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No. 99344-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

Robert R. Williams,

Petitioner.

AMICI CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, COLUMBIA LEGAL SERVICES, WASHINGTON DEFENDER ASSOCIATION, AND KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

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Table of Contents

I. Table of Authorities

i. Washington Supreme Court Decisions

ii. Decisions of the Court of Appeals

iii. United States Supreme Court Decisions

iv. Federal Decisions

v. Other State Court Decisions

vi. Washington State Constitution

vii. United States Constitution

viii. United States Code

ix. Other Authorities

I. IDENTITY AND INTEREST OF *AMICI*

The identity and interest of *amici* are set forth in the Motion for Leave to File that accompanies this brief.

II. ARGUMENT

In The Context of This Case, Article I, Section 14 of the Washington Constitution Should Be Independently Interpreted to Prohibit Objective Cruelty and Lead to Mr. Williams' Release.

i. Introduction

This Court has often found that Washington's Constitution, Article I, section 14's ban on "cruel punishment" is more protective than the federal Eighth Amendment's prohibition of "cruel and unusual" punishments. *See, e.g., State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000). The Court should similarly hold here that the state provision is more protective in the context of Mr. Williams' challenge to being confined in prison at extreme risk of death or very serious illness.

The Court should independently interpret Article I, Section 14 in the present case for two reasons. First, it should do so because, as the Court of Appeals found, analysis of the *Gunwall* factors leads to that conclusion. Second, for the reasons given below, the Court should also interpret the state Cruel Punishment Clause independently because the current federal interpretation of the Eighth Amendment does not

sufficiently protect Washingtonians from the core evil that Article I, Section 14 protects against: objectively cruel punishment.

We respectfully urge that in considering the constitutional requirement to avoid "cruel" punishment in the present context, the Court should establish a standard based on the objective cruelty of the specifics of a prisoner's sentence and incarceration. We also urge the Court to decline the State's invitation to dilute the protections of the Cruel Punishment Clause by adopting the current Eighth Amendment standard, which does not adequately protect against objectively cruel punishment. Finally, we suggest adoption of Williams' proposed standard, as it is based on appropriate Article I, Section 14 principles as applied to vulnerable groups at high risk in prison due to the pandemic. The application of these principles should lead the Court to order Williams' release to home confinement.

ii. The Touchstone is Objective Cruelty.

This Court has established a clear duty for the courts of Washington to look first to the Washington State Constitution even when there are analogous state and federal provisions in order to ensure that Washington residents are provided the extra security that the state constitution often provides. *State v. Gregory*, 192 Wash.2d 1, 14-15, 427 P.3d 621 (2018) and cases cited therein. In terms of fulfilling this duty in

the present case, this Court in *State v. Fain*, 94 Wn.2d 387, 393, 617 P.2d 720 (1980) stated an obvious but crucial starting point for interpretation of Wa. Const., art I, §14's prohibition on "cruel punishment:" "[T]he task before us is to decide whether Fain's sentence is 'cruel' within the meaning of the Washington Constitution."

The Court of Appeals undertook this task by analyzing the factors set forth in *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986) and this Court's art. I, §14 cases. *In re Personal Restraint of Williams,* 15 Wn. App. 2d 647, 665-670, 476 P.3d 1064, 1076-1078 (2020). That court correctly concluded that in the context of this case, all six *Gunwall* factors effectively support independent interpretation.[1]

Whether or not the Court considers it necessary to address the *Gunwall* factors, however, the Court can and should look to the fundamental meaning of the words in the constitutional provision at issue. Thus this Court should carefully analyze the constitutional meaning of the operative words "cruel punishment" in Article I, section 14, as *Fain*

[1] We agree with Mr. Williams, however, that in determining the correct art. I, sec. §14 test, Mr. Williams' proposed test and not the test that the Court of Appeals formulated should be employed, and Mr. Williams should be released to home confinement. We also agree with Mr. Williams that even if the Court of Appeals' test is found to be the correct test, application of that test should also lead to Mr. Williams being granted home confinement.

instructs. This Court has employed a number of concepts to assist in this task, some, but not all, borrowed from federal cases. For example, in *Fain,* this Court applied the state provision to hold the life sentence at issue "entirely disproportionate" to the offenses that led to it (94 Wn.2d at 402), and quoted the U.S. Supreme Court's statement that the Eighth Amendment constitutional review of punishments "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[2] In *State v. Bartholomew,* 101 Wn.2d 631, 640, 683 P.2d 1079 (1984), the Court employed the phrase "lacks fundamental fairness." In *State v. Gregory*, 192 Wn.2d 1, 427 P.2d 621 (2018), the Court invalidated the death penalty statute because, upon examination of objective evidence, death was imposed in an arbitrary and racially biased manner and thus caused purposeless and needless pain and suffering.[3] In *State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343 (2018), the Court acknowledged that the individualized "grossly disproportionate" test of *Fain* had been applied to some sentences, but determined that as to

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[2] *Trop v Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 599, 2 L.Ed.2d 630 (1958).

