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No. 98317-8

SUPREME COURT OF THE STATE OF WASHINGTON

SHYANNE COLVIN, SHANELL DUNCAN, TERRY KILL, LEONDIS
BERRY, and THEODORE ROOSEVELT RHONE,

Petitioners,

v.

JAY INSLEE, Governor of the State of Washington, and STEPHEN
SINCLAIR, Secretary of the Washington State Department of Corrections,

Respondents.

**PETITIONERS' MOTION TO SUBMIT ADDITIONAL EVIDENCE
IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS,
MOTION TO EXPEDITE REVIEW, AND MOTION FOR
APPOINTMENT OF ER 706 EXPERT**

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I. INTRODUCTION

The Court’s April 23, 2020, Order found that “**on the record presented**, Petitioners have not shown that the Respondents’ actions constitute deliberate indifference to the COVID-19 risk at [DOC] facilities” and that “Petitioners have not shown that the Respondents are **currently** failing to perform a mandatory, nondiscretionary duty in addressing the COVID-19 risk at [DOC] facilities.”¹ However, that Order did not terminate review unconditionally.²

At the time the Order was entered, the Department of Corrections (DOC) reported 12 confirmed positive cases of COVID-19 among incarcerated individuals at DOC prisons and work release facilities.³ Since that time, there has been a significant change in circumstances, as the number of positive tests within DOC have substantially increased, particularly at Coyote Ridge Corrections Center (CRCC), a DOC prison in rural Franklin County. When the parties argued before the Court on

¹ Order, *Colvin v. Inslee*, Wash. Sup. Ct. No. 98317-8 (April 23, 2020) (hereinafter “April 23, 2020 Order”) at 1-2 (emphasis added).

² See Letter from Deputy Clerk, *Colvin v. Inslee*, Wash. Sup. Ct. No. 98317-8 (May 8, 2020).

³ See Department of Corrections website, COVID-19 information (April 23, 2020), available at

<https://web.archive.org/web/20200423212940/https://doc.wa.gov/news/covid-19.htm>.

A thirteenth individual tested positive while at a community medical center.

April 23, 2020, DOC reported zero confirmed cases of COVID-19 among the incarcerated population at CRCC.⁴ As of June 23, 2020, that number had skyrocketed; 100 people in prison and 42 DOC staff have tested positive for COVID-19 at CRCC.⁵ One person at CRCC died after contracting COVID-19 in the prison.⁶ Overall, 83 DOC employees and 131 people in DOC facilities have tested positive. A stunning 19.2% of completed tests have come back positive.

Given this change in circumstances, Petitioners request that this Court accept the new evidence Petitioners seek to submit to the Court, reevaluate its April 23, 2020, Order in light of this new evidence, and appoint an expert to investigate and provide the Court with additional information regarding Respondents' efforts to protect all people incarcerated in DOC facilities from COVID-19.

II. IDENTITY OF MOVING PARTIES

The moving parties are Petitioners Shyanne Colvin, Shanell Duncan, Terry Kill, Leondis Berry, and Theodore Rhone.

⁴ See Department of Corrections website, COVID-19 information (April 27, 2020), available at <https://web.archive.org/web/20200428025650/https://www.doc.wa.gov/news/covid-19.htm>

⁵ See Department of Corrections website, COVID-19 Information, available at <https://doc.wa.gov/news/covid-19.htm#status>.

⁶ Department of Corrections, *Press Release: First Incarcerated Individual in Washington Dies of COVID 19* (June 18, 2020), available at <https://doc.wa.gov/news/2020/06182020p.htm>.

III. RELIEF REQUESTED

Petitioners request the following relief: 1) pursuant to RAP 9.11, an order allowing Petitioners to submit additional evidence to assist the Court in its consideration of the issues presented in this action; 2) pursuant to RAP 17.4(b), consideration of this motion on an expedited basis; and 3) pursuant to ER 706, an order to show cause why a public health expert should not be appointed to prepare a report on an expedited basis to update the record in this case, with said report to provide an on-the-ground summary of the expert's investigation of conditions at CRCC and to evaluate the steps DOC has taken, or failed to take, to protect the health and safety of the individuals incarcerated there, in response to the COVID-19 outbreak.

