

SUPREME COURT OF THE STATE OF WASHINGTON

SHYANNE COLVIN, et al.,

Petitioners,

v.

JAY INSLEE, et al.,

Respondents.

RESPONSE TO
PETITIONERS'
EMERGENCY MOTION TO
ACCELERATE REVIEW, FOR
APPOINTMENT OF A
SPECIAL MASTER, AND
FOR IMMEDIATE RELIEF

I. IDENTITY OF RESPONDENTS

Respondent Governor Inslee and Secretary Sinclair respectfully request that the Court deny Petitioners' emergency motion.

II. INTRODUCTION

Petitioners filed a petition for writ of mandamus, asking this Court to order the Governor and Secretary to take various discretionary actions, including the immediate release of thousands of prisoners regardless of the risk to the prisoners or the public. The Court has already set an expedited schedule, with the Court to hear oral argument in less than two weeks. Respondents submitted their record last Friday and will be submitting their responsive brief this coming Monday. Foremost, Respondents' brief will show that Petitioners' mandamus claims fail as a matter of law because they show neither a lack of alternative remedy, nor a mandatory duty that Governor Inslee or Secretary Sinclair have failed to fulfill.

Respondents' record shows that the Department of Corrections (DOC) has intensely engaged in responding to the COVID-19 crisis since February 2020, and has taken significant action to mitigate risk to the incarcerated population. These efforts include implementing nearly all of the guidelines issued on March 23, 2020, by the Centers for Disease Control (CDC). The record also shows that Petitioners' request for the hasty release of nearly two-thirds of the state's prison population would not only endanger communities across the state, but also would threaten the health and safety of those individuals released without housing, employment, medical care, and other services critical to successful reentry. A decision to release individuals before expiration of their sentences requires careful balancing of interests and exercise of discretion. As announced Thursday, the Governor is exercising discretion and evaluating release options that are consistent with public safety and health.¹

Petitioners have now moved for emergency relief. They argue that a disturbance Wednesday night at the Monroe Correctional Complex evidences a need for appointment of a special master and certain injunctive

¹ Jim Brunner, Mary Hudetz, and Joseph O'Sullivan, *After Tensions Erupt Over Coronavirus Fears, Inslee Says He's Considering Early Release for Some Nonviolent Offenders*, Seattle Times (April 9, 2020) https://www.seattletimes.com/seattle-news/crime/gov-inslee-scolds-monroe-inmates-involved-in-disturbance-says-hes-considering-allowing-early-release-for-some-nonviolent-offenders/?utm_source=marketingcloud&utm_medium=email&utm_campaign=BNA_041020014624+Gov.+Inslee+scolds+inmates+involved+in+disturbance_4_9_2020&utm_term=Registered%20User

relief. However, the disturbance, if anything, highlights the difficult tasks and discretionary decisions the Secretary must regularly face in day-to-day operations of Washington's correctional system. Petitioners' motion is essentially their petition in microcosm: it does not identify a mandatory duty owed by the Secretary, it incorrectly states that DOC has done nothing in response, and it merely asks the Court to require DOC to do what petitioners think is the best course of action. The Court should deny the motion and proceed on the previously set briefing and argument schedule.

III. FACTS

As outlined more fully in the brief of respondent, the Department for several months has actively engaged in implementing steps to mitigate the risks associated with the COVID-19 coronavirus, including working daily to develop and implement new protocols and directives specifically to combat the pandemic. Appendix D, Declaration of Martin, at 3-4. Among other things, the Department has implemented enhanced screening protocols, provided education to the incarcerated population, authorized the use of alcohol-based hand sanitizers for all staff and for inmates working in medical areas, and ensured free soap and handwashing facilities are otherwise available for all prisoners. App. D at 5-7. The Department has waived statutory copays for inmates seeking testing and treatment for COVID-19. App. D at 6. The Department suspended visitations, and

provided free or reduced cost communications between inmates and their families. App. D at 6 and 24. The Department has directed staff to stay home if they feel sick, and directed eligible staff to telecommute. App. D at 5-6.

