NO. 98317-8

SUPREME COURT OF THE STATE OF WASHINGTON

SHYANNE COLVIN, et al.,

Petitioners,

v.

JAY INSLEE, et al.,

Respondents.

BRIEF OF RESPONDENTS

ROBERT W. FERGUSON
Attorney General

TIM LANG, WSBA #21314
Senior Assistant Attorney General
JOHN S. SAMSON
Assistant Attorney General
Attorney General's Office
Corrections Division, OID #91025
P.O. Box 40116
Olympia WA 98504-0116
(360) 586-1445
Timothy.Lang@atg.wa.gov
John.Samson@atg.wa.gov

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I. INTRODUCTION

Petitioners' request for mandamus is legally untenable, factually inaccurate, and dangerously shortsighted. Granting the writ would endanger the very people that Petitioners theoretically mean to benefit, as well as the broader community. The Court should deny mandamus relief.

The Department of Corrections has acted aggressively to prevent the spread of COVID-19 in its facilities. Nonetheless, Petitioners ask this Court to order the immediate release of over 11,700 incarcerated individuals—nearly two-thirds of the State's prison population—without regard to risk of dangerousness, victims' rights, or supervision requirements. Many of those released would have no access to medical care or stable housing, putting them at greater risk of contracting COVID-19 and other negative healthcare consequences. In short, the whole premise of Petitioners' case is wrong, as the relief they seek would endanger not only the broader community, but also the very people they seek to have released.

Petitioners' mandamus claim is also legally indefensible for at least three reasons. First, Petitioners cannot demonstrate the absence of an adequate remedy at law necessary to obtain the extraordinary remedy of mandamus. To the contrary, simultaneous to this proceeding, plaintiffs in the separate case of *Nagel, et al., v. Washington Department of Corrections, et al.*, Pierce County Cause No. 20-2-05585-4, have sought injunctive relief

in the superior court, raising nearly identical arguments and requesting essentially the same relief as sought by Petitioners. The superior court case shows that Petitioners have an adequate remedy at law.

Second, this is a mandamus action in title only, and therefore the Court lacks original jurisdiction to consider it. Instead of pursuing an actual mandamus claim seeking to compel the performance of a currently existing mandatory duty, the petition instead asserts claims raising causes of actions properly brought in a civil rights action or a declaratory judgment action; claims reserved to the original jurisdiction of the superior court.

Third, even if this action falls within the Court's jurisdiction, Petitioners nonetheless fail to identify a currently existing mandatory duty. Instead, Petitioners ask this Court to direct how the Governor and Secretary exercise their discretion in responding to the COVID-19 pandemic. Petitioners ask this Court to direct how the Governor exercises the emergency power to waive statutes, direct to whom the Governor grants clemency, direct how the Secretary operates the prisons, direct when the Secretary releases incarcerated individuals, and direct how the Secretary supervises such released individuals. However, these executive actions are entirely discretionary, and none of the claims or relief requested by Petitioners seek to compel a mandatory duty as required in a mandamus action. The Court should deny the petition for writ of mandamus.

Nor should the Court convert this action into a personal restraint petition proceeding. Petitioners specifically filed this action as a petition for writ of mandamus, seeking the relief of mass release of prisoners. Petitioners never asked this Court to consider the action as a personal restraint petition as to the individual petitioners, and they cannot make such a request for the first time in a reply brief. A party has the right to choose how to seek relief, and the Court should not unilaterally convert an action for them.

Moreover, converting the action into a personal restraint petition would not save Petitioners' claims. Petitioners must prove an unlawful restraint to obtain relief under RAP 16.4(a), but they cannot make this showing because the Department confines them under lawful judgments and sentences. Petitioners do not contend or show unlawful restraint; instead, they seek to waive the law that validly requires their continued confinement. The very fact that Petitioners must obtain a waiver of statutes to facilitate their release demonstrates the lack of an unlawful restraint.

Petitioners cannot make the showing required to obtain relief, whether the Court views the action as a petition for writ of mandamus or a personal restraint petition, and the relief they seek would endanger the broader community and the incarcerated individuals they seek to have released. The Court should deny relief.

II. STATEMENT OF THE CASE

A. The Department of Corrections' Response to COVID-19

For months, the Department of Corrections, in coordination with the Governor's Office, the Department of Health, and other partners, has actively worked to mitigate the risks associated with COVID-19. This brief summarizes just some of the steps taken to mitigate the risk.

The Department operates 12 prisons, housing about 18,000 people. Appendix D, Declaration of Martin at 1. Each major prison has medical facilities, led by a physician director and staffed with doctors, physician assistants, nurse practitioners, and other health care providers. App. D at 1. Similar to a primary care clinic, the medical facilities provide a range of health services. App. D at 2. An individual requiring additional care may receive services at a hospital or other community provider. App. D at 2.

Long before the COVID-19 pandemic, the Department established a Communicable Disease and Infection Prevention Program. App. D at 2; DOC Policy 670.000. The program focuses on infectious disease prevention, education, identification, and treatment. App. D at 2. Since the discovery of COVID-19, the Department has worked diligently to prepare for the disease and manage the risk to the incarcerated population.[1]

[1] The Department daily updates a webpage dedicated to providing information about the response to the COVID-19 coronavirus. App. D at 3 (https://www.doc.wa.gov/news/covid-19.htm).

From the very beginning of the pandemic, medical and administrative staff have worked daily to develop and implement new protocols and directives to combat the pandemic. App. D at 3-4. The Department opened the Emergency Operations Center to support a statewide response in February 2020, and later activated Incident Command Posts at each prison. App. D at 4 and 6. On March 4, 2020, the Department authorized use of alcohol-based hand sanitizers (usually a contraband item) in its facilities for staff and others working in the prison. App. D at 5. Incarcerated individuals who work in the medical areas of prisons may use an alcohol-based hand sanitizer, as well as soap and handwashing facilities. App. D at 5. While other incarcerated individuals do not generally have access to alcohol-based hand sanitizer, all such individuals have access to soap and handwashing facilities. App. D at 5. Additionally, some units have dispensers for non-alcohol based hand sanitizer. App. D at 5.

On March 5, 2020, DOC's Chief Medical Officer created a team to develop guidelines specific to the COVID-19 coronavirus. App. D at 5. The guidelines include details for screening, testing, and infection control procedures, including guidelines for isolation/quarantine. App. D at 5-6. Among other things, the guidelines require temperature readings of all new intakes, healthcare screening of symptomatic individuals, and supplying masks to such symptomatic individuals. App. D, Ex. 3. The guidelines also

set out testing protocols and infection control procedures, including isolation and quarantine. App. D, Ex. 3. Medical staff update the guidelines regularly to reflect the rapidly evolving nature of the COVID-19 pandemic. App. D at 5.

On March 12, 2020, the Department waived the statutory copays for incarcerated individuals being tested/treated for COVID-19, allowing individuals to seek medical care without fear of being charged. App. D at 6. The Department informed staff to stay home if they feel sick, directed certain staff to telework, and suspended all prison visits on March 13, 2020. App. D at 6. On March 15, 2020, the Department implemented enhanced screening for all staff, including temperature checks, and further encouraged employees to telework when able. App. D at 6-7.

On March 18, 2020, the Department issued guidelines for special population units, including those designed for individuals age 55 or older. App. D at 7. The guidelines allowed self-quarantine, required handwashing when entering or exiting a cell, implemented nursing wellness checks at individuals' cells, and mandated separate dining for the special populations. App. D, Ex. 6. On March 19, 2020, the Department implemented special procedures for transportation of inmates to protect individuals and staff. App. D at 7. This included screening of transported individuals, and disinfecting of buses. App. D, Ex. 7.