IV. FACTUAL BACKGROUND

A. The Governor and DOC's Initial Response to COVID-19 in the Prisons Was Minimal Until the Court Ordered Them to Act.

Petitioners filed this action in late March in an attempt to protect people in DOC custody from exposure to and transmission of COVID-19.⁷ Petitioners filed declarations from public health and correctional experts explaining that reduction of the prison population was necessary to

⁷ See Petition for a Writ of Mandamus (Mar. 24, 2020).

mitigate against the spread of COVID-19 in prisons.⁸ Petitioners further explained that Respondents’ failure to take immediate steps to reduce the population would result in a crisis within the prisons that DOC was not prepared to handle.⁹

Within days of the filing of the Petition, DOC reported the first confirmed case of COVID-19 within the prisons.¹⁰ Several days later, an outbreak of COVID-19 occurred at the Minimum Security Unit at the Monroe Correctional Complex (MCC-MSU), prompting Petitioners to file an emergency motion with the Court requesting that it take immediate action to protect people living in MCC-MSU.¹¹ Petitioners further requested that the Court appoint a special master “to provide the Court with information regarding the current emergency at MCC-MSU and about DOC’s other actions to address the COVID-19 pandemic there and elsewhere;” to test everyone at MCC-MSU; and begin immediate release of people housed there who are particularly vulnerable and/or close to

⁸ See Declaration and Supplemental Declaration of Dr. Robert Greifinger at PSD 195-220, 720-726; Declaration of Dr. Frederick Altice at PSD 221-234; Declaration of Drs. Puisis and Shansky at PSD 168-194; and Declaration of Dan Pacholke at PSD 235-248 and Supplemental Declaration of Dan Pacholke at PSD 727-734.

⁹ See Petition for Writ of Mandamus at 4.

¹⁰ Department of Corrections, *Press Release: First Positive COVID-19 Test for Incarcerated Individual within Washington Correctional Facility* (Apr. 5, 2020), <https://www.doc.wa.gov/news/2020/04052020p.htm>.

¹¹ Petitioners’ Emergency Motion to Accelerate Review, For Appointment of a Special Master and for Immediate Relief (April 9, 2020).

release.¹² At the time the Petitioners filed the emergency motion, at least six people living in MCC-MSU and five DOC employees had tested positive for COVID-19.¹³

The following day, the Court granted Petitioners' Motion, in part, ordering the Governor and DOC Secretary,

to immediately exercise their authority to take all necessary steps to protect the health and safety of the named petitioners and all Department of Corrections inmates in response to the COVID-19 outbreak, and to report to the Court in writing no later than noon on Monday, April 13, 2020, all steps that have been taken and will be taken and their emergency plan for implementation.¹⁴

The Court further ordered Respondents to submit an updated report prior to oral argument on "steps taken and their plan for implementation."¹⁵

In its initial report, Respondents defended their plan for addressing COVID-19 in the prisons by citing statistics showing test rates within DOC that were lower than in Washington State generally.¹⁶ It noted that DOC had eight incarcerated individuals who tested positive for COVID-

¹² *Id.* at 3.

¹³ *Id.* at 5.

¹⁴ Order, *Colvin v. Inslee*, Wash. Sup. Ct. No. 98317-8 (April 10, 2020) (hereinafter "April 10, 2020 Order"), at 2.

¹⁵ *Id.*

¹⁶ Respondents' Report on the Department of Corrections' COVID-19 Response at 2 (April 13, 2020).

19 out of a total population of approximately 18,000, which equated to 0.039%.¹⁷ In contrast, they noted that approximately 0.14% of the total population of Washington had tested positive for COVID-19.¹⁸ Respondents also stated that testing shortages throughout the U.S. limited access to testing at DOC.¹⁹

Additionally, Respondents addressed release of people from custody, explaining that the Governor was evaluating release options to mitigate the risk of harm to incarcerated individuals.²⁰ Within five days of this Court's Order, the Governor entered a Proclamation and Order creating the facilitation of release of a limited number of persons from

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 11 (as of April 12, 2020, DOC reported it had only 588 COVID-19 tests in its inventory).

²⁰ *Supra* note 16 at 43.

DOC custody.²¹

In their supplemental report to the Court, Respondents also touted that “[n]o incarcerated individuals at eleven of the Department’s twelve correctional facilities have tested positive as of the date of this Report.”²²

At oral argument, Respondents reiterated much of what was included in their reports to the Court. At that time, DOC had tested over 300 people in prison, with 12 positive tests, and claimed the ratio of positives was comparable to statewide numbers.²³ DOC’s figures did not provide the ratio of statewide positive tests to *completed* tests.

Respondents also discussed the issue of subsequent reporting to the Court: “[w]hat the Department would propose if this Court does not feel sufficient facts are presented is do what the Court did already which is to require the Department to submit another report within two weeks of how the situation currently exists.”²⁴ If required to report, Respondents noted

²¹ See Emergency Proclamation No. 20-50 by the Governor Amending Proclamation No. 20-05 Reducing Prison Population (April 15, 2020); available at <https://www.governor.wa.gov/sites/default/files/proclamations/20-50%20-%20COVID-19%20Reducing%20Prison%20Population.pdf>; Emergency Commutation in Response to COVID-19 (Apr. 15, 2020), available at <https://www.governor.wa.gov/sites/default/files/COVID-19%20-%20Commutation%20Order%204.15.20%20%28tmp%29.pdf>.

