washington's prisons. Instead, they state that we all have no choice but to trust that they have everything well in hand.¹ However, yesterday, at Governor Inslee's press conference, Department of Corrections (DOC) Secretary Steven Sinclair stated that, "[h]opefully we'll maintain our defense against this [COVID-19] and limit the cases that we don't get in that situation, would be my *hope*[,]” when discussing the COVID-19 outbreak at the Monroe Correctional Complex (MCC).² Rather than take the steps necessary to protect people in DOC's custody from an imminent COVID-19 outbreak, Secretary Sinclair, the Governor, and DOC are relying on hope.

Hope is not one of the strategies public health and correctional experts recommend implementing to effectively protect against the spread of COVID-19 in prisons, and it has not been effective at preventing

¹ The Respondents utilize a large part of their response to a variety of legal arguments. The Petitioners have already addressed those arguments in their Petition and in their brief filed in support of their motion for a writ of Mandamus. They respectfully refer the Court to those documents and have not restated those arguments here. While the Petitioners continue to seek relief as requested in their original Petition, they brought this emergency motion in response to the outbreak at Monroe and the relief they seek here is directed at that particular emergency.

² *Governor Inslee Press Conference on COVID-19*, TVW (April 9, 2020) at 16:20, <https://www.tvw.org/watch/?clientID=9375922947&eventID=2020041030>.

transmission and the spread of the virus at MCC-MSU. Those hopes have already been dashed. There has been an outbreak.³

Rather than employing measures at the prison that *are* recommended by subject matter experts – namely reduction of the prison population – DOC has refused to do so, with disastrous results: at least six positive tests of people in prison at MCC-Minimum Security Unit (MSU) in the last week, one a 68 year old person,⁴ coupled with the infection of at least five DOC staff members from the facility in the past several weeks.⁵ These results are reminiscent of other very recent and tragic scourges of COVID-19 in similar congregate environments; namely, cruise ships and local nursing facilities. Accordingly, it is quite likely that MCC will follow a similar path towards outbreak without immediate intervention by the Court, particularly given the sordid history of inadequate health care at Monroe. Moreover, an outbreak is possible at any Washington prison at

³ Respondents state that this emergency motion came in response to the disturbance at MCC-MSU. Response to Petitioner’s Emergency Motion at 7. That is incorrect. This emergency motion came in response to the outbreak that the Respondents did not prevent and which the Petitioners, their experts, people living in MCC-MSU and other DOC facilities, and thousands of other concerned stakeholders have been warning against for weeks. This motion and the disturbance are both results of the Respondents’ failures to meet their duties to adequately protect the people living in Washington’s prisons.

⁴ Wash. St. Dep’t of Corrections, *COVID-19 Information* (April 9, 2020), <https://doc.wa.gov/news/covid-19.htm>; Wash. St. Dep’t of Corrections, Press Release: *Additional Positive COVID-19 Tests for Incarcerated Individuals within Monroe Correctional Complex* (Apr. 7, 2020), <https://www.doc.wa.gov/news/2020/04072020p.htm>.

⁵ DOC COVID-19 Information *supra* n. 4. However, DOC’s information regarding staff infections is dubious because DOC relies upon staff “self-reports” in order to determine the number of staff members who have tested positive. It has not independently verified the actual numbers of staff who are or have been infected. *Id.*

any time until a COVID-19 vaccine is readily available. There is immediate urgency for action, but the danger does not evaporate if this current outbreak is luckily brought under control.

Respondents have failed to take the essential step of reducing the number of people who can contract COVID-19 in prison, which all objective public health experts agree is essential. Additionally, it has resorted to limiting the information it is providing to the public and now this Court about COVID-19 infections. Despite repeated warnings, Respondents failed to take the steps necessary to prevent COVID-19 from entering MCC. This outbreak proves why this Court should take immediate action as requested in the motion and points to the need for an independent investigator to provide the Court with relevant, unvarnished, scientifically-valid, factual information.⁶

II. ARGUMENTS IN REPLY

A. Monroe Correctional Complex Is Ill-Equipped to Provide Necessary Health Care to Petitioners Infected with COVID-19.

MCC has a long history of failing to provide adequate medical care to those housed in its facilities. Just last year, the head doctor at MCC was fired for misconduct, including improper and negligent care for at least six

⁶ The Respondents utilize a large part of their response to make legal arguments. The Petitioners have appropriately addressed those arguments in their Petition and in their brief filed in support of their motion for a writ of Mandamus. They respectfully refer the Court to those documents and have not restated those arguments here.