On March 20, 2020, the Department implemented social distancing protocols in the prisons, and the Department amended the protocol on March 23, 2020, to provide direction regarding kitchen workers and meals. App. D at 8. On March 21, 2020, the Department implemented an enhanced, second screening process for staff. App. D at 7-8. A few days later, the Department gave further direction about cleaning and sanitizing products approved for COVID-19, including instructions for mixing the cleaners and bleach to comply with the Centers for Disease Control (CDC) guidelines. App. D at 8. On March 31, 2020, the Secretary issued an updated memo regarding enhanced screening procedures. App. D at 8. The memo provided information about enhanced screening of staff, including detailing when staff may excluded from work and setting out requirements staff must satisfy to return to work. App. D, Ex. 13.

B. The Department's Procedures Comply With CDC Guidance

On March 23, 2020, the CDC issued guidance specific to corrections facilities. App. D at 8. The CDC Guidance noted that the guidance "may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions." App. D at 8-9. The guidance serves as recommendations for prisons, but advises facilities to work with state and local health departments to determine what procedures a prison should implement for a particular State. App. D at 9.

The Department, working with its Chief Medical Officer and Infectious Disease Physician, as well as state and local partners, have substantially complied with the CDC's recommendations. App. D at 9; *see also* App. D at 9-40 (chart comparing the Department's compliance with the CDC guidance for correctional institutions). One of the few applicable recommendations the Department has not yet implemented is to quarantine all new incoming individuals for 14 days, but the Department is considering ways to implement that recommendation. App. D at 25. The Department has otherwise implemented fully or partially, or is in the process of implementing, all remaining CDC recommendations applicable to prison facilities in Washington State. App. D at 9-40.

C. The Department Provides Much of the Requested Relief

Petitioners request that the Court order the Secretary to take various steps to protect individuals from COVID-19. However, the Department already performs much of the requested tasks. For example, Petitioners ask the Court to order the Department to provide soap, water, and towels without charge to individuals. Pet. at 64. The Department provides all individuals with free soap and access to handwashing facilities, including towels. App. D at 5, 12-13, and 18-19. While the Department does not generally allow incarcerated individuals to use alcohol-based hand sanitizer due to its contraband nature, Petitioners provide no evidence that hand

sanitizer works better than soap and water.[2] Similarly, Petitioners request that the Court order the Department to provide instructions to individuals about COVID-19, and to implement a plan to ensure that incarcerated individuals receive appropriate medical care, screening, testing, and treatment related to COVID-19. Pet. at 64. The Department has already done both of these requested tasks. *See, e.g.*, App. D at 5 and 18-21.

Petitioners request that the Department provide telephone and email access to individuals at no cost. Pet. at 66. While this remedy has no direct correlation to protecting someone against COVID-19, the Department's contractors are already providing individuals with free or reduced cost communication. App. D at 24. Petitioners request that the Department not retaliate against individuals. Pet. at 66. Petitioners fail to present any competent evidence of retaliation, and the Department has eliminated copay requirements that might have made individuals reluctant to seek treatment. App. D at 6 and 16. Similarly, Petitioners request that the Department implement social distancing measures and implement staffing plans to address likely staffing shortages. Pet. at 66. The Department has already done so. *See, e.g.*, App. D at 7-8, 10-11 and 19-21.

[2] The CDC indicates that handwashing with soap and water is preferable to hand sanitizer., https://www.cdc.gov/handwashing/show-me-the-science-hand-sanitizer.html.

D. The Status of COVID-19 Testing in Prison

The limited nationwide availability of COVID-19 tests is common knowledge. In anticipation of a limited supply, the Department ordered 100 additional test kits each for the Monroe Correctional Complex, Washington Correctional Center for Women, Airway Heights Corrections Center, and Washington Corrections Center, and 50 additional test kits each for the remaining eight prisons. App. D at 40-41. By March 19, 2020, all prison facilities had testing kits. App. D at 41.

When Respondents submitted the record in this case, no incarcerated individual in prison had tested positive for COVID-19, and only one such individual housed in a community medical center, not a prison, had tested positive. App. D at 41. The individual residing in the community medical center had been there since March 3, 2020, initially tested negative at the center, and later tested positive, all while outside of prison. App. D at 41. Since the submission of the record, a few individuals have tested positive at the Monroe Correctional Complex – Minimum Security Unit. *See* Declaration of Rob Herzog, submitted with response to Emergency Motion. The Department placed these individuals in isolation and placed the housing unit on quarantine, pursuant to the COVID-19 guidance. The Department continues to work around the clock to ensure the safety of staff, incarcerated individuals, and the public as a whole. App. D at 43.

E. An Immediate, Large Scale Release of Individuals Would Severely Harm Public Safety

The Legislature declared that ensuring public safety is the Department's paramount statutory duty. RCW 72.09.010(1). The proposal for the immediate release of individuals would severely harm public safety and effectively invalidate the Department's primary statutory duty.

Petitioners propose the immediate release of all individuals incarcerated in prison and work release facilities who are age 50 or over, who have underlying health conditions that may increase their susceptibility to COVID-19, or who are within at least 18 months of their early release date. Pet. at 58-61. According to Department data, Petitioners' proposal would require the immediate release of at least 11,715 individuals. Appendix C, Declaration of Dr. David Luxton at 2-3.

Petitioners' request includes no qualifier based upon an assessment of risk. The 11,715 individuals identified in the petition would include 470 people serving a sentence of life without parole, and 5,272 people serving a sentence for serious offenses, including crimes such as murder, rape, and child molestation. App. C at 3. In fact, Petitioners' proposal would require the release of two of Washington's most notorious serial killers, Gary Ridgway and Robert Yates. App. C at 4.

In a footnote, Petitioners dismiss this fact by suggesting that "of course there will be unique circumstances that will not allow individual people, like Mr. Ridgway, to be released." Pet'rs' Br. at 25 n. 95. However, Petitioners' requested relief does not allow for consideration of "unique circumstances," and instead demands that the Department release all individuals who fall within their proposed three categories, regardless of risk or sentence. Petitioners also fail to recognize that many other individuals, besides Ridgway, pose a risk if released early. Petitioners' after-the-fact realization that the Department must exercise discretion when releasing individuals in order to protect the public from risk simply highlights that the Petitioners are not seeking to enforce a mandatory duty, but are seeking to direct how the Department exercises its discretion.

The Department currently has only 800 Community Corrections Officers to supervise the 21,000 individuals currently on community custody. Appendix E, Declaration of Max Pevey at 1. Immediately releasing over 11,700 more individuals, especially without proper release planning, would overwhelm the system. App. E at 2. The Department would quickly become understaffed, even without considering the effect the pandemic may have on current staffing levels. App. E at 2.

Nor could the Department hire sufficient staff in time to handle such an immediate influx of individuals released to the community. Even under

normal conditions, the employment process takes approximately 14 weeks to establish, hire, and train just one position. App. E at 2. This, of course, assumes availability given limited openings in the academy even under normal circumstances not affected by the pandemic. App. E at 2. The Department could not hire and train sufficient staff to handle the immediate large scale early release of 11,715 individuals.

Rather than enforcing a mandatory duty, Petitioners would require the Department to forego performing mandatory statutory duties. First, Petitioners would require the release of individuals not eligible for release under existing statutes, such as those serving sentences of life without parole. App. C at 3. Second, even when an individual may release to community custody, the statutes require the Department to investigate and approve the individual's proposed release plan to protect against risk to the community. App. E at 3. Proposed release addresses may include a family residence, private housing paid for by the individual or individual's family, housing that accepts a Department housing voucher, or a homeless shelter. App. E at 3. The investigation allows staff to verify that the proposed residence does not place the individual in violation of their conditions of supervision, does not place the individual in proximity to victims and witnesses in the case, and does not place the individual in areas that may place the individual or others at risk. App. E at 3.