²² Respondents’ Supplemental Report on the Department of Corrections/ COVID-19 Response at 3 Apr. 17, 2020)

²³ Washington State Supreme Court oral argument, *Colvin v. Inslee*, Wash. Sup. Ct. No. 98317-8 (Apr. 23, 2020) at 37:05, available at <https://www.tvw.org/watch/?eventID=2020041052> (last accessed June 22, 2020).

²⁴ *Id.* at 33:42.

that they would include information about testing and further reduction of the population.²⁵

Additionally, Respondents discussed what a “change in circumstances might look like” during the following exchange with the Court:

JUSTICE PRO TEMPORE WORSWICK: So, what are the changed circumstances?

COUNSEL FOR RESPONDENTS: For instance, I’m saying that if there were a change in circumstances. For instance, if there was a positive test in another institution. And so far the only institution that has had a positive test is the Minimum Security Unit in Monroe. If there was a positive test of the incarcerated population in another prison that might be a change in circumstance that the Governor and the Secretary would look at to engage in either isolation or possible releases.²⁶

B. Circumstances in the DOC Facilities Related to COVID-19 Have Changed Significantly since the Court Entered Its April 23 Order.

In the two months since the Court entered its Order denying Petitioners’ Petition, circumstances have significantly changed within DOC facilities. Most of what Respondents relied on in their April reports

²⁵ *Id.* at 37:03.

²⁶ *Id.* at 41:01.

and at oral argument to defend their response to COVID-19 is no longer true.

Positive tests are no longer confined to one institution. At the time Respondents submitted their Reports to the Court, Monroe Corrections Center was the only facility where people in prison had tested positive for COVID-19.²⁷ Now, people in prison have tested positive for COVID-19 at four of the twelve correctional facilities; staff have tested positive at six of these facilities.²⁸

The total number of cases has significantly increased. At oral argument, Respondents reported 12 known positive cases of COVID-19 among the incarcerated population.²⁹ In the two months since that date, the number of positive tests has increased tenfold; as of June 23, 2020, 131 incarcerated people had tested positive for COVID-19,³⁰ including

²⁷ *Supra* note 22 at 3.

²⁸ *Supra* note 5.

²⁹ *Supra* note 23.

³⁰ *Supra* note 5.

one death.³¹ 83 DOC employees have also tested positive,³² including one death.³³

As more tests have been administered, the total percentage of the DOC population that has tested positive for COVID-19 has also risen significantly. As noted above, in defending their COVID-19 response, Respondents stated that the percentage of people who tested positive for COVID-19 in DOC – 0.039% -- was lower than the percentage of people in Washington who tested positive for COVID-19 – 0.14%.³⁴ Currently, DOC’s positive test rate is double that of the community’s rate.³⁵

An even more accurate metric of the crisis is the percentage of tests that have been administered to people in DOC custody that came back positive for COVID-19; this figure, too, has risen steeply in the last

³¹ See *supra* note 6.

³² See *supra* note 5.

³³ Wash St. Dep’t of Corrections, *Press Release: First Washington Corrections Line of Duty Death from COVID-19* (May 18, 2020), <https://www.doc.wa.gov/news/2020/04052020p.htm>.

³⁴ *Supra* note 16 at 2.

³⁵ Currently, 130 people in DOC have tested positive out of population of approximately 17,000. See Department of Corrections, “Average Daily Population of Incarcerated Individuals – Fiscal Year 2020, available at <https://www.doc.wa.gov/docs/publications/reports/400-RE002.pdf>. The average daily population for May 2020, the most recent information available, was 16,906. that means about 0.75% of the DOC population has tested positive for COVID-19. Meanwhile, 28,870 people have tested positive for COVID-19. See <https://www.doh.wa.gov/emergencies/coronavirus>. The Washington State Department of Health states that 28,225 people in Washington have tested positive for COVID-19. Washington has approximately 7.6 million residents. See <https://www.census.gov/quickfacts/WA>. This means about 0.37% of Washingtonians have tested positive for COVID-19, about half the rate of DOC.

two months. In late April, Respondents stated that 4% (12 out of 300) of the COVID-19 tests DOC administered to people in prison came back positive; roughly the same as the community in general.³⁶ Currently that number stands at **19.2%** (131 positive tests out of 682 completed tests)³⁷ – a percentage over **three times higher** than the percentage of administered tests that were positive in Washington.³⁸

Circumstances have also changed significantly with regards to access to testing. In their April report to the Court, Respondents explained that testing was limited at DOC due to testing shortages and limited inventory.³⁹ That no longer appears to be the case. In a recent Division One decision, the court revealed that, as of May 7, 2020, DOC was awaiting receipt of 10,000 swabs and 2,000 test vial kits, which had both already been ordered.⁴⁰ Yet, DOC continues to test only individuals who

³⁶ *Supra* note 23.