individuals, three of whom died.⁷ The doctor had been hired to oversee the care of thousands of individuals at Monroe, even though she lacked a DOC-approved medical residency and board certification, which were stated qualifications for the job.⁸ The DOC’s own investigation concluded that the doctor had “failed to advocate for these patients and delayed emergency medical care, which was essential to life and caused significant deteriorations in patients’ medical conditions.”⁹ The Washington Medical Commission subsequently opened its own investigation into seven deaths at MCC.¹⁰

The 2019 annual report authored by the Office of the Corrections Ombuds (OCO) identified DOC’s health services as the “largest area of concern.”¹¹ According to the OCO, Monroe has the third highest rate of complaints per 100 incarcerated individuals of any DOC institution.¹² Moreover, the report highlights “very disturbing allegations” regarding

⁷ Jim Brunner, *The head doctor at Monroe prison was fired over alleged negligent care. Now seven inmate deaths are under investigation*, Seattle Times (Feb. 26, 2020), <https://www.seattletimes.com/seattle-news/the-head-doctor-at-monroe-state-prison-was-fired-over-alleged-negligent-care-now-seven-deaths-are-under-investigation/>.

⁸ Seattle Times Editorial Board, *Inmate Deaths at State Prisons are Unconscionable*, Seattle Times (July 23, 2019), <https://www.seattletimes.com/opinion/editorials/reform-washingtons-department-of-corrections/>.

⁹ See *supra* n. 7.

¹⁰ *Id.*

¹¹ Wash. St. Office of the Corrections Ombuds, *Office of the Corrections Ombuds Annual Report 2019*, 14, 19 (Nov. 1, 2019), <https://oco.wa.gov/sites/default/files/public/Annual%20Report%202019%20Final.pdf>. The OCO is an independent state agency tasked with investigating and resolving complaints related to DOC’s operations and issuing reports to the legislature and public. *Id.* at 8.

¹² *Id.* at 10.

DOC deaths due to inadequate medical care.¹³ For example, the OCO report noted egregious medical case examples where delays in cancer treatment at Monroe have resulted in death.¹⁴ Given the substandard level of medical care that has been documented at MCC under normal conditions, there are significant, legitimate concerns regarding the care that can be provided at that facility in an emergency situation during a global pandemic.

B. DOC Cannot Effectively Quarantine People at MCC-MSU or Other DOC Prisons, which Contributes to the Spread of COVID-19.

Due to the physical layout of some DOC facilities, including MCC-MSU, effective quarantining is impossible. *See* Petitioners' Brief in Support of Petition for a Writ of Mandamus at 19. Release – an option Respondents have unequivocally rejected – is the only way to address this shortcoming and protect the prison population from rapid spread of COVID-19.¹⁵

¹³ *Id.* at 19.

¹⁴ *Id.* at 20-21; *see also* Matthias Gyde, *OCO Investigation Report*, Office of the Corrections Ombuds, 1-8 (Nov. 15, 2019), https://oco.wa.gov/sites/default/files/MCCC%20Death%20Report%20Final_0.pdf; Jim Brunner and Joseph O'Sullivan, *As the Washington Department of Corrections struggles with health care, cancer patients say they suffer*, *Seattle Times* (February 24, 2020), <https://www.seattletimes.com/seattle-news/politics/as-the-washington-department-of-corrections-struggles-with-healthcare-cancer-patients-say-they-suffer/>.

¹⁵ In an attempt to argue that they have taken appropriate action, the Respondents cite the fact that the Oregon Department of Corrections has adopted some of Washington's procedures around COVID-19. *See* Response to Petitioner's Emergency Motion at 10. In doing so, they fail to mention that the Oregon DOC has at least eight known COVID-19

DOC is engaged in “cohorting,” at MCC-MSU, a practice that involves housing together asymptomatic individuals who were exposed to an infectious person.¹⁶ It is using this practice because it has no other options available to it. Other courts have already recognized in similar circumstances that such measures are “patently ineffective in preventing the spread of COVID-19.”¹⁷

The Centers for Disease Control (CDC) recommends that facilities quarantine close contacts of people who test positive for COVID-19 *individually*, because cohorting multiple quarantine contacts together can easily transmit COVID-19 from infected to uninfected individuals.¹⁸