The Department has issued guidelines for special population units, including those designed for individuals age 55 or older, implemented special procedures for transportation of inmates, and implemented social distancing protocols in the prisons. App. D at 7-8. The Department gave direction about cleaning and sanitizing for COVID-19. App. D at 8.

The Department's actions comply with CDC guidance specific to corrections facilities. App. D at 8. The Department has implemented or is in the process of implementing all applicable recommendations of the CDC. App. D at 9; *see also* App. D at 9-40 (chart comparing the Department's compliance with the CDC guidance for correctional institutions). In fact, as outlined in Respondents' record and as will be shown in the brief of respondent, the Department has already provided much of the relief sought by Petitioners.

Among the requests for emergency relief, Petitioners ask the Department to test all inmates in the unit the Monroe Correctional Complex – Minimum Security Unit. Mot. at 3. The Department does appropriately test the incarcerated population for COVID-19, having tested over 230 inmates so far, but the limited nationwide availability of COVID-19 tests is

common knowledge. In anticipation of the limited supply, the Department ordered additional test kits for each of the prison facilities. App. D at 41. Until this past week, no inmate actually housed in prison had tested positive for COVID-19. App. D at 41. After Respondent submitted the record in this case, the first inmate tested positive for COVID-19. Declaration of Rob Herzog at 2. In accordance with Department protocols and CDC guidance, the Department placed the individual in isolation and quarantined the housing unit. Herzog Decl. at 2.

Contrary to Petitioner's assertions, the Department is not hiding this or any other information. Petitioner's emergency motion, suggesting that the Department hides information, states that "DOC announced on Wednesday that it will provide no further details about any subsequent positive test that may occur in any DOC facility beyond the three tests that it has publicly acknowledged." Mot. at 6 & n.16 (citing April 7, 2020 press release). This is entirely false. The press release said, "The Department of Corrections will maintain public updating of new positive cases on the agency's dedicated COVID-19 Information Center webpage and will no longer send individual news releases on each new incarcerated individual case." See <https://www.doc.wa.gov/news/2020/04072020p.htm>. As stated by the Department, information about additional positive tests are publicly available on the Department's dedicated webpage.

Since the first positive test, additional inmates have tested positive. Herzog Decl. at 2-3. The Department placed these inmates in isolation, and provided surgical masks to all inmates in that unit. Herzog Decl. at 3. The Department has offered to move the most vulnerable inmates to another unit, but those inmates have declined the offer to move. Herzog Decl. at 4.

As publicly reported in a press release, the Department's infectious disease physician was speaking with inmates about the coronavirus when individual inmates broke their quarantine and, without authorization, went out into the yard. Herzog Decl. at 4. Additional inmates then followed, resulting in a mob gathering in the yard. Herzog Decl. at 4. These inmates pulled fire alarms, set off fire extinguishers, vandalized property, turned bunks over to use as barricades, wrapped towels around their faces and stuffed magazines in their sweatshirts to protect against riot control measures, and said that they were going to take hostages. Herzog Decl. at 4-5. With the assistance of outside law enforcement agencies, the Department's Emergency Response Team stopped the destructive behavior and brought the men into compliance. Herzog Decl. at 5. The entire incident lasted approximately three hours. Herzog Decl. at 5. There were no reports of injuries to staff or inmates. Herzog Decl. at 5. Petitioners' motion claims that the Washington State Patrol showed up in force to intimidate inmates, *see* Motion at 2 and 5, but Petitioners fail to mention the inmate disturbance

that prompted the presence of the patrol and other agencies. Herzog Decl. at 5.