[3] We support the Brief of Amicus Curiae of Fred T. Korematsu Center For Law and Equality examining how disproportionate rates of incarceration of Black people and other people of color fuel unconstitutional arbitrariness in who is exposed to the danger of infection from the pandemic.

prisoners sentenced to life without parole for crimes committed as juveniles, a "categorical" approach weighing life without parole versus the scientifically-established immaturity of all youth was appropriate. In other words, art. I, §14 operated as a "safety valve" that required consideration of mitigation to avoid the imposition of "cruel" punishment.

The concepts that this Court has used in a variety of cases interpreting what is "cruel" contain different words, but all have two common characteristics. One, they attempt to analyze what is *objectively* cruel enough to violate the constitution. Two, the tools used to determine what is unconstitutional cruelty do not include any inquiry into the intent or mindset of officials carrying out the punishment.

No search for pure objectivity can be entirely successful, but it is clear that this Court has sought to interpret "cruelty" under art. I, §14 as objectively as possible. Because, as is next shown, the current Eighth Amendment test adds requirements that are not helpful in determining the meaning of "cruelty" and create unnecessary barriers to relief from cruel punishment, this Court should determine this case based on an independent interpretation of art. I, §14 that rests solely on the question of objective cruelty.

iii. The Current Federal Standard Does Not Adequately Protect Prisoners Against Objective Cruelty.

This Court has sometimes exercised the power of independent state constitutional interpretation when federal constitutional law does not provide adequate protection for the values underlying the state provision at issue. *See State v. Boland*, 115 Wn.2d 571, 577-580, 800 P.2d 1112 (1990) (holding the police violate Const. art. I, § 7 privacy rights when they search a person's curbside garbage, even though the United States Supreme Court held to the contrary when applying the Fourth Amendment). *See also, State v. Roberts*, 142 Wn.2d at 506 (holding that jury instructions in a death penalty case were unconstitutional not only under federal law but "especially […] in light of our repeated recognition that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment…"). Because current federal interpretation of the Eighth Amendment does not adequately protect Washington residents from punishments that are objectively cruel, this Court should decline to adopt the federal standard in the present context.

For many years, the United States Supreme Court interpreted the Eighth Amendment employing only concepts relating to objective cruelty that were essentially the same as this Court has employed in the cases

discussed above. However, in 1991, a bare majority of that Court grafted onto Eighth Amendment review in all cases claiming cruel incarceration a requirement that prisoners prove that their jailers have what amounts to evil intent. The mental state chosen for prisoners to try to prove was "deliberate indifference" to the plight of the prisoner. *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). Speaking for four Justices, Justice White strenuously objected to adding an elusive search for the mental state of the jailer as "inconsistent with our prior decisions" (*Id.* at 306) that focused on objective cruelty:

> …[Previous authority] makes it crystal clear, therefore, that Eighth Amendment challenges to conditions of confinement are to be treated like Eighth Amendment challenges to punishment that is "formally meted out *as punishment* by the statute or the sentencing judge," *ante,* at 2325—we examine only the objective severity, not the subjective intent of government officials.

Id. at 309 (emphasis in original). Justice White's opinion concluded with great concern about the human consequences of adding this difficult barrier to relief from inhumane treatment:

> In my view, having chosen to use imprisonment as a form of punishment, a State must ensure that the conditions in its prisons comport with the "contemporary standard of decency" required by the Eighth Amendment. See *DeShaney* v. *Winnebago Cty. Dept. of Social Services,* 489 U. S. 189, 198-200 (1989). As the United States argues: "[S]eriously inhumane, pervasive conditions should not be insulated from constitutional challenge because the officials managing the institution have exhibited a conscientious concern for ameliorating its problems, and have made efforts (albeit unsuccessful) to that end." Brief for United States as *Amicus*

> *Curiae* 19. The ultimate result of today's decision, I fear, is that "serious deprivations of basic human needs," *Rhodes* [*v. Chapman,* 452 U.S. 337 (1981)], at 347, will go unredressed due to an unnecessary and meaningless search for "deliberate indifference."