³⁷ *Supra* note 5. This percentage is calculated as follows: Total number of completed tests (699) minus tests pending lab results (17) = 682 completed tests with results. Of those 682, 131 were positive, which is 19.2%.

³⁸ *Supra* note 35. The Department of Health reports that 477,204 individuals have been tested for COVID-19 in Washington. 28,870 of those tests were positive.

³⁹ *Supra* note 19.

⁴⁰ *In re Pers. Restraint of Pauley*, No. 81370-6-I, 2020 WL 3265574, at *3 (Wash. Ct. App. May 18, 2020).

are symptomatic, and has not revealed its plan to increase testing despite the increasing number of positive tests and availability of tests.

C. Nowhere Is the Change in Circumstances More Pronounced than at Coyote Ridge Corrections Center.

The recent outbreak at Coyote Ridge Corrections Center (CRCC) provides the clearest evidence of a change in circumstances since the Court entered its April 23rd order.

As noted above, the last time Respondents reported to the Court, the only confirmed cases of COVID-19 in DOC's incarcerated population were at MCC.⁴¹ Furthermore, no deaths from COVID-19 had been reported. Since that time – and mostly in the last month – CRCC has gone from zero cases to 100.⁴² Tragically, these numbers also include the first COVID-19 related fatality of a person in prison.⁴³ On June 17, Victor Bueno, a 63-year old person housed in CRCC's long-term minimum unit, died after contracting the virus.⁴⁴ Mr. Bueno was scheduled to be released from prison in just three months.⁴⁵

To contain spread of the virus at CRCC, DOC has resorted to measures that severely restrict the movement of residents at the facility

⁴¹ *supra* note 22.

⁴² *supra* note 5.

⁴³ *supra* note 6.

⁴⁴ *Id.*

⁴⁵ *Id.*

and deprive them of access to basic human needs. The result has been a terrible decline in conditions.

Abdullahi Noor, an inmate at CRCC, who prior to coming to the United States witnessed unimageable atrocities as a Somali civil war refugee, describes the current conditions at the prison as “horrendous.”⁴⁶ Mr. Noor states that, starting May 29, the prison population was put on 23-hour per day lockdown.⁴⁷ Jason Streiff, another person in prison at CRCC, has been locked down in his cell since June 11.⁴⁸ Initially, he was locked in his cell with his three cellmates for 48 hours. A few days later, the prison allowed people out of their cells for 20 minutes per day.⁴⁹ Currently, people in prison at CRCC are only given 30 minutes per day

⁴⁶ Declaration. of Abdullahi Noor (Noor Decl.) at PSD 736, ¶ 3; *see also* Declaration of Jason Streiff (Streiff Decl.) at PSD 741, ¶ 3.

⁴⁷ Noor Decl. at PSD 736, ¶ 3.

⁴⁸ Streiff Decl. at PSD 741, ¶ 3.

⁴⁹ *Id.*; *see also* Office of the Corrections Ombuds, Follow-up Monitoring Visit to Coyote Ridge Corrections Center (June 12, 2020) (“June 12, 2020 OCO CRCC Report”), *available at* <https://oco.wa.gov/sites/default/files/CRCC%20Rapid%20Monitoring%20Visit%20June%2012%202020.pdf> (includes DOC’s June 19, 2020 response).

out of their cells.⁵⁰ DOC has not provided people with access to exercise or fresh air outside for several weeks.⁵¹

Mr. Noor shares a cell with three other people, and there is no toilet or water in the cell.⁵² There is no opportunity to social distance in the cell because it is very small, with two sets of bunk beds and a table in between the bunks.⁵³

According to declarants, during their 30 minutes out per day, people have to use this time to choose between using the toilet, taking a shower, making phone calls, getting water and ice, using the microwave, and cleaning their cells.⁵⁴

Access to the bathroom is severely restricted. If people want to use the restroom, they must put a sign on the cell door and receive permission.⁵⁵ It can take between 45-90 minutes to get permission to use

⁵⁰ *Id.*; Noor Decl. at PSD 736, ¶ 3; Declaration of Andres Ferrer (Ferrer Decl.), at PSD 739, ¶ 2.

⁵¹ Noor Decl. at PSD 736, ¶ 3; Streiff Decl. at PSD 740, ¶ 3.

⁵² Noor Decl. at PSD 736, ¶ 3; Streiff Decl. at PSD 740, ¶ 3.

⁵³ Noor Decl. at PSD 736, ¶ 3; Streiff Decl. at PSD 741, ¶ 5.