Immediately after the incident, Petitioners indicated they would file the current motion for emergency relief. In disregard of the facts, Petitioners assert that the Department is hiding information and failing to protect inmates. Petitioners ask this Court to appoint a special master, to require the testing of all inmates at the prison regardless of symptoms, and to release inmates before the Court hears argument on the underlying petition. For the reasons set forth below, the Court should deny the motion.

IV. ARGUMENT

A. Petitioners do not Satisfy the Requirements for Expedited Relief Prior to Resolution of the Petition

Without demonstrating a likelihood of success, or showing that the balance of interests tip in their favor, Petitioners seek to change the status quo by obtaining in an expedited manner much of the very relief sought by the petition. Petitioners seek the appointment of a special master to oversee the Department's response to the COVID-19 pandemic, immediate testing of large numbers of prisoners (regardless of symptoms), and release of large numbers of prisoners. The Court should deny the motion.

The Court has the authority to issue orders “to insure effective and equitable review, including authority to grant injunctive or other relief to a party.” RAP 8.3. However, to obtain injunctive relief pending the outcome of

an appellate proceeding, the requesting party must generally demonstrate the existence of debatable issues and that the request is necessary to preserve the status quo, considering the equities of the situation. *Confederated Tribes v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260 (1998). Where the party seeks the equivalent of preliminary injunctive relief, the Court must examine the request in light of equity, while balancing the interests of the parties. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). As this Court has explained, “An injunction is distinctly an equitable remedy and is ‘frequently termed “the strong arm of equity,” or a “transcendent or extraordinary remedy,” and is a remedy which should not be lightly indulged in, but should be used sparingly and only in a clear and plain case.” *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) (quoting 42 Am. Jur. 2d *Injunctions*, § 2, at 728 (1969) (footnotes omitted)). In addition, the Court must also view the motion for injunctive relief in light of the heavy burden imposed on a petitioner seeking the extraordinary remedy of a writ of mandamus. An injunction should not issue in a doubtful case. *Tyler Pipe*, 96 Wn.2d at 793.

First, Petitioners fail to prove that they can actually prevail on the underlying mandamus action. Petitioners cannot prevail in the mandamus action because they do not show the absence of an adequate remedy at law. *Judges of Benton & Franklin Ctys. Superior Court v. Killian*, __ Wn.2d __,

___ P.3d ___ (March 19, 2020) (No. 96821-7) (2020 WL 1467030), at *2; *Riddle v. Elofson*, 193 Wn.2d 423, 434, 439 P.3d 647 (2019). A nearly identical action remains pending in the superior court in *Nagel, et al., v. Department of Corrections, et al.*, Pierce County Cause No. 20-2-05585-4. This Court cannot grant mandamus relief because Petitioners have an adequate remedy at law. Petitioners also cannot prevail because they cannot show Respondents have failed to perform a currently existing, mandatory duty. *Walker v. Munro*, 124 Wn.2d 402, 408-11, 879 P.2d 920 (1994). Rather, Petitioners seek to have this Court direct how Respondents exercise their discretionary authority to operate prisons. Even the current requested relief seeks not to compel the performance of a duty, but to direct how Respondents exercise their discretion. For example, Petitioners ask this Court to order Respondent to provide COVID-19 tests to all prisoners held in the Monroe Correctional Complex – Minimum Security Unit for the last 14 days, regardless of symptoms, and to release such prisoners. This relief seeks to direct how the Secretary exercises his discretion, and usurps the decision-making authority of the Secretary, who must account for numerous factors, including limited test kits, public safety, and maintenance of a safe and disciplined environment for inmates. The Secretary must make these difficult operational decisions while dealing with events such as the inmate disturbance. As demonstrated by Respondents’ record, the Secretary has

made many difficult discretionary decisions in response to the COVID-19 pandemic. In fact, the correctional institutions of other States have adopted some of the procedures implemented by the Secretary. See Declaration of Oregon Department of Corrections Director, Colette S. Peters.