Id. at 311.

The Court later went even further in making the proof of deliberate indifference extremely difficult in *Farmer v. Brennan,* 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). There was a split of authority regarding whether the mental state that needed to be shown was "objective" deliberate indifference, or "subjective" deliberate indifference. The Court determined that it would be subjective deliberate indifference, the more difficult to prove, *i.e.* " …the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference…" 511 U.S. at 837. After *Farmer*, prisoners in federal court cannot have awful cruelty stopped "merely" by proving "seriously inhumane" conditions; the prisoner must also try to prove the subjective state of mind of those who administer prisons. This creates a harmful and unnecessary barrier to freedom from objectively cruel imprisonment.

As Justice White's trenchant opinion in *Wilson* makes clear, the entire point of a challenge to cruel imprisonment is the claim that the punishment has gone beyond the reasonable consequences of a prison

sentence and veered into something grossly unfair and inhumane. There is no more reason to inquire into the mental state of the jailer of a person seeking to be freed from ongoing cruel punishment than there was to inquire into the mind of a judge meting out a sentence that was later held unconstitutionally cruel. The touchstone in all cases is whether the prisoner is now objectively suffering cruel punishment.[4]

Justice White's critique of deliberate indifference has been echoed by many commentators. *See, e.g.*, Philip M. Genty, *Confusing Punishment With Custodial Care: The Troublesome Legacy of Estelle v. Gamble*, 21 Vt. L. Rev. 379 (1997), setting out multiple reasons why this element should never have been imported into analysis of constitutional claims seeking relief from cruel conditions:

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[4] The State claims that Washington courts have "consistently" followed federal standards regarding cruel punishment in prisons. Department of Corrections' Supplemental Brief at 9-10. But the two cases the State cites are from the 1970's, well before the decision in *Wilson v. Seiter* applied deliberate indifference to all Eighth Amendment challenges to the plight of prisoners. We know of no Washington cases considering whether to import the deliberate indifference standard into state constitutional jurisprudence.

The State (at 9) also cites a Pennsylvania Supreme Court decision that found that a state "cruel punishments" clause is co-extensive with the Eighth Amendment, but that case dealt with life without parole sentences for juveniles and so was not only decided in a different context but also was decided contrary to this Court's later decision in *State v. Bassett. See Commonwealth v. Batts,* 620 Pa. 115, 66 A.3d 286 (2013).

> The Court's shift to an analysis which focuses on the motivations of correctional actors in prison condition cases is problematic in at least three respects: first, the theoretical premise upon which the imposition of an intent requirement is based is wrong; second, an intent-based standard is unworkable in cases involving challenges to conditions of confinement; and, third, the use of an intent-based standard is inherently weighted against prisoners.

Id. at 390; *see* 390-395 (elaborating each of the reasons). The article advocates an "impact-based" instead of an "intent-based" standard, just like the objective cruelty standard we urge should continue to apply for art. I, §14 analysis. *See also* Lori A. Marschke, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. 487, 531 (2004)("… almost any claim of cruel and unusual punishment can be circumvented so long as prison officials can show some good faith basis for their actions or omissions…"); Holly Boyer, *Home Sweet Hell: An Analysis of the Eighth Amendment's 'Cruel and Unusual Punishment' Clause as Applied to Supermax Prisons*, 32 SW. U. L. REV. 317, 332 (2003)("deliberate indifference" is meaningless in situations in which the harm is not the result of specific decisions by local prison administrators).[5]

[5] The objective measures of cruelty applicable in this context are grounded in basic principles of human rights and dignity, and so should also be informed by relevant principles of international law, as outlined in the Amicus Brief of the Seattle Chapter of the National Lawyers Guild.

All of these materials raise some basic questions: What does the mental state of the jailer actually have to do with determining whether punishment is "cruel" in the constitutional sense, when the petitioner is asking the court to simply end the claimed cruelty? How can the subjective mental state of entire prison system administrations as a whole, or even local prison administrations, be rationally determined? And in the present context of a pandemic that has entered the prison, how could the mental state of prison administrators matter when they made no decision at all that led to the danger springing from a virus? We respectfully suggest that, as Justice White predicted, when prisoners claim that their imprisonment is or has become cruel, especially in the present context, the search for subjective deliberate indifference is not only futile, but directly harmful as it can and does leave prisoners subject to objective cruelty.[6]

