NO. 98317-8

SUPREME COURT OF THE STATE OF WASHINGTON

SHYANNE COLVIN, et al., Petitioners, v. JAY INSLEE, et al., Respondents.	RESPONSE TO PETITIONERS' EMERGENCY MOTION TO ACCELERATE REVIEW, FOR APPOINTMENT OF A SPECIAL MASTER, AND FOR IMMEDIATE RELIEF

I. IDENTITY OF RESPONDENTS

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

II. INTRODUCTION

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

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

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

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

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

III. FACTS

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

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

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

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

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

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

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

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

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

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

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

IV. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

RESPECTFULLY SUBMITTED this 10th day of April 2020.

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

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