The request for a special master is also improper at this stage. Citing *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012), Petitioners contend this Court may appoint a special master to gather facts and oversee the Department's response to the pandemic. Mot. at 7 & n. 9. However, *McCleary* involved an appeal from a declaratory judgment action, not an original action for writ of mandamus. *McCleary*, 173 Wn.2d at 512. Under RAP 16.2(d), the role of a special master is limited to gathering facts, not overseeing the operations of the executive branch. Moreover, as discussed above and as shown in the soon to be filed Brief of Respondents, the action does not require further factual development because it fails as a matter of law. To the extent a material factual dispute exists, that simply shows the pending superior court is the proper forum to develop evidence necessary to resolve any such factual dispute. The role of this Court is not fact finding. *Garcia v. Henley*, 190 Wn.2d 539, 544, 415 P.3d 241 (2018).

Second, the Court should deny the requested relief because the relief would change the status quo prior to a determination of the underlying claims. The relief sought in the current motion is actually the relief sought by the

petition itself, including release of prisoners contrary to the existing law. Statutes currently prohibit the release of these offenders prior to expiration of their sentences. *See, e.g.*, RCW 9.94A.728; RCW 9.94.729. The requested relief would not preserve the status quo; the relief would alter the law.

Third, Petitioners fail to show the equities of the situation warrant the requested relief. Like all Washingtonians, Petitioners understandably are afraid of COVID-19, but their fear is not sufficient to override existing law, to allow this Court to assume the executive branch's operational oversight of prisons, or to require the release of prisoners. As the record submitted by Respondents shows, the immediate release of prisoners would harm public safety and the prisoners themselves. Respondents' Appendices A through E. The Department could not provide necessary statutorily and constitutionally required notice to victims, could not approve release plans to avoid risk, and could not properly supervise the released prisoners. The Department also could not provide adequate services to the released prisoners, many of whom would need housing and financial assistance not available to them if immediately released. The requested relief would cause severe harm. The balancing of the interests weigh against the requested injunctive relief.

B. The Requested Injunctive Relief Violates the Separation of Powers Doctrine

“The separation of powers doctrine ensures that the fundamental functions of each branch of government remain inviolate.” *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 389-90, 932 P.2d 139 (1997) (citing *Carrick v. Locke*, 125 Wn.2d 129, 882 P.2d 173 (1994); *In re Juvenile Dir.*, 87 Wn.2d 232, 242, 552 P.2d 163 (1976)). “Courts will not interfere with the work and decisions of an agency of the state, so long as questions of law are not involved, and so long as the agency acts within the terms of the duties delegated to it by statute.” *Wash. State Coal. for the Homeless v. DSHS*, 133 Wn.2d 894, 913, 949 P.2d 1291 (1997). A court may interfere with the functions of an executive branch agency only when necessary to protect individuals from agency action that is arbitrary and tyrannical, or predicated on a fundamentally flawed basis. *Id.* at 913-14. The court may not assume control of legislative and executive functions under the guise of protecting constitutional rights. *Southcenter Joint Venture v. NDPC*, 113 Wn.2d 413, 426, 780 P.2d 1282 (1989) (“Statutes would become largely obsolete if courts in every instance of the assertion of conflicting constitutional rights should presume to carve out in the immutable form of constitutional adjudication the precise configuration needed to reconcile the conflict.”) (internal quotes, citations, and emphasis omitted).

Absent a violation of the law or the Constitution, the Court must be careful not to infringe upon the historical and constitutional rights of the executive branch, and not usurp the authority of this separate branch of government. *Walker v. Munro*, 124 Wn.2d 402, 407-10, 879 P.2d 920 (1994). Managing prisons is a purely executive branch function. The courts have long recognized the broad authority of prison officials in making difficult decisions involved in managing correctional facilities; a task that requires expertise “peculiarly within the province of the legislative and executive branches of government.” *Procunier v. Martinez*, 416 U.S. 396, 404-05, 94 S. Ct. 1800, 40 L.Ed.2d 224 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). The proper operation of prisons falls “peculiarly within the province and professional expertise of corrections officials.” *In re Gronquist*, 138 Wn.2d 388, 405, 978 P.2d 1083 (1999). “[T]he unique demands of prison administration warrant judicial deference to prison administrative decisions.” *McNabb v. Dep’t of Corr.*, 163 Wn.2d 393, 406, 180 P.3d 1257 (2008).