The immediate large-scale early release of individuals, without the statutorily required residence approval process, will make it difficult to locate suitable housing safe for the individual and the public. App. E at 3. The Department could not properly perform the statutory duty of investigating the release plan if the Court adopts the proposal for immediate release of thousands of individuals to the community. App. E at 3.

A large scale early release of individuals would pose a severe risk to community safety, given the impact on staffing, the inability to investigate release plans, and the inability to supervise such individuals. App. E at 5. Research shows that the first 90 days after release is the most critical to successful reentry because individuals are at their highest risk during this time given challenges around the adjustment in their return to the community, re-connection with family, obtaining stable housing, receiving treatment, and gaining employment. App. E at 5. A mass release of individuals, without opportunity for individualized planning, community referrals, and meaningful supervision, would negatively affect both the released individuals and the community. App. E at 5.

Petitioners propose releasing large numbers of individuals to electronic home monitoring (EHM), but the Department has limited ability to provide EHM. App. E at 4. EHM requires equipment leased from a vendor; the Department does not own such equipment. App. E at 4. EHM

also requires the extensive training of staff. App. E at 4. The Department is not authorized to or capable of using EHM as a large scale alternative to total confinement. The Department simply does not have the trained staff or equipment necessary to provide EHM to thousands of immediately released individuals. App. E at 4.

The statutes also require that the Department provide advance notice of the release to victims or witnesses enrolled in the notification program. App. E at 3. A large scale release of individuals prior to their scheduled release date, without completion of the established release process, would prevent the Department from fulfilling this statutory duty. App. E at 3; *see also* Appendix B, Declaration of Sheila Lewallen.

The Department's Victim Services Unit works closely with victims and witnesses harmed by crime. App. B at 1. After the horrific murders committed by Charles Campbell when he was confined at a work release facility, the Legislature required the Department to provide notice to victims and witnesses enrolled in the notification program prior to any release of an individual convicted of certain types of crimes. App. B at 2. Additionally, the Victims' Rights Amendment in article I, section 35 of the Washington State Constitution provides victims and survivors the constitutional right to make a statement at any proceeding where a defendant's release is considered. App. B at 2.

The Victim Services Unit works to provide the necessary notice and to protect the rights of victims. App. B at 2. However, the unit has just twelve employees providing services for the entire state. App. B at 1-2. An immediate release would prevent the statutorily required notice to victims. App. B at 1-2. Victim Services staff also notifies Community Corrections Officers of any concerns and any need for any additional conditions of supervision. App. B at 2-3. The staff facilitates "wrap around" meetings to allow the victim/survivor to interact directly with the Community Corrections Officer to strategize methods of decreasing risk. App. B at 3. The statewide "stay home" directive for the COVID-19 pandemic limits the Victim Services Unit's ability to perform such "wrap around" meetings. App. B at 3. Immediately releasing thousands of individuals to the community, without proper notice and adequate preparation for victims and witnesses, would severely harm the public. App. B at 3.

The victims' access to judicial resources are greatly limited during the pandemic. App. B at 3. Since courts throughout the state are not operating as usual, victims will have great difficulty obtaining protective orders. App. B at 3-4. Domestic violence has risen during the pandemic, and victims have limited ability to protect themselves. App. B at 4. Immediately releasing thousands of individuals without proper planning will severely harm the safety and security of victims. App. B at 4.

F. The Proposed Immediate, Large Scale Release Would Harm the Formerly Incarcerated Individuals

Staff identify individuals eligible for the graduated reentry program at 18 months prior to their scheduled release date. Appendix A, Declaration of Susan Leavell at 2. Staff then engage with these individuals 9 months before the scheduled release in order to begin to develop addresses, resources, and identify other needs for successful reentry. App. A at 2. Overall, the Department in 2019 released 8,218 individuals from prison for an average of approximately 684 individuals per month. App. A at 2. However, the graduated reentry system, which is still a fairly new program, transitioned only about 20 individuals to work release, and just 30 individuals to EHM, per month. App. A at 2.

To succeed upon release, individuals need housing, employment, food, transportation, a support system, and family. App. A at 1-2. In addition, many individuals need to develop life skills necessary to manage difficult interpersonal relationships. App. A, at 2. Release often fails because of the individuals' inability to handle the conflict that occurs with essential people. App. A at 2. Providing interpersonal and conflict resolution skills help the individuals manage daily stress. App. A at 2. Providing coaching through the reentry process helps to effect positive change and to create avenues of successful reentry. App. A at 2.

Some barriers to successful reentry include lack of access to care, lack of resources, engaging in at-risk behaviors, lack of focus on objectives, and lack of engagement. App. A at 3. Individuals often need assistance, but are unable to arrange for services on their own, creating a barrier to successful reentry. App. A at 3. Many often give up due to the length of time it takes to secure those services. App. A at 3. The proposal for immediate early release of thousands of individuals would jeopardize the wellbeing of these individuals. App. A at 3.

Research shows that incarcerated individuals have lower coping and life skills to manage through crises. App. A at 3. Transition planning helps them align with necessary services, such as substance abuse and mental health treatment, medical treatment, and housing supports, so the individuals are better prepared to deal with life stressors. App. A at 3. Individuals transitioning from a correctional facility who receive minimal preparation and inadequate resources will experience extreme challenges, and will likely return to criminal behavior. App. A at 4. This will result in new crimes, and new victims of crimes, and individuals returning to confinement for new felony behavior. App. A at 4.

The COVID-19 pandemic will increase the difficulties faced by released individuals. The pandemic has significantly affected the availability of transitional services in the community, with public offices

now offering limited services, or moving to online applications with no face-to-face contact. App. A at 4. Individuals must apply by phone or online for programs such as food, cash, and medical services. App. A at 4. Services such as housing support, mental health treatment, and substance abuse treatment will likely become inaccessible as the crisis persists. App. A at 4.

Individuals will face difficulty in securing housing because shelters have temporarily suspended their routine services. App. A at 4. Transitional housing options, already limited under normal circumstances, are in even shorter supply due to the pandemic. App. A at 4-5. Individuals will also have difficulty finding employment because job opportunities have diminished as businesses close. App. A at 5. Sober support meetings have closed or referred individuals to online platforms, to which many released individuals lack access. App. A at 5. Services providing for essential needs, such as food banks, experience high demand and often lack supplies, and the released individuals would add strain on this resource. App. A at 5.

Many community mental health providers are not offering new patient appointments at this time. App. A at 5. For existing patients, providers are moving from in-office visits to telephone visits, which further limits our population's ability to access services to maintain their needs. App. A at 5-6. As a result, released individuals may revert to criminal behavior in the absence of proper care. App. A at 6.

Finally, many incarcerated individuals have extraordinary medical needs. App. A at 6. The Department currently provides for those needs through health services delivered within the prisons. App. A at 6. Releasing these individuals to the community would eliminate the Department's ability to provide such care, and would further strain community health care resources. App. A at 6. The immediate early release of thousands would likely result in the formerly incarcerated individuals showing up at hospital emergency rooms, further straining this critical resource. App. A at 6.