⁵⁴ Noor Decl. at PSD 736, ¶ 3; Streiff Decl. at PSD 741, ¶ 3; Ferrer Decl., PSD 739, ¶ 2.

⁵⁵ Noor Decl. at PSD 736, ¶ 7; Streiff Decl. at PSD 741, ¶ 7; Declaration of Nicholas B. Allen in Support of Petitioners' Motion to Submit Additional Evidence in Support of Petition for Writ of Mandamus, Motion to Expedite Review, and Motion for Appointment of ER 706 Expert ¶ 6 (the restrictions CRCC has placed on the incarcerated population has also significantly affected counsel for Petitioners' ability to hold legal calls with residents of CRCC. Due to these severe restrictions, counsel was unable to complete declarations with other people at the facility who similarly spoke of awful conditions at CRCC).

the bathroom.⁵⁶ On one occasion, Mr. Noor had to wait almost three hours before a staff member gave him permission to use the restroom.⁵⁷ On other occasions, he has had to urinate in a small coffee bottle because of the long wait times to use the bathroom. As a result, sometimes has soiled himself.⁵⁸

When Mr. Noor soils himself, it impacts his ability to practice his religion. He is a devout Muslim and by obligation, must pray five times each day.⁵⁹ As a Muslim, before presenting himself to God during his prayer ritual, he must be clean and wear good clothes.⁶⁰ He has to make ablution and wash his hands, face and legs to pray.⁶¹ This practice is impossible if he has soiled his clothes and lacks access to fresh water

⁵⁶ Noor Decl. at PSD736, ¶ 7; Streiff Decl. at PSD 740, ¶ 7.

⁵⁷ Noor Decl. at PSD 736, ¶ 7.

⁵⁸ Noor Decl. at PSD 736-737, ¶¶ 7-8; Streiff Decl. at PSD 741, ¶ 8; *see also* Ashley Hiruko, “*Coronavirus cases pass 100 at Coyote Ridge prison in eastern Washington*,” KUOW (June 15, 2020) (reporting that inmates who live in dry cells have been forced to urinate in bottles because they are not allowed out of their cells in time to use the restroom).

⁵⁹ Noor Decl. at PSD 737 at ¶ 9.

⁶⁰ *Id.*

⁶¹ *Id.*

during the day.⁶² When he has complained about this to staff, he has been told that no one can help him.⁶³

According to Mr. Noor, his cellmates have also soiled themselves due to the lack of bathroom access.⁶⁴ He has a cellmate who has been sick with cancer and has defecated on himself due to cell restriction.⁶⁵ Consequently, this creates a very bad smell in the cell.⁶⁶

People who live in “wet cells” describe similarly awful conditions. Although these individuals have access to water in the cells, the quality of the water is bad; it is lukewarm, cloudy, has a bad taste, and seems unsafe to consume.⁶⁷ However, given the poor conditions in the prison and lack

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at ¶ 8.

⁶⁵ *Id.*

⁶⁶ *Id.*; *see also* Streiff Decl. at PSD ¶ 8 (explaining that he and his cell mates all have had to urinate in small bottles due to limited access to a toilet, which creates a bad smell inside the cell).

⁶⁷ Ferrer Decl., at PSD739, ¶ 3.

of access to filtered water and ice in the common areas, people have no choice but to drink the water.⁶⁸

Food conditions are also appalling. While people are supposed to get two hot meals every day, by the time it is delivered to the cells it is cold.⁶⁹ Access to water is also very limited.⁷⁰

People in the prison at CRCC also report lack of access to medical and mental health care. The only steps medical is currently taking to treat the prison population are daily temperature checks.⁷¹ Access to care for non-COVID-19 medical issues has not occurred.⁷² CRCC staff recently expressed concerns to the Office of the Corrections Ombuds (OCO) about the aging population at CRCC and the need for more mental health staff.⁷³

⁶⁸ *Id.*

⁶⁹ Noor Decl. at PSD 736, ¶ 4; Ferrer Decl. at PSD 739, ¶ 4; Streiff Decl. at PSD 741, ¶ 4.

⁷⁰ Noor Decl. at PSD 736, ¶ 4; Streiff Decl. at PSD 741, ¶ 4.

⁷¹ Noor Decl. at PSD 736, ¶ 6; Streiff Decl. at PSD 739, ¶ 6.

⁷² Noor Decl. at PSD 736, ¶ 6.

⁷³ *See supra* note 49.