Although the separation of powers does not prevent a court from declaring that specific acts of prison officials are unconstitutional, Petitioners seek far more than such a declaration. Rather, before the Court has the opportunity to determine whether Respondents have failed to perform a currently existing mandatory duty, Petitioners ask the Court to

appoint a special master to oversee the Department's ongoing response to the COVID-19 crisis, to impose testing of all inmates in a particular prison, and to order the release of such inmates. Petitioners seek this relief immediately, without this Court having determined the existence of an unperformed mandatory duty, a prerequisite condition for the issuance of any writ of mandamus. Petitioners' requested relief would violate the separation of powers doctrine.

C. Petitioners do not Show a Basis for Release of Prisoners

Petitioners fail to show a legitimate basis to release prisoners at this time. Petitioners filed a petition for writ of mandamus. The proper remedy is performance of a duty, not release of prisoners in violation of the law.

None of the prisoners that Petitioners ask this Court to release show that their confinement is unlawful. Rather, the Department confines the prisoners as a result of valid judgments and sentences imposed by the superior courts. For this reason alone, the request for immediate release must fail. In addition, Petitioners seek a writ of mandamus, but they fail to show the Governor or Secretary have not performed a currently existing, mandatory duty. Moreover, even assuming Petitioners could show the existence of such a duty, the remedy is to compel performance of the duty, not to release prisoners. As this Court has repeatedly determined, even the existence of an unconstitutional condition of confinement does not entitle

the prisoner to release; it only entitles the prisoner to correction of the condition. *See, e.g., In re Det. of Campbell*, 139 Wn.2d 341, 349-50, 986 P.2d 771 (1999) (unconstitutional conditions of confinement did not entitle petitioner to release). As the Court explained in the *Turay* case:

The fact that a federal court recently found that the conditions of confinement at the SCC do not yet meet constitutional standards is irrelevant to our holding here because Turay's remedy for these unconstitutional conditions is not a release from confinement. Turay's remedy for unconstitutional conditions of confinement at the SCC is, therefore, an injunction action and/or an award of damages.

In re Det. of Turay, 139 Wn.2d 379, 420, 986 P.2d 790 (1999) (footnotes omitted).

Even assuming, *arguendo*, that Petitioners could show a currently existing mandatory duty owed by Respondents, and even assuming Petitioner could show the alleged failure to perform the duty resulted in unconstitutional conditions of confinement, Petitioners still would not be able to show an entitlement to release of prisoners. *Gomez v. United States*, 899 F.2d 1124, 1125-26 (11th Cir. 1990) (a finding that prison officials were deliberately indifferent to prisoner's medical needs, in violation of Eighth Amendment, does not permit release of prisoner). Rather, the remedy would be to perform the duty or to correct the allegedly unconstitutional condition *Id.* at 1127.

D. The Inmate Disturbance Shows the Department has Legitimate Concerns about the Early Release of Inmates Without Proper Release Planning and Supervision

The Department has demonstrated the severe harm that would occur if the Court ordered the immediate early release of thousands of inmates. Harm to the public and to the prisoners themselves. The actions that occurred Wednesday night confirm the existence of such potential harm.