The Department understands that incarcerated individuals, like all Washingtonians, are concerned about the COVID-19 coronavirus. However, a decision to release individuals before the expiration of their sentences requires careful balancing of interests and exercise of discretion. The Governor is exercising discretion and evaluating release options that are consistent with public safety and health. However, the mass releases contemplated by Petitioners would harm, rather than help, such individuals and the public at large.[3]

[3] Petitioners allege that the Department is not releasing people eligible for release, such as Mr. Maples and Mr. Stark. For example, Petitioners assert, "Mr. Maples was supposed to be released from prison on April 1, 2020, but remains behind bars." Pet'rs' Br. at 18. Actually, the Department released Maples as scheduled. As for Mr. Stark, his sponsor asked for a delay because contractors had not yet completed construction of Mr. Stark's room in the sponsor's house.

III. ARGUMENT

Petitioners seek mandamus relief, but their claims necessarily fail. Petitioners first cannot demonstrate the absence of an adequate remedy at law, a showing necessary to obtain the extraordinary remedy of mandamus. Petitioners may pursue their claims in superior court. In fact, Petitioners must bring their claims in superior court because the original jurisdiction to consider the actual claims raised by Petitioners lies in that court. Instead of a claim seeking to compel the performance of an existing duty, Petitioners instead assert causes of actions properly brought in a civil action at law. Since the Washington State Constitution gives original jurisdiction over these claims to the superior court and Petitioners have an adequate remedy in that court, this Court should deny the petition.

Even if this action falls within the Court's original jurisdiction, Petitioners nonetheless fail to identify a currently existing mandatory duty. Instead, Petitioners ask this Court to direct how the Governor and Secretary exercise their discretion. Such remedy does not lie in a mandamus action. Nor may the Court convert this action into a personal restraint petition. Not only have Petitioners never asked for such relief, Petitioners do not show an unlawful restraint. Rather, because Petitioners are lawfully restrained, Petitioners actually seek to waive the laws that prevent their release. A request to waive the law does not show unlawful restraint.

A. The Court Must Dismiss the Petition Because Petitioners Have Other Adequate Remedies at Law

Mandamus is available only if there is "not a plain, speedy and adequate remedy in the ordinary course of law." RCW 7.16.170.[4] Just weeks ago, this Court reaffirmed that the extraordinary writ is not available if there are other available remedies. *Burrowes v. Killian*, __ Wn.2d __, __ P.3d __ (March 19, 2020) (No. 96821-7) (2020 WL 1467030), at *2. An adequate remedy exists if the plaintiff has process by which to seek redress. *Wash. State Council of Cty. & City Emps.,Council 2, Local 87 v. Hahn*, 151 Wn.2d 163, 167, 86 P.3d 774 (2004) (remedy under collective bargaining act); *City of Seattle v. Williams*, 101 Wn.2d 445, 455-56, 680 P.2d 1051 (1984) (existence of RALJ appeal provided an adequate remedy).

'"A remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship.'" *Killian*, 2020 WL 1467030, at *2 (quoting *Riddle v. Elofson*, 193 Wn.2d 423, 434, 439 P.3d 647 (2019)). For a remedy to be inadequate, "[s]omething in the nature of the action must make it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ." *Killian*, 2020 WL 1467030, at *2 (quoting *Riddle*, 193 Wn.2d at 434).

[4] The same "adequate remedy" rule precludes any grant of relief for a personal restraint petition. RAP 16.4(d). *In re McNeil*, 181 Wn.2d 582, 590-93, 334 P.3d 548 (2014).

Petitioners have an adequate remedy because they can file an action in superior court seeking injunctive relief, as several plaintiffs recently did in the pending matter of *Nagel v. Department of Corrections*, Pierce County Cause No. 20-2-05585-4. *See* Appendix F, Declaration of Timothy Feulner, Ex. 1. In fact, the pending superior court matter involves many of the same issues as this action. *Compare* Pet. at 55-56; *with* App. F, Ex. 1, at 18 (both actions raising claims under the Privilege and Immunities Clause and the Cruel Punishment Clause).

The two actions also involve similar requests for relief, including the immediate mass release of individuals. *Compare* Petition, at 58-59, *with* App. F, Ex. 1, at 20. The superior court denied a preliminary request for release, but the court reserved ruling on the other issues, and the matter remains pending. App. F, Ex. 2. Moreover, the fact that a claim may not ultimately succeed does not show the absence of an adequate remedy. *See, e.g.*, *Bock v. State*, 91 Wn.2d 94, 98, 586 P.2d 1173 (1978) ("Appellant's loss of the remedy provided by the APA through failure to file a timely petition for review does not render that remedy inadequate, or give rise to a right to extraordinary writs."). The superior court action demonstrates that Petitioners have a "plain, speedy, and adequate remedy in the ordinary course of law" to address their claims.

Petitioners cite to *Cougar Business Owners Ass'n v. State*, 97 Wn.2d 466, 471, 647 P.2d 481 (1982), *abrogated by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019), to argue the lack of an adequate remedy. Pet'rs' Br. at 54. To the extent that *Cougar* remains good law, it does not support their claim. The *Cougar* Court suggested in dicta that the plaintiffs could have pursued an extraordinary writ when the Governor actually acted and exercised authority to include their land in the "red zone" in response to volcanic activity of Mount St. Helens. *See Cougar*, 97 Wn.2d at 471. The Court never ruled that a person could file a mandamus petition to force the Governor to exercise such authority in the first place. In fact, in denying the plaintiffs' claims, the Court ruled that the Governor's actions were "authorized by statute and were entirely discretionary." *Id*. at 470-71. *Cougar* provides no help to Petitioners in attempting to show that filing an action in superior court is not an adequate remedy.

B. The Court Lacks Original Jurisdiction to Consider Petitioner's Various Underlying Causes of Action

Although Petitioners title their petition as a mandamus action, the petition actually pursues causes of action over which the Court lacks original jurisdiction. While the Court has appellate jurisdiction to consider the issues Petitioners raise, original jurisdiction vests in the superior court.

The Washington State Constitution governs this Court's original jurisdiction. *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994). The Constitution grants this Court original jurisdiction to consider petitions for mandamus relief, but not other actions, such as declaratory judgment. *Id*. While a narrow exception applies when a declaratory judgment "necessarily underlies a writ of mandate," that exception does not apply where the Court determines the impropriety of mandamus relief. *Id*.

After making numerous factual assertions, *see* Pet. at 5-55, the petition alleges the Governor and Secretary have violated the Washington State Constitution, failed to exercise statutory emergency powers under RCW 43.06.220, and violated the Washington Law Against Discrimination. Pet. at 55-57. These claims all assert causes of action properly brought in an action at law, not in a mandamus action to enforce an existing duty.

In essence, the petition asks this Court to direct executive branch officials to perform their duties in a constitutional manner, but the writ does not serve such a purpose. *Walker*, 124 Wn.2d at 407-10. Rather, the Court will issue the writ only when an official has failed to perform a specific, existing duty. *Id*. Petitioners should file these claims in superior court as this Court lacks original jurisdiction over these claims. *Wash. State Council of Cty. & City Emps., Council 2, Local 87 v. Hahn*, 151 Wn.2d 163, 170-71, 86 P.3d 774 (2004).

C. Petitioners do not Show a Currently Existing Mandatory Duty that the Governor or Secretary Failed to Perform

1. Legal standard for the writ of mandamus

"Mandamus is an extraordinary writ, the issuance of which is not mandatory, even in response to allegations of constitutional violations." *Staples v. Benton County*, 151 Wn.2d 460, 464, 89 P.3d 706 (2004). When directed to an equal branch of government, the Court "should be especially careful not to infringe on the historical and constitutional rights of that branch." *Walker*, 124 Wn.2d at 407. The jurisdiction "'to issue writs of mandamus to state officers, does not authorize [the Court] to assume general control or direction of official acts.'" *Id*. at 407 (quoting *State ex rel. Taylor v. Lawler*, 2 Wn.2d 488, 490, 98 P.2d 658 (1940)).