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[6] It is possible that a mental element could be appropriate in determining whether damages should be awarded for cruel treatment in prison. When a court is asked to require individuals to pay money for specific actions they took, their state of mind is often relevant. Indeed, the deliberate indifference standard itself was first introduced into Eighth Amendment law in a damages complaint against three individuals, alleging that they provided inadequate medical care. *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). The Court justified the adoption of the deliberate indifference standard in the context of that damages case as a way of distinguishing denial of medical care rising to a constitutional violation from "mere" medical malpractice. But for all of the reasons given above, the *Wilson v. Seiter* majority's importation of the deliberate indifference standard established in a damages case into cases seeking an

This Court's decision in *Colvin v. Inslee*, 195 Wn.2d 879, 467 P.3d 953 (2020) demonstrates how the deliberate indifference standard focuses courts away from the most important issues. In applying the Eighth Amendment standard, the Court specifically found that "…the petitioners face a substantial risk of serious harm…" and "…the risk of a COVID-19 outbreak is undeniably high in these facilities and under these conditions…" But then the Court realized this objectively awful situation was "not sufficient" for prisoners to prevail because of the need to show subjective deliberate indifference, *i.e,* "the official must know of and disregard the risk…" 195 Wn.2d at 900, citing *Farmer*. The Court determined that because DOC had done a number of things to allegedly mitigate the risk, there was no showing of deliberate indifference. And, consistently with the federal standard, the Court simply stopped there. *Id.* at 901. Because the deliberate indifference standard diverted and stopped the analysis, the Court did not ask the most important question: Whether, *even after DOC's measures*, the "substantial risk" and "undeniably high" risk of outbreak remained.

This shows how adoption of the current federal standard in the present case would lead this Court astray from the animating principles of

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end to ongoing cruel punishment in prison was ill-considered and should not govern the application of Washington's Cruel Punishment Clause.

the Cruel Punishment Clause. In *Colvin*, because of the distraction of the deliberate indifference standard, the Court did not return to the fundamental constitutional question whether despite DOC's efforts, the petitioners remained at objectively unreasonable risk of harm amounting to unconstitutional cruelty. And the feared outbreaks discussed in *Colvin* have now occurred, leaving vulnerable groups at even greater risk. The record in the present case shows that due to the nature of the pandemic coupled with the reality of prison life, DOC's measures did not and likely cannot adequately reduce that risk for prisoners who are especially vulnerable because of race, age, disability or other vulnerability.[7] The risk, and thus their cruel punishment, remains.

iv. DOC's Arbitrary Denial of Mr. Williams' Request For Release To Home Confinement Leaves Him Subject to Objectively Cruel Incarceration That Must Be Remedied.

As Mr. Williams' counsel has documented, DOC has for unfathomable reasons denied Mr. Williams' request for release to home confinement. There is no need to determine the exact state of mind of the decisionmakers regarding this decision, as the result is objectively cruel incarceration arbitrarily and purposelessly imposed. As in other cases, art.

[7] *See* Brief of *Amici Curiae* Public Health and Human Rights Experts.

I, §14 provides the mechanism for the courts of this State to end this cruel punishment if the Executive Branch will not.

Through independent interpretation of the Cruel Punishment Clause, this Court has ordered death sentences ended and prohibited judges from imposing the sentence of life without parole for people who committed crimes while juveniles. *Gregory*; *Bassett*. A prisoner serving a prison term based solely on a sentence that is deemed cruel punishment would certainly be ordered immediately released. A sentence that becomes cruel after entry into prison as Mr. Williams has experienced must also be remedied.

Releases from prison are a proper remedy when cruel punishment cannot be abated absent release, even of many prisoners. *Brown v. Plata,* 563 U.S. 493, 502, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011) (court-imposed limit on prison population held "necessary to remedy the violation of prisoners' constitutional rights" in case proving needless suffering and death due to systemic breakdowns of medical and mental health care). Though the Executive Branch is primarily charged with managing prisons and courts should not lightly intervene, "Courts nevertheless must not shrink from their obligation to 'enforce the constitutional rights of all 'persons,' including prisoners.'" *Id.* at 511,

quoting Cruz v. Beto, 405 U.S. 319, 321, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972). *See* also, *Colvin,* 195 Wn.2d at 966 (González, J., dissenting).

Judicial intervention based on the Constitution is especially necessary here because there is no other plausible or effective remedy available to Mr. Williams once DOC denied his application. There is no established system in Washington, such as there is in the federal system, for sentencing courts to take extraordinary circumstances into account and order release to less dangerous confinement or probation when continued incarceration becomes incurably cruel because of the prisoner's significant medical risks.