During a presentation by medical staff to the inmates regarding the recent positive tests of COVID-19 coronavirus, inmates broke quarantine, refused to comply with commands to return to their units, and engaged in disruptive and criminal behavior. The actions of these prisoners, even if an understandable emotional response, show the Department has concerns that these individuals pose the risk of engaging in the same behavior, or worse, if released to the community without proper release plans and supervision. At the very least, if not engaging in new criminal behavior, they may likely disregard the Governor's order to shelter in place, risking the spread of the virus we have all sought to control these past weeks. The Secretary therefore must make discretionary decisions of whether and when to release such individuals to the community, exercising the discretion given by the Legislature. Petitioners attempt to control how the Secretary exercises such discretion is improper in a mandamus action.

V. CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Court deny Petitioners' motion.

RESPECTFULLY SUBMITTED this 10th day of April 2020.

s/ Tim Lang

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be electronically filed with the Clerk of the Court, which will send notification of such filing to the following:

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

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

s/ Kathy Anderson

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SUPREME COURT OF THE STATE OF WASHINGTON

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DECLARATION OF
ROB HERZOG

I, ROBERT HERZOG, make the following declaration:

1. I have knowledge of the facts herein, am over eighteen years of age, and am competent to testify to such facts.

2. I have been employed by the Washington State Department of Corrections (DOC or Department) since April 1982. In my 38-year career with the Department I served as uniformed custody staff, Associate Superintendent, Deputy Superintendent, and Superintendent of a number of Department facilities. Most recently, I was the Superintendent of the Monroe Correctional Complex which included oversight of the Special Offenders Unit, Twin Rivers Unit, Intensive Management Unit as well as the Washington State Reformatory. In 2015, I became the Deputy Director of Prisons for the Department at Headquarters in Tumwater, Washington. The duties of this position included providing overall leadership, direction, strategic planning and oversight for safety, security, and programming operations and related activities for all Washington state prisons, which

include 10 adult male and 2 adult female correctional facilities housing approximately 18,000 offenders and employing 5,000+ custody and non-custody staff. On April 26, 2017, I became the Assistant Secretary of the Prisons Division. As the Assistant Secretary of Prisons, I oversee the Prisons Division and supervise the Department's three Deputy Directors of Prisons. I also have been very closely involved in the Department's COVID-19 response.

3. On April 5, 2020, the Department had its first positive test of an incarcerated individual in a prison. This individual was a man housed in the Minimum Security Unit (MSU) of the Monroe Correctional Complex (MCC). This individual presented with symptoms and was taken to a community hospital on April 5, where he underwent rapid testing for COVID-19 and tested positive. Following the Department's protocol for isolation and quarantine of individuals, the man returned to MCC and was placed in isolation in a single person cell, where the Department began to give him treatment appropriate for COVID-19. The housing unit where the individual previously was housed was placed on quarantine with no transfers in or out of the unit.

4. As of April 6, 2020, an additional seven incarcerated individuals from the MSU had been placed in isolation. All Minimum Security Unit staff at MCC were directed to mandatorily wear issued, general use expired N95 respirators. The Centers of Disease Control (CDC) has approved the use of expired N95 respirators. Additionally, all incarcerated individuals at the Minimum Security Unit and staff have been

issued surgical masks to wear. The MCC facility medical director, in consultation with the Department's Chief Medical Officer and Infectious Control Physician, have begun the staff and incarcerated contact mapping process and are following established protocols. According to the quarantine protocol, a health care team assesses each person on quarantine status for COVID-19 symptoms twice a day. These assessments include the taking of each individual's temperature. The Department is doing this in the housing unit where this individual was previously housed. The Department issued a news release publicly announcing the result on April 5, 2020, and this news release is available on the Department's public website.

5. After the first positive test on April 5, 2020, the Department used a contact mapping process and placed other incarcerated individuals at the MSU in isolation. Two of these individuals placed in isolation were tested on-site for COVID-19 on April 5, 2020, and the test results came back positive on April 7, 2020. The Department issued a news release on the same day. The Department received news of an additional three positive tests of incarcerated individuals in the Minimum Security Unit at MCC on April 8, 2020. Those individuals were also identified as part of the contact mapping process of the first positive test and were placed in isolation.