Mandamus is appropriate only "where there is a specific, existing duty which a state officer has violated and continues to violate. . . ." *Walker*, 124 Wn.2d at 408. There must be a currently existing mandatory duty to act. *Id*. at 409; *Gerberding v. Munro*, 134 Wn.2d 188, 195, 949 P.2d 1366 (1998); *In re Dyer*, 143 Wn.2d 384, 398, 20 P.3d 907 (2001). While the Court may issue the writ to direct an agency to exercise a mandatory discretionary duty, it cannot direct the manner in which the agency exercises that discretion. *Peterson v. Dep't of Ecology*, 92 Wn.2d 306, 314, 596 P.2d 285 (1979). "Mandamus will not lie to compel the performance of acts or duties which call for the exercise of discretion." *Vangor v. Munro*, 115

Wn.2d 536, 543, 798 P.2d 1151 (1990). To grant the writ, the petitioner must prove a clear abuse of discretion amounting to a failure to exercise discretion. *Vangor*, 115 Wn.2d at 543. As this Court explained:

> Mandamus lies to compel discretionary acts of public officials when they have totally failed to exercise their discretion to act, and therefore it can be said they have acted in an arbitrary and capricious manner. Once officials have exercised their discretion, mandamus does not lie to force them to act in a particular manner.

Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 32, 978 P.2d 481 (1999) (quoting *Aripa v. Dep't of Soc. & Health Servs.*, 91 Wn.2d 135, 140, 588 P.2d 185 (1978)). Petitioners ignore this basic limitation.

The Court will not use the writ to "usurp the authority of the coordinate branches of government." *Walker*, 124 Wn.2d at 410. This principle applies with even greater force when the Court considers a case involving prisoners and correctional institutions. This Court, like many others, has recognized that 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). Here, Petitioners fail to show the Governor and Secretary have not performed a currently existing, mandatory duty.

2. Petitioners' claims do not show the Governor or Secretary failed to perform an existing duty

First, Petitioners broadly contend that the Governor and Secretary have each violated the Washington State Constitution. Pet. at 55-56 (alleging that the Governor violated the Privileges and Immunities Clause by not exercising discretionary authority under RCW 43.06.220 to protect particular individuals in prison); Pet. at 56-57 (alleging the Secretary violated the Cruel Punishment Clause by not taking steps to mitigate the risk to prisoners). However, the broad assertion of a constitutional violation does not suffice to issue the writ. As this Court declared, "[i]t is hard to conceive of a more general mandate than to order a state officer to adhere to the constitution. We have consistently held that we will not issue such a writ." *Walker*, 124 Wn.2d at 408. The Court will not issue the writ simply to tell the executive official to act in a constitutional manner. *Id*. Yet, this is the essence of Petitioners' claim.

Second, Petitioners' allegations show at most a disagreement with how the Governor and Secretary have exercised their discretionary authority, not a failure to act. The Governor has exercised his discretion to suspend statutes under RCW 43.06.220, and the Secretary has taken steps to protect the incarcerated population. In other words, the Governor and Secretary have acted, just not in the manner Petitioners prefer.

a. Petitioners seek to direct how Governor Inslee exercises his broad discretion

Petitioners' claim alleging a violation of the Privileges and Immunities Clause, like their claim under RCW 43.06.220 itself, alleges that Governor Inslee is not exercising his powers under RCW 43.06.220 to protect them. Petition, at 55-56. However, the statutory authority is entirely discretionary. Nothing in RCW 43.06.220 imposes a duty on the Governor to suspend any statute, and once the Governor decides to suspend a statute, nothing in RCW 43.06.220 requires the Governor to suspend other statutes. The decision whether to exercise the statutory authority at all, as well as the decision of what particular statues to suspend, falls entirely within the Governor's discretion. Nothing in RCW 43.06.220 imposes a currently existing mandatory duty that the Governor has not performed.

Framing the issue as a violation of the Privileges and Immunities Clause does not save the claim. The Clause provides protections similar to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Seeley v. State*, 132 Wn.2d 776, 791, 940 P.2d 604 (1997). Absent a fundamental right or a suspect class, the rational basis standard of review applies to an equal protection challenge. *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010); *Tunstall v. Bergeson*, 141 Wn.2d 201, 224, 5 P.3d 691 (2000). The government action

passes the rational basis test so long as it bears a legitimate relation to some legitimate end. *Hirschfelder*, 170 Wn.2d at 551; *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 609, 192 P.3d 306 (2008). Deciding not to immediately release large numbers of prisoners regardless of risk or planning is rational. Nothing requires the Governor to suspend the particular statutes desired by Petitioners. While Petitioners disagree with the Governor's decision, Petitioners do not show the Governor's decision lacks a rational basis. Moreover, even assuming the Governor's decision lacked a rational basis, the proper remedy is to file an action in law, not to seek to compel a discretionary act through mandamus.

Absent clemency or a statutory exception, the law presumes that all defendants will serve the maximum sentence imposed by the superior court. *Honore v. Wash. State Bd. of Prison Terms & Paroles*, 77 Wn.2d 697, 700, 466 P.2d 505 (1970); *State v. Rogers*, 112 Wn.2d 180, 183, 770 P.2d 180 (1989); *In re Mattson,* 166 Wn.2d 730, 214 P.3d 141 (2009). While the Governor may grant early release for medical reasons or other factors, *see* RCW 9.94A.728(1)(d), and may even order a special session of the Clemency and Pardons Board to consider petitions for early release, *see* RCW 9.94A.870, both actions fall entirely within the broad discretionary power of the Governor. *In re Bush*, 164 Wn.2d 697, 702, 193 P.3d 103

(2008) (citing Wash. Const. art. III § 9) (noting that nothing limits the Governor's discretion to grant or deny commutations).

The Governor's decisions whether to act, and how to act, are entirely discretionary. Petitioners argue that under the holding of *Bullock v. Roberts*, 84 Wn.2d 101, 103, 524 P.2d 385 (1974), where the Court directed a judge to exercise discretion in considering a party's request to proceed *in forma pauperis*, this Court may order the Governor to exercise his discretion under RCW 43.06.220. This argument fails for two reasons.

First, the constitutional right to access to courts imposed a duty on the judge in *Bullock* to consider whether to grant or deny the party's request to proceed *in forma pauperis*. *Bullock*, 84 Wn.2d at 104-05. No such corresponding duty exists here. Nothing in RCW 43.06.220 or any other law imposes upon the Governor a duty to consider a request to suspend a particular statute. Similarly, while RCW 9.94A.870 allows the Governor to call an emergency session of the Clemency and Pardons Board, nothing in the statute imposes a duty on the Governor to call such a special session. Unlike the judge in *Bullock,* who had a duty to consider whether to grant or deny *in forma pauperis* status to the requesting party, the Governor has no duty to consider whether to suspend a statute, to call a session of the Clemency Board, or to grant clemency to Petitioners.