As the DOC has refused to release even prisoners at high risk like Mr. Williams, so officials in the federal prison system—despite virtually being ordered to place many prisoners on home confinement—have been very reluctant to take action despite horrific COVID-19 outbreaks and a shocking number of deaths.[8] Whatever the motives of prison officials,

[8] Roni Caryn Rabin, *Vulnerable Inmates Left in Prison as Covid Rages,* N.Y. Times, Feb. 27, 2021 https://www.nytimes.com/2021/02/27/health/coronavirus-prisons-danbury.html?searchResultPosition=1 (viewed March 2, 2021).

many, as in the present case, have not acted even in extreme circumstances.[9]

But in the federal system, sentencing courts are specifically empowered to reduce sentences and to convert sentences of incarceration to release or other forms of confinement if, in part, "extraordinary and compelling reasons warrant such a reduction," 18 U.S.C. § 3582(c)(1). Prior to 2018, courts could only grant such requests upon motion by the Bureau of Prisons (BOP). But under the First Step Act, enacted in 2018, a court may also grant a sentence reduction by motion of the defendant filed 30 days after submitting the request to the warden. 18 U.S.C.§ 3582(c)(1)(A). Many federal sentencing courts have granted motions for compassionate release even when denied by the warden and opposed by the government, and have ordered significant sentence reductions or

[9] DOC very rarely grants extraordinary medical placement. In a seven-year timeframe, only 45 inmates were granted EMP. *See* Wash. Dep't. of Corr, *Extraordinary Medical Placement Report for CY 2012-2016,* https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=EMP%20CY2016_%20%28002%29_ab1e01a1-dff4-4bb8-b1d3-d4117820ad15.pdf (viewed March 2, 2021); Wash. Dep't. of Corr, *Extraordinary Medical Placement Report for CY 2017,* https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=EMP%20CY2017%20Report_6b7b83fc-8092-424d-805a-3c300d4d6034.pdf (viewed March 2, 2021); Wash. Dep't. of Corr, *Extraordinary Medical Placement Report for CY 2018,* https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=EMP%20Report%20CY2018_1426077e-20d2-4654-96e1-ef73f078261c.pdf (viewed March 2, 2021).

modifications for prisoners at high risk from prison environments dangerous to their health due to the pandemic.[10]

It took authorizing court review of release for vulnerable federal prisoners to receive meaningful consideration of the very serious dangers presented by COVID-19. Significantly, the courts reviewing these vulnerable prisoners' cases are not required to inquire into the intent of the prison official; the courts simply look at the danger to the prisoner and whether the criteria are met. These courts are effectively empowered to determine if continued incarceration would be unacceptably cruel, and have exercised that power.

The compassionate release statute provides a safety valve for inmates who might continue to face cruel punishment in the federal system if they had to seek release under the standard of subjective deliberate indifference. Without an objective cruelty standard that Washington courts are required to similarly apply, vulnerable Washington

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[10] *See, e.g., United States v. Sandoval*, No. CR14-5105 BHS, 2021 WL 673566 (W.D.Wa. February 22, 2021), and the compassionate release cases catalogued therein. The court in *Sandoval* granted compassionate release even though the prisoner both had previously contracted COVID-19 and had been vaccinated, because he still suffered the effects of his infection and remained at very high risk because of serious medical conditions, much like Mr. Williams in the present case.

State prisoners facing serious danger from the pandemic will not have the protection the Cruel Punishment Clause promises them.

In applying art. I, §14, this Court should employ principles of objective cruelty and adopt the standard suggested by Mr. Williams for courts to review continued incarceration, based on actual risk of COVID to particular groups based on race, age, and disability/medical vulnerability. People in these groups have no alternative but to turn to the courts and this Court should respond with a constitutional standard that addresses the objective danger they face from the pandemic while they remain in prison and allow those at greatest risk, such as Mr. Williams, to be released.

v. Conclusion

The record in this case shows that Mr. Williams remains in great danger. The Court should review these facts unfettered by the insufficiently protective federal constitutional standard, and decide the present case by reference to the fundamental objective principles contributing to the constitutional meaning of "cruel punishment" as enshrined in the Washington Constitution. Application of those principles should lead to Mr. Williams' release to home confinement.

Respectfully submitted March 2, 2021,

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on March 2, 2021, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 2nd day of March, 2021.

s/Amy Muth
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