6. All individuals who are housed in the MCC MSU B unit where the positive cases were identified have been provided surgical masks for further protection. The Department is currently creating a new staffing model for the MSU. This model will identify only those staff who are approved to work inside the MSU, and such employees will not be allowed

to work anywhere else at MCC. The Department also scheduled a Skype call with B unit and the Department's infectious disease control expert, Dr. Lara Strick, to answer any COVID-19 health-related questions the B unit residents might have.

7. The Department also offered to move the most vulnerable individuals in B Unit to single cell housing within the unit or to another unit to add an additional layer of protection from others on quarantine. To facilitate this process, Captains at MCC met with those identified as vulnerable to discuss the offer to move them out of the Minimum Security Unit. All of these approximately thirty individuals have declined the Department's offer to move them. The Department's Chief Medical Officer and Infection Control Physician have continued to have additional conversations with these individuals to see if they still do not want to move out of the unit.

8. As the Department has reported in a press release, last night, April 8, 2020, while the Skype call was occurring between B unit tier reps and the Department's infectious disease physician, individuals from MSU D-unit broke their quarantine and, without authorization, went out into the yard. Individuals from C-unit followed, resulting in essentially a mob of individuals from the two units gathering in the yard. To contain the volatile situation, staff directed the individuals to return to their units for count. They initially complied with the direction, but once inside, pulled fire alarms, set off fire extinguishers, vandalized property, turned bunks over to use as barricades, wrapped towels around their faces and stuffed magazines

in their sweatshirts to protect against riot control measures, and said they were going to take hostages if staff entered the tier. At that point, the decision was made to evacuate staff from C and D units their safety. Outside law enforcement arrived on site to establish a perimeter to prevent against escape. This included response from the Monroe Police Department, Snohomish County Sheriff's Office, and Washington State Patrol. Fire trucks from the Monroe Fire Department were also staged on site.

9. After evacuating staff from the units, MCC locked down the entire complex to avoid the disturbance spreading to other units, and began developing emergency plans to regain control of MSU C and D units. During the operation to recover control of the units, and because there were a significant number of men who continued to ignore verbal directives, an Emergency Response Team deployed pepper spray and sting balls (which release light, noise, and rubber pellets) to stop the destruction of property and bring the men into compliance. From start to finish, the incarcerated individual's active resistance to staff directives lasted approximately 3 hours. There were no injuries to staff or incarcerated men.

10. Our understanding is that the incident related to concern over the positive COVID-19 cases within the MSU. According to initial staff reports, one inmate began to yell at staff and use profanity. Reports indicate that this individual yelled at staff something to the effect that "there are more of us than you have" and "what the fuck are you going to do about it?" According to staff, this inmate was yelling such things in the presence of over 20 inmates. Other staff reports indicate that at least one inmate was

heard threatening to kidnap any law enforcement. Staff also observed inmates wielding fire extinguishers as weapons.

11. Department staff have begun to assess physical plant damage. The Department has also begun to repair damage with a focus on life safety systems, such as fixing broken overhead fire sprinklers and replacing fire extinguishers maliciously discharged by incarcerated individuals, even though there were no fires started during this disturbance. The Department is also in the process of repairing other items vandalized during the disturbance such as doors, wall mounted convex mirrors used for observation by staff of incarcerated occupied areas, etc. A total damage assessment is still being completed.

12. One extremely disturbing consequence of the disturbance was that the actions of these incarcerated individuals interrupted the Department's COVID-19 response and its ability to monitor whether any additional incarcerated persons on quarantine had become symptomatic. The Department's need to respond to this disturbance required the Department to devote resources to address the inappropriate behavior of these individuals rather than working to address issues related to its response to COVID-19. As a result, these incarcerated individuals have essentially increased the risk to a population that the Department was protecting through the various protocols established for the health care management of persons on quarantine. The incident also resulted in increased, close interaction among inmates and between inmates and Department staff.