Second, even if the Governor had such a duty, the Governor has performed that duty. As the Court recognized in *Bullock*, while mandamus may require that discretion be exercised in the presence of an existing duty, "mandamus will not lie to control the exercise of discretion." *Bullock*, 84 Wn.2d at 103. Contrary to Petitioners' allegations, the Governor has exercised his discretionary authority under RCW 43.06.220 many times, suspending some statutes, including granting relief to individuals accused of violating conditions of community custody. *See, e.g.*, Proclamation No. 20-35, (March 30, 2020) https://www.governor.wa.gov/node/522113 (eliminating the requirement to treat low-level violations as high-level violations, thereby allowing imposition of non-confinement sanctions rather than imprisonment). The Governor has exercised discretion under RCW 43.06.220. Petitioners' request that the Governor suspend specific statutes to allow for their release from confinement does not seek to compel the exercise of discretion; it improperly seeks to compel how the Governor exercises that discretion.

b. Petitioners similarly seek to direct how Secretary Sinclair exercises his discretion

Similarly, Petitioners' claims under the Cruel Punishment Clause and the Washington Law Against Discrimination (WLAD) broadly allege that Secretary Sinclair has not protected them or accommodated their

disabilities. Pet. at 56-57. However, like the claims against the Governor, these claims fails to show the Secretary has not performed a currently existing mandatory duty. Rather, the claims seek to direct how the Secretary exercises his discretion.

Secretary Sinclair has taken a number of actions to respond to the COVID-19 pandemic and to promote the safety of Petitioners, including acting to comply with CDC guidance and implementing many of the measures Petitioners currently seek as relief in their petition. Petitioners' complaint shows only a disagreement with how Secretary Sinclair has acted, not the existence of an unperformed mandatory duty. [5]

Petitioners complain that Secretary Sinclair has not granted them early release, but Petitioners do not show they are entitled to such release. Under the indeterminate sentencing scheme in chapter 9.95 RCW, the prison must confine a person until completion of the maximum sentence, parole by the Indeterminate Sentence Review Board, or a grant of clemency by the Governor. RCW 9.95.020. The Secretary cannot otherwise release a person under the jurisdiction of the Board. Similarly, the Sentencing Reform Act

[5] Respondents assume, for sake of argument, that state prisons are even "public" places subject to the WLAD. *See* RCW 49.60.040(2); *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 638 n.24, 911 P.2d 1319 (1996). Petitioners concede that the federal courts have determined that the law does not apply to prisons. Pet'rs' Br. at 50 n.133.

presumes that a person sentenced to a determinate sentence will not obtain release before the expiration of the maximum sentence. RCW 9.94A.728(1) ("No person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence" except as authorized in the statute). "The statute prohibits early release absent existence of one of the statutory exceptions." *Rogers*, 112 Wn.2d at 183. Petitioners make no showing that they have satisfied the requirements for early release under the applicable statutes, RCW 9.94A.728 and RCW 9.94A.729, and that Secretary Sinclair is refusing to release them. Petitioners fail to show the Secretary has failed to perform any currently existing, mandatory duty.

Contrary to Petitioners' assertion, Respondents are exercising discretion to release individuals eligible for release. For example, Petitioner Kill concedes that he is "on track for graduated reentry and work release. . . ." Declaration of Kill at 1. The Secretary has exercised discretion and is processing Kill for release in accordance with the statutes. Similarly, Petitioner Berry concedes his early release date is not until 2029, but he has filed for clemency. Declaration of Berry at 7. This again shows Respondents have exercised discretion and are proceeding in accordance with the statutes governing requests for clemency.

Where a sentence includes a term of community custody, a person may become eligible for transfer to community custody in lieu of earned release time. RCW 9.94A.729(5)(a). However, the person seeking such transfer must submit "a release plan that includes an approved residence and living arrangement." RCW 9.94A.729(5)(b). "All offenders with community custody terms eligible for release to community custody in lieu of earned release shall provide an approved residence and living arrangement prior to release to the community." RCW 9.94A.729(5)(b). The Department may deny a person transfer to community custody "if the department determines an offender's release plan, including proposed residence location and living arrangements, may violate the conditions of the sentence or conditions of supervision, place the offender at risk to violate the conditions of the sentence, place the offender at risk to reoffend, or present a risk to victim safety or community safety." RCW 9.94A.729(5)(c). The decision to release an individual under the statute falls solely within the Department's discretion. *In re Mattson,* 166 Wn.2d 730, 214 P.3d 141 (2009).

Petitioners also fail to show the Secretary is failing to perform a currently existing mandatory to protect the Petitioners confined in prisons. As discussed above in the statement of the case, the Department has actually implemented most of the relief requested for individuals confined inside the prisons. The Department provided free soap, towels, and handwashing

facilities, *see* App. D at 13 and 18-19, provided instructions about the coronavirus, *see* App. D at 18-21, implemented a plan to ensure that incarcerated individuals receive appropriate medical care, screening, testing, and treatment, *see* App. D at 5, provided individuals with free or reduced cost communication, *see* App. D at 24, eliminated copays for testing or treatment related to COVID-19, *see* App. D at 6 and 16, and implemented social distancing measures and staffing plans to address likely staffing shortages. *See, e.g.*, App. D at 7-8, 10-11 and 19-21. These actions show the Secretary has exercised his discretion.

In short, Petitioners do not actually seek to compel Secretary Sinclair to perform an existing duty to protect them in the prisons. Rather, Petitioners attempt to use the global crisis to seek outright release from prison. As Petitioners plainly state in their supporting brief, "no matter what steps DOC takes to address the COVID-19 pandemic, the Secretary does not satisfy his duties unless and until DOC begins to release people." Pet'rs' Br. at 52. Moreover, Petitioners request the release of thousands without any plan for their return to confinement once the pandemic ends. It is telling that nowhere in Petitioners' brief or their petition do they address what happens when the pandemic is over. Petitioners do not indicate that released individuals must return to prison to finish their lawfully imposed sentences.

Petitioners' claims at best allege that the Secretary has not exercised his discretion in the manner Petitioners desire: namely, immediate release from prison. However, Petitioners cannot use the writ of mandamus to obtain release. Petitioners may use the writ only to compel the performance of a duty. Even to the extent the Secretary owed a duty, the Secretary has clearly exercised discretion in responding to the COVID-19 pandemic. "Once officials have exercised their discretion, mandamus does not lie to force them to act in a particular manner." *Nat'l Elec. Contractors Ass'n. v. Riveland*, 138 Wn.2d 9, 32, 978 P.2d 481 (1999) (quoting *Aripa v. Dep't of Soc. & Health Servs.*, 91 Wn.2d 135, 140, 588 P.2d 185 (1978)). Petitioners do not show a legitimate basis for mandamus relief.

3. The requested relief is not proper under mandamus

Aside from their claims for relief, Petitioners' specific requests for remedies also fail to seek the performance of a mandatory duty. Rather, all of the proposed remedies seek either the exercise of discretionary power, or the performance of acts not contemplated by, or currently prohibited by, existing state law. Such remedies do not lie in mandamus.

For example, Petitioners seek a general declaration that the Governor and Secretary must act in accordance with state constitutional and statutory law. Pet. at 58. The writ does not issue to direct an official to act in general compliance with the law. *Walker*, 124 Wn.2d at 407-10.

Similarly, Petitioners ask this Court to direct Governor Inslee to exercise his discretionary power under RCW 43.06.220 to waive various statutes that could prevent the release of individuals, to direct the Governor to exercise his discretion to call an emergency meeting of the Clemency Board, and to direct the Clemency Board to actually recommend the grant of clemency for individuals identified by Petitioners. Pet. at 58-63. However, all of this requested relief falls within the discretion of the Governor to waive or not waive statutes, the discretion of the Governor to call an emergency meeting or not call a meeting of the Board, and the discretion of the Board to recommend or not recommend clemency. The Court will not issue the writ to direct how an executive official exercises discretion in a particular manner. *Riveland*, 138 Wn.2d at 32.