The lack of these supports has led to an incarcerated population that is extremely stressed both emotionally and mentally.⁷⁴

Notably, these efforts have not led to a reduction in the number of cases; each day several new cases among staff and people in prison are reported by DOC.⁷⁵

If DOC had developed a strategy early on to increase testing of the entire prison population it may have been able to reduce spread of the virus at CRCC. However, to date, DOC is still using the same testing protocols it has been using for the last several months: only testing prisoners who are symptomatic. Only after the death of Mr. Bueno did DOC discuss increasing testing of all people at CRCC.⁷⁶ But, DOC is still only working on *developing* a testing plan; none has actually been implemented despite the urgency of the situation.⁷⁷ Despite the alarming speed of the CRCC outbreak – and the clear recommendations for action

⁷⁴ *Id.*

⁷⁵ Adding to the problem is that DOC is still transferring people between facilities. Jim Brunner, “*Department of Corrections accused of retaliating against inmates at Seattle work-release facility over coronavirus protests*,” The Seattle Times (June 4, 2020), available at <https://www.seattletimes.com/seattle-news/crime/departments-of-corrections-accused-of-retaliating-against-inmates-at-seattle-work-release-facility-over-coronavirus-protests/> (explaining how families demonstrated outside Reynolds Work Release in early May after an outbreak of COVID-19 at the facility resulting in 6 individuals being transferred to the Washington Corrections Center and Monroe Correctional Complex).

⁷⁶ See *supra* note 6.

⁷⁷ *Id.*

uniformly identified by experts – DOC continues to delay in taking the critical steps that could flatten the curve.

V. ARGUMENT

A. The Court Should Accept Petitioners' New Evidence, Pursuant to RAP 9.11, Because Doing So Would Serve the Ends of Justice.

The Court “may direct that additional evidence on the merits of the case be taken before the decision of a case on review” if six conditions are met: 1) “additional proof of facts is needed to fairly resolve the issues on review,” 2) “the additional evidence would probably change the decision being reviewed,” 3) “it is equitable to excuse a party’s failure to present evidence to the trial court,” 4) “the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive,” 5) “the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive,” and 6) “it would be inequitable to decide the case solely on the evidence already taken in the trial court.” RAP 9.11(a). While new evidence generally will be accepted only if all six conditions are met, the Court “may waive or alter” these requirements “to serve the ends of justice[.]” RAP 1.2(c); *see also* RAP 18.8(a) (“The appellate court may, on its own initiative or on motion of a party, waive or alter the provisions of any of these rules...”); *State v. Elmore*, 139 Wn.2d

250, 302-303, 985 P.2d 289 (1999) (noting that RAP 9.11's six criteria may be waived if necessary "to serve the ends of justice").

In this RAP 16.2 original action in an appellate court, the RAP 9.11 criteria that reference actions taken, or not taken, in the trial court below are less relevant than the first two criteria: that "additional proof of facts is needed to fairly resolve the issues on review" and that "the additional evidence would probably change the decision being reviewed." Therefore, Petitioners request that the Court grant their motion based on these two factors and waive consideration of the other factors pursuant to RAP 1.2 and RAP 18.8 to meet the ends of justice.

The evidence Petitioners seek to admit makes clear that the circumstances that were in place at the time the court entered its Order denying Petitioners' requests for relief no longer exist. The number of cases and positive test rates within DOC have increased exponentially; people have died; testing is more widely available, yet is not being utilized by DOC; and a large-scale COVID-19 outbreak has unfolded at CRCC. Moreover, the CRCC crisis provides the Court with more than just Respondents' description of policies and its plans for responding to an outbreak; instead, the Court now has the opportunity to see in practice how DOC actually responds to outbreaks: through widespread implementation of near total lockdown in the prisons, the most basic and

inhumane response imaginable. Unsurprisingly, this response has failed to quell the spread of the virus at the prison. But it has resulted in severe deprivation of basic human needs like water, fresh air, and humane toileting options, and created deteriorating and humiliating conditions for people living at CRCC. Equally concerning is that this plan is likely not limited to CRCC.⁷⁸ This *is* DOC's plan for addressing COVID-19 outbreaks and these are the measures that will be used when the next outbreak occurs. Consequently, the CRCC situation impacts everyone in DOC custody.

This additional evidence would probably change the decision being reviewed. At a minimum, the evidence Petitioners seek to submit establishes a significant change in circumstances since the Court entered its Order on April 23, and on that basis, the Court could either appoint an expert to investigate the conditions at CRCC and evaluate the steps DOC has taken to protect people in DOC custody from COVID-19 or order Respondents to produce additional evidence showing how it is meeting its duty to take all necessary steps to protect the health and safety of people in DOC custody from the COVID-19 virus. The Court did so in April when three people tested positive for the disease at Monroe. The same response

⁷⁸ See *supra* note 75. (Describing conditions for person placed in isolation at Monroe after testing positive for COVID-19. The individual was placed in an isolation cell for 22 days and denied books or other ways to pass the time).

from the Court is appropriate now, given the much more severe outbreak occurring at CRCC and the deadly and contagious nature of COVID-19.