DOC has acknowledged that it is not following this recommendation and

cases connected to their prisons, and the Governor is considering early release. *See* Lauren Drake and Conrad Wilson, *Inmates Brace For Virus Outbreak, While Oregon Considers Early Release*, Oregon Public Broadcasting (April 7, 2020 7:46 p.m., Updated: April 8, 2020 8:37 p.m.), <https://www.opb.org/news/article/coronavirus-covid-19-prison-oregon-inmates/>. Furthermore, on the day before a disturbance occurred at Monroe, a protest over COVID-19 occurred at a prison in Oregon as well. *See* Alex Zielinski, *Inmate Protest Over COVID-19 Response Forces North Portland Prison Into Lockdown*, Portland Mercury Blogtown (Apr. 8, 2020). And finally, Oregon DOC is currently being sued by a number of individuals in custody who are also alleging a failure to protect them from COVID-19. *Maney et al v. Brown*, Case No. 6:20-cv-00570, US District Court for the District of Oregon, Eugene Division, available at <https://static1.squarespace.com/static/524b5617e4b0b106ced5f067/t/5e8bdfa383174b5369448d17/1586225062402/1+Complaint+%28Maney+et+al%29.pdf>. The case is pending.

¹⁶ Declaration of Julie Martin at 28 attached as Appendix D to Index of Respondents’ Court Record (“DOC is cohorting quarantined patients”). Respondents admits that DOC cannot do anything differently, because they do not have the facilities that allow them to do so. *Id.* at 32.

¹⁷ *See, e.g., Thakker v. Doll*, No. 1:20-cv-480, at 15 & 22 n.15 (M.D. Pa. Mar. 31, 2020).

¹⁸ *See* Ctrs. for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited Apr. 10, 2020).

is instead using cohorting in a number of instances.¹⁹ Though multiple individuals have tested positive for COVID-19 at MSU, residents of A Unit (approximately 50 individuals) and B Unit (a quarantined unit with approximately 119 people) continue to be allowed in close contact in the same areas.²⁰

C. DOC’s Inconsistent Reporting on COVID-19 and Restrictions on the Access to Available Information Require Appointment of a Special Master to Provide the Court with Relevant, Unbiased Information.

At a time when consistent, transparent, and thorough reporting of information about the transmission of COVID-19, and related DOC policies and practices at MCC is absolutely essential, DOC has acted to the contrary.²¹ For example, DOC made clear that it will be less forthcoming about future reports of COVID-19 in the prisons and has failed to provide basic information regarding the outbreak or conditions under which people are held in isolation or quarantine.”²²

¹⁹ See Martin Decl. at 32 (DOC not meeting CDC guidelines with regards to cohorting).

²⁰ See Supplemental Declaration of Terry Kill, 1-3; ¶¶ 7-13; 15.

²¹ The Respondents assert that releasing people from prisons will endanger society. However, DOC releases hundreds or thousands of people a year from its custody back to their homes and communities. The petitioners are merely asking DOC to address this unprecedented global pandemic by taking actions that it otherwise does every single day of the year.

²² Wash. St. Dep’t of Corrections, *Press Release: Additional Positive COVID-19 Tests for Incarcerated Individuals within Monroe Correctional Complex* (April 7, 2020), <https://doc.wa.gov/news/2020/04072020p.htm>. In this press release, where DOC first reported the additional positive COVID-19 tests for people at MCC-MSU, it also noted that “it will no longer send individual news releases on each new incarcerated individual case.” DOC has also failed to explain any number of things, including: how COVID-19 got into MCC-MSU, what DOC is doing to ensure that it does not happen again, how it is

DOC has similarly provided inconsistent and limited information to people living at MCC and now to this Court.²³ Crucially, they have not explained how COVID-19 got into MCC-MSU and what DOC is doing to ensure that it doesn't happen again or doesn't happen elsewhere.

The MCC outbreak so early in this pandemic demonstrates the danger that will exist for months or potentially years until a vaccine is readily available. DOC offers nothing to suggest that it will be able to stop a new outbreak; likely because it knows it cannot.

Furthermore, just yesterday at a press conference Governor Inslee and Secretary Sinclair refused to answer basic questions regarding COVID-19 and acknowledged that weeks into this COVID-19 epidemic they still have no concrete plan regarding whether to release anyone or who those people should be.²⁴

caring for people who have become sick, the conditions under which people who are being held in isolation and quarantine are living, the actual number of staff who have tested positive, its medical capacity to handle an outbreak at MCC-MSU or at any other prison, why it has not required all staff to wear masks at all times, whether it has sufficient testing kits to test anyone who may have become infected or been in contact with someone who has become infected, whether it has sufficient personal protective equipment for all staff and for people living inside who should have it, and why kitchen workers, porters and other people have been denied PPE.