13. I understand that Petitioners in this matter have accused the Department of hiding information from the public related to their COVID-19 response. I disagree with this allegation. The Department early in its response established a page on its publicly available website devoted to providing information about its COVID-19 response. The Department has provided regular updates to incarcerated individuals. The Department has been committed to providing such updates to the public and incarcerated individuals while simultaneously managing its evolving response to COVID-19. I am also aware that various Department staff have provided declarations with detailed information to the courts about the Department's response to COVID-19. To address the various allegations being made about the Department's response, these staff members have taken time away from assisting in the Department's response to the COVID-19 situation in order to help provide information to the courts. Additionally, as explained in the April 7, 2020 press although the Department will not be issuing press releases each time a new case is identified, it will continue to publicly update the agency's COVID-19 webpage with information about the number of positive cases. The claim that the Department is somehow hiding the ball with regard to its COVID-19 response is false. The Department will

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continue to provide regular updates on its website about its COVID-19 response, and its priority will remain working to ensure the safety of staff, the incarcerated, and the public.

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 9th day of April 2020, at Tumwater, Washington.


ROBERT HERZOG
Assistant Secretary of Prisons

No. 98317-8 CERTIFICATE OF SERVICE

I hereby certify that I caused the Declaration of Herzog to be electronically filed with the Clerk of the Court, which will send notification of such filing to the following:

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

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

s/ Kathy Anderson

Kathy Anderson, Legal Assistant
Attorney General's Office
Corrections Division, OID #91025
P.O. Box 40116
Olympia WA 98504-011

FILED
SUPREME COURT
STATE OF WASHINGTON
4/10/2020 8:53 AM
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CLERK

NO. 98317-8

SUPREME COURT OF THE STATE OF WASHINGTON

SHYANNE COLVIN, et al.,
Petitioners,
v.
JAY INSLEE, et al.,
Respondents.

DECLARATION OF OREGON
DEPARTMENT OF CORRECTIONS
DIRECTOR COLETTE S. PETERS

I, COLETTE S. PETERS, make the following declaration:

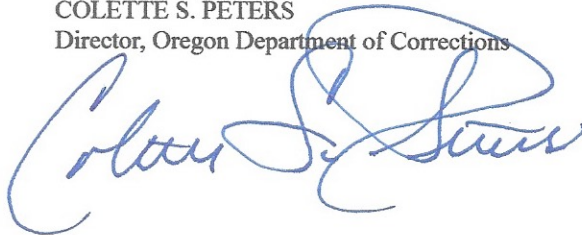
1. I am currently the Director for the Oregon Department of Corrections and have held this position since February 2012. As Director, I am responsible for the ultimate oversight of an agency with 4,700 employees; a biennial budget of \$2 billion; and responsibility for managing 14,700 incarcerated adults in 14 prisons across the state.

2. In order to assist in the Oregon DOC's COVID-19 response, Oregon DOC officials routinely confer with our counterparts at the Washington DOC. Some of Washington DOC's current policies and practices were adopted by the Oregon DOC and also help to inform the judgments, policies and practices of the Oregon DOC in responding to the COVID-19 emergency.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 9th day of April, 2020, at Salem, Oregon.

COLETTE S. PETERS
Director, Oregon Department of Corrections



No. 98317-8 CERTIFICATE OF SERVICE

I hereby certify that I caused the Declaration of Peters to be electronically filed with the Clerk of the Court, which will send notification of such filing to the following:

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

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

s/ Kathy Anderson

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CORRECTIONS DIVISION ATTORNEY GENERAL'S OFFICE

April 10, 2020 - 8:50 AM

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Appellate Court Case Number: 98317-8
Appellate Court Case Title: Shyanne Colvin et al. v. Jay Inslee et al.

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