Given the damning nature of the evidence, Petitioners also assert that it would likely persuade the Court that that the Respondents' actions constitute deliberate indifference to the COVID-19 risk at DOC facilities and that Petitioners have now shown that the Respondents are currently failing to perform a mandatory, nondiscretionary duty in addressing the COVID-19 risk at DOC facilities.

B. Expedited Consideration of This Motion Pursuant to RAP 17.4(b) Is Appropriate Because of the Life-Threatening Conditions at CRCC.

RAP 17.4 (b) allows a party to seek “expedited consideration” of a motion in an emergency. The party moving for expedited consideration and accelerated review must demonstrate that “adequate relief cannot be given if the motion is considered in the normal course.” RAP 17.4(b). In evaluating the motion, the court should consider factors like the urgency of the request and any consequences of delay. *Cf.* 3 Wash. Prac., Rules Practice, RAP 18.12 (8th ed.) (explaining under a different expedited review procedure that “[t]here are times when it is necessary for the court to act swiftly, particularly in matters relating to affairs of the state ... or when irreparable harm to a party would result from delay”).

Here, the request is unquestionably urgent. It is now common knowledge – even more so than it was when Petitioners initiated this proceeding – that COVID-19 is highly dangerous and life-threatening. Compounding this danger is the growing recognition that Black people, who are disproportionately represented in Washington State’s prison population,⁷⁹ “are contracting SARS-CoV-2 at higher rates and are more likely to die.”⁸⁰ The situation at CRCC is endangering the lives of those incarcerated individuals residing there and the risk increases with each rise in the number of positive cases among those individuals as well as DOC staff.

The outbreak at CRCC also presents a danger to the local hospitals and to the broader local community, which presumably includes CRCC staff and their families, who enter and leave the prison as part of their

⁷⁹ The Court has already taken judicial notice of the “implicit and overt racial bias against [B]lack defendants in this state.” *State v. Gregory*, 192 Wn.2d 1, 22, 427 P.2d 621 (2018) (citing Task Force on Race & the Criminal Justice System, Research Working Group, *Preliminary Report on Race and Washington’s Criminal Justice System* 7 (2011) (“Task Force on Race Report”). This bias has resulted in a prison population where Black people (and Native people) are over-represented in the ranks of those serving the longest sentences, including life sentences, and thus, the population of older people (who are also more vulnerable to COVID-19) in Washington’s prisons is also disproportionately Black and Native people. See Katherine Beckett and Heather Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State*, American Civil Liberties Union of Washington, February 2020, at 27-30, available at <https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state> (last visited June, 22, 2020).

⁸⁰ Clyde W. Yancy, MD, MSc, *COVID-19 and African Americans*, JAMA, published online April 15, 2020, <https://jamanetwork.com/journals/jama/fullarticle/2764789> (last visited June 22, 2020).

workday. Franklin County, where CRCC is located, is currently experiencing some of the highest levels of COVID-19 cases in Washington, along with neighboring Benton County; Yakima County is the only county in the state with a higher per capita rate of individuals testing positive for the virus.⁸¹ Hospitals in the area are overwhelmed caring for COVID-19 patients.⁸²

The consequences of delaying action in this emergency are dire. This recent outbreak also throws into question whether the DOC's actions and procedures in all its facilities have been constitutionally sufficient to address the risk of COVID-19 to Petitioners and all those similarly situated. Further, adequate relief cannot be given if the motion is considered in the normal course and schedule, and consideration of this additional evidence is appropriate under court rules. As detailed above, RAP 9.11 allows for additional evidence to be considered by leave of the court before a final decision. There has been no final decision terminating

⁸¹ See Annette Cary, "New Tri-Cities reopening plan submitted. It steps up plans to fight COVID," Tri-City Herald (June 19, 2020), available at <https://www.tri-cityherald.com/news/coronavirus/article243678072.html> (Benton and Franklin counties among just three counties in Washington not yet approved to move out of Phase 1 of reopening; counties were far from meeting targets, including having too many new COVID-19 cases),

⁸² See Annette Cary, "Tri-Cities death toll reaches 96. COVID cases spike again, fueling Father's Day worries," Tri-Cities Herald (June 19, 2020), available at <https://www.tri-cityherald.com/news/coronavirus/article243662742.html> (hospitalizations remain high in Benton and Franklin County, accounting for 75 of the 242 patients statewide hospitalized with confirmed cases of COVID-19).

review in this case.⁸³ As such, this case is still active, and an emergency motion to consider this additional evidence and for appointment of an ER 706 expert is the only way Petitioners can seek adequate relief in this unprecedented situation. Waiting for an order terminating review, with no required deadline, so that a RAP 12.4 motion for reconsideration can be filed is insufficient in these emergency circumstances.