Petitioners also ask this Court to compel Secretary Sinclair to exercise his discretion to furlough individuals, to grant individuals extraordinary medical release, and to grant individuals graduated entry release. Pet. at 64. Again, all of these actions fall within the discretion of the Secretary. *See, e.g.*, RCW 9.94A.728; RCW 9.94A.729. None of the requests seeks the performance of a mandatory duty under existing law. The requested remedies require waiver of the existing law. Mandamus does not lie to force the Secretary to release individuals not entitled to early release under the existing statutes.

Petitioners also ask this Court to order the Secretary to provide medical care that "exceeds the community standard of care." Pet. at 65. Petitioners fail to cite any legal authority that requires the Department to provide care in excess of that received by other Washingtonians. Certainly no statute or constitutional provision requires such medical care.

Rather than seeking to compel performance of an existing statutory duty, Petitioners instead ask this Court to essentially assume the role of the legislative and executive branches and override the statutes. For example, Petitioners ask this Court to direct the Governor to waive the statutes requiring timing of the Clemency Board hearing and notice of releases to victims, both of which protect the constitutional rights of victims. *See* Pet. at 60 and 67. Petitioners also ask this Court to direct the Governor to waive any statutes that would prevent release of individuals, including the statutory prohibition on releasing individuals sentenced to life without parole. Pet. at 61-62. As noted, this request would direct the release of two of Washington's most notorious serial killers, Ridgway and Yates, along with hundreds if not thousands of other serious violent offenders. The writ of mandamus serves to compel the performance of duties under statutes, not to eliminate statutory requirements imposed by the Legislature to protect the people of Washington. The requested relief is simply not proper under the law.

Petitioners also ask this Court to order the Department to ensure that individuals receive assistance necessary to meet housing and medical needs after their release. Pet. at 60. "An agency possesses only those powers granted by statute." *In re Elec. Lightwave Inc.*, 123 Wn.2d 530, 537, 869 P.2d 1045 (1994) (citing *Cole v. Wash. Util. & Transp. Comm'n*, 79 Wn.2d 302, 485 P.2d 71 (1971)). The current statutes specifically authorize the Department to provide only limited financial assistance to individuals released from prison. *See, e.g.*, RCW 72.02.100; RCW 72.02.110; RCW 9.95.320; RCW 9.95.370. The statutes do not authorize the Department to provide the wide range of financial assistance, for both housing and medical care, contemplated by Petitioners' request for relief, and the Department may not expend funds not authorized by the Legislature. Again, Petitioners do not seek to compel an existing duty; instead, they ask this Court to become the Legislature and to force expenditure of funds not authorized by legislative action.

The requested relief also ignores that an immediate, large scale release of individuals will harm not only victims but the individuals themselves. Without adequate release planning and support, many individuals will not find proper housing and care, and will likely return to criminal behavior resulting in a return to prison. *See* App. A.

Without regard to public safety, Petitioners also ask this Court to prohibit sanctioning any individuals who violate conditions of community custody. Pet. at 67. No statute authorizes or compels such relief. On the contrary, the statutes specifically require the Department to address violation behavior during a term of community custody. RCW 9.94A.737(1). Although the Department has made the discretionary decision not to impose confinement sanctions for low level violations, this action falls within the discretion of the Secretary. Mandamus does not lie to compel how the Secretary exercises his discretion.

Many of Petitioners' remaining requests for relief seek not to enforce statutory duties, but to waive them. In essence, Petitioners do not seek valid mandamus relief to compel the performance of an existing duty. Rather, Petitioners ask this Court to replace both the executive and legislative branches and to assume decision making regarding incarcerated individuals. This is not proper relief under the writ of mandamus.

Petitioners fail to identify any mandatory, nondiscretionary duty that the Governor and Secretary have not performed. Petitioners identify a number of actions they would like Respondents to take, and a number of actions they believe Respondents "should" take, but most of the requested acts are actually contrary to statute. Because Petitioners fail to show a currently existing mandatory duty, the Court should deny the petition.

4. The requested relief violates separation of powers

"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, Petitioners ask the Court to direct how the executive branch operates the state correctional system. This request violates separation of powers.

D. The Court May Not Grant Relief by Converting the Action into a Personal Restraint Petition Proceeding

First, the Court should not convert the action into a personal restraint petition. Petitioners specifically filed this action as a petition for writ of mandamus, and they have never asked this Court to consider the action as a personal restraint petition. Even if the decision to proceed via mandamus rather than another avenue is faulty and ultimately subject to dismissal, the party and not the court has the right to choose the type of action a party initiates when seeking a judicial remedy.[6]

The courts generally will not unilaterally convert one type of action into another, including a personal restraint petition. *See, e.g., State v. Smith*, 144 Wn. App. 860, 864, 184 P.3d 666 (2008) (rejecting prosecutor's request to convert defendant's appeal into a personal restraint petition because doing so could infringe on the defendant's right to choose how to litigate the action, and could subject the defendant to the successive petition bar under RCW 10.73.140).

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[6] In *Liptrap*, this Court did convert a mandamus petition into a personal restraint petition. *See In re Liptrap*, 127 Wn. App. 463, 469, 111 P.3d 1227 (2005), *abrogated by In re Mattson*, 166 Wn.2d 730, 214 P.3d 141 (2009). Unlike the action here, which challenges conditions of confinement and seeks to waive statutes, the *Liptrap* petitioners directly challenged the duration of their confinement, alleging the Department held them past their release dates in violation of the existing statutes. *Id*. The claims in Liptrap properly belonged in a personal restraint petition, not a mandamus petition.

Second, even to the extent Petitioners would ask in their reply for this Court to convert the mandamus action seeking the release of thousands of prisoners into a personal restraint petition seeking the release of just the individual petitioners, the Court should decline the request. The Court generally will not review an issue raised and argued for the first time in a reply brief. *In re Rhem*, 188 Wn.2d 321, 327, 394 P.3d 367 (2017) (citing *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990)). If Petitioners wish to file a personal restraint petition, Petitioners should do so by filing the proper action, which would allow Respondent to raise defenses that may be unique to a collateral challenge to custody.

Most fundamentally, however, Petitioners cannot establish an entitlement to relief even if the Court treats the action as a personal restraint petition. To obtain relief in a personal restraint petition proceeding, Petitioners must prove an unlawful restraint. RAP 16.4(a); *In re Dalluge*, 162 Wn.2d 814, 817, 177 P.3d 675 (2008). While a petitioner need not satisfy a threshold prejudice burden when challenging an action by the Department, the petitioner still must prove the "restraint is unlawful for one of the reasons listed in RAP 16.4(c)." *In re Blackburn*, 168 Wn.2d 881, 884, 232 P.3d 1091 (2010) (citing *In re Grantham*, 168 Wn.2d 204, 214, 227 P.3d 285 (2010)). To prevail, the petitioner still must prove prejudice from

the alleged error underlying the claim. *In re Grantham*, 168 Wn.2d 204, 215-17, 227 P.3d 285 (2010).

Petitioners do not and cannot show an unlawful restraint because the Department confines them under lawful judgments and sentences. In fact, Petitioners do not contend or show an unlawful restraint. Rather, Petitioners seek to waive the laws that validly require their continued confinement. Petitioners seek to waive statutes that prevent the release of individuals serving sentences of life without parole, and they seek to waive statutes that prevent the release of individuals who have not reached their early release date. While the Department may release individuals on their early release date, the decision to release someone rests solely within the Department's discretion. *In re Mattson,* 166 Wn.2d 730, 214 P.3d 141 (2009) (rejecting personal restraint petition challenge to the Department's decision not to release a sex offender).

Petitioners also seek to waive the statutes that require the Department to provide notice to victims and witnesses prior to release, as well as the statutes that require the Department to supervise individuals and to enforce conditions of supervision. In short, Petitioners seek to waive the law, not to enforce it. Such request does not show an unlawful restraint.