²³ See *supra* n. 15; also, Supplemental Decl. of Terry Kill, 1, ¶ 8 (“[t]here has been a daily update, but we have not been getting updates of who is sick and who is not.”); Declaration of Julia Bladin, 3, ¶ 12 (“people are just taken off the unit without any explanation, creating confusion and uncertainty”); 2, ¶ 7 (person in prison at MCC-MSU “said that they heard that wearing of masks for staff is supposed to be mandatory, but that it seems optional because there is no consistency among staff.”).

²⁴ Governor Inslee Press Conference (April 9, 2020); <https://www.tvw.org/watch/?clientID=9375922947&eventID=2020041030> (Governor Inslee and Secretary Sinclair refused to explain in any detail how people are being cared for or the conditions under which they are living. Furthermore, Governor Inslee

DOC's communications deficiencies are also not a recent development. The Office of Corrections Ombuds recently highlighted this problem. In its 2019 Annual Report, the OCO noted that the DOC is a "siloed bureaucracy...Information out of DOC is often conflicting or inaccurate, and there can be great variation between how policy is implemented between facilities," and that "[DOC] staff at the administrative level often assume that they know how things operate when in fact the situation on the ground may be much different."²⁵ The Court should appoint a special master in order to ensure that it receives all relevant information in as accurate, complete and unbiased a manner as possible.

III. CONCLUSION

Based on the foregoing, the Court should grant Petitioners' Emergency Motion, appoint a special master pursuant to RAP 16.2(d) and should immediately order the Respondents to take the other actions requested in Petitioners' Emergency Motion to protect the people currently living in MCC.

explaining that he has not taken action yet related to prisons because he has had to look after 7,000,000 Washingtonians first, and that he is considering whether to release people and may announce a plan shortly).

²⁵ See *supra*, note 11 at 4.

RESPECTFULLY SUBMITTED this 10th 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

CERTIFICATE OF SERVICE

I certify that on the date below, I electronically filed Reply in Support of Petitioners' Emergency Motion to Accelerate Review, for Appointment of A Special Master and for Immediate Relief 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:

Tim Lang	timothy.lang@atg.wa.gov
John Samson	John.Samson@atg.wa.gov
Haley Sebens	Hsebens@co.skagit.wa.us
Nathaniel Block,	Nblock@co.skagit.wa.us
J. Dino Vasquez	dvasquez@karrtuttle.com
Susanna M. Buergel	sbuergel@paulweiss.com
Antoinette M Davis	tdavis@aclu-wa.org ; pleadings@aclu-wa.org
D'Adre Beth Cunningham	DAdreBCunningham@gmail.com ; dadre@defensenet.org
Heather Lynn Mckimmie	heatherm@dr-wa.org
Nancy Lynn Talner	talner@aclu-wa.org
John Ballif Midgley	jmidgley@aclu-wa.org ; pleadings@aclu-wa.org
Melissa R. Lee	leeme@seattleu.edu
Neil Martin Fox	nf@neilfoxlaw.com
Robert S Chang	changro@seattleu.edu
Rachael Elizabeth Seevers	rachaels@dr-wa.org
Jacquelyn M. Aufderhedie	jaufderh@co.kitsap.wa.us
	djohnson@paulweiss.com
	andrea@smithalling.com
	dkimballstanley@paulweiss.com
	hhatrup@karrtuttle.com
	andrea@smithalling.com
	correader@atg.wa.gov
	mmc@smithalling.com
	pleadings@aclu-wa.org

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

EXECUTED this 10th 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

April 10, 2020 - 11:51 AM

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- janet.chung@columbialegal.org
- jaufderh@co.kitsap.wa.us
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- kcpaciv@co.kitsap.wa.us
- leeme@seattleu.edu
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- nblock@co.skagit.wa.us
- nf@neilfoxlaw.com
- nick.straley@columbialegal.org
- pleadings@aclu-wa.org
- rachael@dr-wa.org
- sbuergel@paulweiss.com
- talner@aclu-wa.org
- tdavis@aclu-wa.org
- teresa.chen@piercecountywa.gov
- tim.lang@atg.wa.gov

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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