C. Appointment of an ER 706 Expert Is Appropriate and Necessary.

ER 706 authorizes courts to appoint experts, either on the court's own motion, or on a party's motion requesting the court "enter an order to show cause why expert witnesses should not be appointed[.]" ER 706(a). The role of a court-appointed expert is to investigate facts on the court's behalf, to assist in understanding the evidence and help determine facts at issue. *See, e.g. Delany v. Canning*, 84 Wn. App. 498, 506, 929 P.2d 475 (1997) (holding trial court did not err by appointing accountant as an expert, pursuant to ER 706, to "reconstruct the financial affairs of the partnerships" in dispute between business partners).

Federal courts⁸⁴ have held that appointment of a Rule 706 expert is appropriate when a case raises "important questions regarding the

⁸³ Letter from Deputy Clerk, Wash. Sup. Ct. No. 98317-8 *Colvin v. Inslee*, (May 8, 2020).

⁸⁴ Federal Rule of Evidence 706 is substantively similar to ER 706, with some slight differences regarding expert compensation, and decisions interpreting the federal rule can

plaintiffs’ constitutional rights[.]” including cases involving the rights of people incarcerated in correctional institutions. *See, e.g., Willis v. Palmer*, 192 F. Supp. 3d 973, 976 (N.D. Iowa 2016) (holding appointment of expert to “help [the court] resolve the dispute” regarding several issues, including whether state hospital’s treatment program for people convicted of sex offenses committed to civil confinement at state hospital violated constitutional standards, was warranted); *Morales Feliciano v. Rosselló González*, 13 F. Supp. 2d 151, 155 (D. Puerto Rico 1998) (holding that correctional system violated individuals’ constitutional rights by failing to provide adequate medical care; to assist in its deliberation, court appointed Rule 706 expert “to prepare a report that would update the record in this case and document the state of compliance with the court’s order”).

Here, appointment of a neutral, public health expert to investigate the conditions at CRCC and evaluate the steps DOC has taken, or failed to take, to protect the health and safety of the individuals incarcerated there, in response to the current outbreak, would provide the Court with an on-the-ground report of conditions at CRCC. Such a report would assist the Court in determining whether Respondents’ COVID-19 response plan, and

be treated as persuasive authority. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989) (“Washington courts treat as persuasive authority federal decisions interpreting the federal counterparts of our own court rules”).

the prison conditions that have resulted as a consequence of that “plan,” are constitutionally sufficient.

In the Court’s April 10, 2020 Order on Petitioner’s Emergency Motion to Accelerate Review and for Immediate Relief, the Court ordered Respondents to submit a report to the Court describing “all steps that have been taken” to “protect the health and safety of the named petitioners and all [DOC] inmates in response to the COVID-19 outbreak” and to describe Respondents’ “emergency plan for implementation[,]” with a supplemental report to follow.⁸⁵ Notwithstanding Respondents’ representations in those reports, submitted over two months ago, and the plan for implementation described therein, a public health emergency exists at CRCC, which has already resulted in one avoidable, unacceptable death.

In *Morales Feliciano*, cited above, the court-appointed expert found that ““there is virtually no likelihood that the defendants, **left to their own devices**, will ever achieve compliance with the court’s orders in the areas of medical and mental health care or will ever provide services in these areas that comport with even the most basic constitutional requirements.”” 13 F. Supp. 2d at 154 (emphasis added). Similarly, here,

⁸⁵ April 10, 2020 Order at 2.

while the Court could certainly require Respondents to submit another supplemental report, to address the emergency conditions at CRCC, the changed circumstances described herein demonstrate that reporting by a neutral expert, with expertise in public health, is now required, to avoid the crisis at CRCC from occurring at another DOC facility. If “left to their own devices,” there is no assurance that Respondents will fulfill the Court’s April 10 order to “take all necessary steps” to protect people in DOC custody from COVID-19.

VI. CONCLUSION

This Court has previously exercised its power to order the Governor and DOC to immediately exercise their authority “to take all necessary steps to protect the health and safety” of all persons in DOC custody in response to the COVID-19 outbreak. The Court’s subsequent April 23 Order denying Petitioners’ requested relief was based “on the record presented.”

Now, with a positive test rating of 19.2% within DOC facilities, it is imperative for the Court to again exercise its power to serve the ends of justice. Petitioners respectfully request that this Court expedite review of this motion, grant Petitioners’ motion to admit additional evidence, reevaluate its April 23, 2020, Order in light of this new evidence, and appoint an expert to investigate and report to the Court to ensure that DOC

is meeting its obligations to protect all people incarcerated in DOC facilities from COVID-19.

RESPECTFULLY SUBMITTED this 23rd day of June, 2020.

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