Petitioners contend the Court must order the immediate release of individuals subjected to conditions of cruel punishment, but such a claim

does not demonstrate an entitlement to release. At most, the claim entitles Petitioners to elimination of the allegedly unconstitutional condition.

As this Court has repeatedly determined, the existence of an unconstitutional condition of confinement does not entitle a person to release; it only entitles the person to correction of the condition. *See, e.g., In re Det. of Campbell*, 139 Wn.2d 341, 349-50, 986 P.2d 771 (1999) (petitioner not entitled to release for unconstitutional conditions of confinement); *In re Det. of Turay*, 139 Wn.2d 379, 420, 986 P.2d 790 (1999) (same). As the Court has explained, the "remedy for these unconstitutional conditions is not a release from confinement." *Turay*, 139 Wn.2d at 420. Rather, the remedy is an injunction to correct the unconstitutional conditions of confinement, and if appropriate, an award of damages. *Id*.; *see also Gomez v. United States*, 899 F.2d 1124, 1125-27 (11th Cir. 1990) (prison officials deliberate indifference to prisoner's medical needs does not permit release of the prisoner). Even if Petitioners could prove unconstitutional conditions, that does not entitle them to release.

Moreover, Petitioners cannot prove that the Department has subjected them to cruel punishment.[7] To determine if a prison condition

[7] Forgoing a *Gunwall* analysis, Petitioners do not show that the state constitution provides broader protection than the Eighth Amendment. The fact that the Cruel Punishment Clause may provide broader protection in one context does not mean that it has a broader protection in all contexts.

constitutes cruel punishment, the courts consider first whether the alleged deprivation is objectively sufficiently serious, and second whether the prison official had a sufficiently culpable state of mind. *Wilson v. Seiter*, 501 U.S. 294, 303-04, 111 S. Ct. 2321, 115 L.Ed.2d 271 (1991).

In determining the first prong, the courts look to the type of deprivation, the length of the deprivation, and the alleged harm that the deprivation caused. *Johnson v. Lewis*, 217 F.3d 726, 731-32 (9th Cir. 2000). The risk must be so grave that it violates contemporary standards of decency to expose someone to the risk; a potential risk of exposure is not enough. Given the unfortunate realities, most if not all Americans face risk of exposure to COVID-19. The fact that an incarcerated individual also faces a risk of exposure to the disease does not render the confinement offensive to society, or make such confinement "cruel punishment" in a constitutional sense. *Hines v. Youseff*, 914 F.3d 1218 (9th Cir. 2019) (risk of prisoners' exposure to Valley Fever—a disease caused by inhaling certain fungal spores common in the Southwest—was not cruel punishment where millions of people also had a risk of exposure to the disease). Given that all Americans have a risk of exposure to COVID-19 and all of us are concerned

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State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018) (recognizing the Court still must apply *Gunwall* analysis because the state constitutional Cruel Punishment Clause does not always provide broader protection than the Eighth Amendment).

about catching the illness, the potential of exposure to the disease does not constitute "cruel punishment" in a constitutional sense. Petitioners cannot satisfy the first prong of a cruel punishment claim.

Second, Petitioners cannot show deliberate indifference; a high legal standard akin to criminal recklessness. *Farmer v. Brennan*, 511 U.S. 825, 836, 114 S. Ct. 1970, 128 L.Ed.2d 811 (1994). Deliberate indifference requires a defendant to have known that the allegedly unconstitutional condition presented an excessive risk to health or safety, and failed to act reasonably in light of that risk. *Id*. at 837-38. In contrast to Petitioners' allegations, Respondents have demonstrated the numerous steps they have taken in response to the pandemic to protect incarcerated individuals. Petitioners cannot show that Respondents have acted with deliberate indifference.[8]

[8] Petitioner Colvin is concerned about the potential effect of COVID-19 because she is pregnant. Decl. of Colvin at 4 (expressing fear because risks of COVID-19 are unknown). However, Petitioners concede that increased risk to pregnant women remains only an unknown possibility at this time. *See, e.g.*, Pet'rs' Br. at 15 n. 54; Decl. of Dr. Stern at 2 (indicating pregnancy is possibly a risk factor). According to the CDC, experts "do not currently know if pregnant people have a greater chance of getting sick from COVID-19 than the general public nor whether they are more likely to have serious illness as a result. Based on available information, **pregnant people seem to have the same risk as adults who are not pregnant**." https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/pregnancy-breastfeeding.html (emphasis in original).

In short, even if the Court converts this action into a personal restraint petition, Petitioner do not demonstrate an entitlement to release. The fact that Petitioners must obtain a waiver of statutes to facilitate their release, including waiving the prohibition on releasing individuals sentenced to life without parole, demonstrates the lack of an unlawful restraint. The Court may not use a personal restraint petition proceeding to waive valid statutes, or to direct how the Governor and Secretary exercise their discretion in managing prisons and release of incarcerated individuals. Petitioners may not obtain relief via a personal restraint petition.

IV. CONCLUSION

For the reasons set forth above, the Court should deny the petition for a writ of mandamus.

RESPECTFULLY SUBMITTED this 13th day of April 2020.

s/ Tim Lang
TIM LANG, WSBA #21314
Senior Assistant Attorney General

s/ John J. Samson
JOHN J. SAMSON, WSBA #22187
Assistant Attorney General
Attorney General's Office
Corrections Division, OID #91025
P.O. Box 40116
Olympia WA 98504-0116
(360) 586-1445
Timothy.Lang@atg.wa.gov
John.Samson@atg.wa.gov

CERTIFICATE OF SERVICE

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

Andrea H. Brewer	andrea@smithalling.com
Antoinette M Davis	tdavis@aclu-wa.org;pleadings@aclu-wa.org
D'Adre Beth Cunningham	DAdreBCunningham@gmail.com
Cara Wallace	cwallace@perkinscoie.com
Darren W. Johnson	djohnson@paulweiss.com
David C. Kimball-Stanley	dkimballstanley@paulweiss.com
Haley Sebens	Hsebens@co.skagit.wa.us
Heather Lynn Mckimmie	heatherm@dr-wa.org
Janet S. Chung	janet.chung@columbialegal.org
Jacquelhn M. Aufderheide	jaufderh@co.kitsap.wa.us
John Randall Tyler	rtyler@perkinscoie.com
John Ballif Midgley	jmidgley@aclu-wa.org
Jose Dino Vasquez	dvasquez@karrtuttle.com;
Lauren Jeffers Tsuji	ltsuji@perkinscoie.com;
Melissa R. Lee	leeme@seattleu.edu
Michael E. McAleenan	mmc@smithalling.com
Nancy Lynn Talner	talner@aclu-wa.org
Nathaniel Block	nblock@co.skagit.wa.us
Neil Martin Fox	nf@neilfoxlaw.com
Nicholas Brian Allen	nick.allen@columbialegal.org
Nicholas Broten Straley	nick.straley@columbialegal.org
Rachael Elizabeth Seevers	rachaels@dr-wa.org
Robert S Chang	changro@seattleu.edu
Susanna M. Buergel	sbuergel@paulweiss.com
Teresa Chen	teresa.chen@piercecountywa.gov

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

DATED this 13th 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 98504-0116

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- caedmon.cahill@seattle.gov
- 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
- hhattrup@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

Comments:

Sender Name: Kathy Anderson - Email: kathy.anderson@atg.wa.gov
Filing on Behalf of: Timothy Norman Lang - Email: tim.lang@atg.wa.gov (Alternate Email:)

Address:
Corrections Division
PO Box 40116
Olympia, WA, 98104-0116
Phone: (360) 586-1445

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