NO. 99344-1

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF

ROBERT R. WILLIAMS

Petitioner,

RESPONSE OF THE DEPARTMENT OF CORRECTIONS TO THE BRIEFS OF AMICI CURIAE

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I. INTRODUCTION

A variety of organizations have filed amici briefs on Williams' behalf, but they provide little to no legal support for Williams's claims. First, these amici briefs raise new arguments and issues that have not been raised by Williams in his petition and were not briefed by the parties. This Court has on numerous occasions stated that it will not consider arguments raised only by amici. Second, amici raise arguments about the difficulty of responding to COVID-19 or criticisms of the criminal justice system as a whole. Such policy issues are not presented by this case where Williams's claims are based on his own individual arguments and he does not challenge his conviction for attempted murder. Such policy arguments should be addressed to the Legislature and provide no support for Williams's individual claims here. Third, even if the Court considers newly raised arguments, the Court should reject them because they are unsupported by precedent or the record in this case, and do not provide a basis for relief. Indeed, the briefs largely ignore the individual circumstances of Williams, including his recent vaccination, and do not appears to leave any room to consider the potential public safety concerns of releasing individuals incarcerated for serious violent offenses.

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II. ARGUMENT

A. The Court Should Not Consider Arguments Raised Only by Amici

This Court will generally not address arguments raised only by amici. *See Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003). This Court has refused to consider issues raised only by amici on numerous occasions. *See, e.g.*, *Fields v. Dep't of Early Learning*, 193 Wn.2d 36, 41 n.1, 434 P.3d 999 (2019); *City of Seattle v. Evans*, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015). This rule is designed to ensure that issues are appropriately raised and adequately briefed before being addressed by this Court. *See State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988).

Almost all of the arguments made by the amici are arguments and issues that have not been raised by Williams. Indeed, some of the amici, like the Seattle Chapter of the National Lawyers Guild (NLG) expressly recognize that it is raising arguments not made by the parties. NLG Br. at 2. The brief filed by the American Civil Liberties Organization of Washington, Columbia Legal Services, Washington Defender Association, and King County Department of Public Defense (collectively "ACLU") proposes a new test based on "objective cruelty" that has never been proposed by Williams or briefed by the parties. ACLU's Br. at 2-5. And the

Fred T. Korematsu Center for Law and Equality raises issues about disparities in the criminal justice system and criminal sentencing. Korematsu Center's Br. at 2-12. Such broad arguments have not been raised by Williams himself and should not be considered by this Court. The application of this rule is particularly appropriate here in light of the expedited timeframe by which the parties have had time to address such novel arguments and issues. The Court should not address novel arguments about the Washington Constitution, which have not been raised by Williams, on such an expedited timeline. Therefore, the Court should not consider the various issues that have been raised only by the amici.

B. The Various Policy Arguments Raised by Amici Are Not Implicated by This Case, Which Concerns Williams's Individual, Current Conditions of Confinement

Before the Court of Appeals, Williams made it clear that he was raising arguments that were specific to him and based on his individualized circumstances. Wash. Court of Appeals oral argument, *In re Williams*, No. 54629-9-II, (Oct. 23, 2020), at 4 min., 38 sec.-43 sec. ("Mr. Williams is not challenging DOC's response to COVID system wide."). That is perfectly understandable because in the context of a conditions-of-confinement case, the focus is on the currently existing conditions. RAP 16.4(c)(6) (posing question of whether conditions "are" in violation of the constitution). Without explaining in any clear manner how such arguments affect the

outcome of this particular case, amici make various policy arguments about the criminal justice system, international law, and the difficulties of managing COVID-19 in prisons. To the extent that those policy concerns are even implicated by this particular case, such concerns are best addressed to the Legislature.

1. The Korematsu Center Raises Broad Questions About the Criminal Justice System That Are Not Implicated in this Case

The Korematsu Center discusses various studies about racial disparities in the criminal justice system generally as well as disparities in the community impact of COVID-19 among certain groups. However, the Korematsu Center candidly recognizes that these disparities have not occurred among inmates in the Washington Department of Corrections (Department or DOC). Korematsu Center's Br. at 4 (recognizing that "Black people in Washington prisons are not at greater risk of getting COVID-19 than are other people in prison"). In the context of this case, that concession undermines any remaining argument about the disparities in the community. Moreover, it is not entirely clear why releasing someone from an environment where racial disparities have not been documented to an environment where significant disparities have been documented, i.e. the community, would address such disparities. In terms of the arguments that the Korematsu Center makes about the racial disparities in the criminal

justice system as a whole, Williams is not challenging his underlying convictions and has not made any showing that he is being treated differently based on his race. As such, regardless of the merit of the Korematsu Center's concerns about structural racism within the criminal process, this case does not present an opportunity to address such issues. Such policy arguments are better made to the Legislature, and are particularly misplaced in a personal restraint petition focusing on Williams's individual circumstances.

2. The National Lawyers Guild Does Not Explain Why or How the Various Sources of International Law Affect the Court's Analysis of the Constitutional Issues

The NLG focuses its analysis on issues of international law and argues that this Court should find that Williams's continued confinement is illegal because it violates international law. NLG's Br. at 2. Even if the Court were to consider these arguments not raised by Williams, NLG fails to show how these sources can aid this Court's analysis. NLG explains that many of the sources of international law upon which it relies have not been ratified by the United States or might not otherwise be binding on the United States. *See, e.g.*, NLG's Br. at 7 (stating that the issue is not one of the binding effect of treaties), at 15 (recognizing that the United States has not ratified the International Covenant on Economic, Social, and Cultural Rights). Furthermore, NLG refers to broad principles found in sources of

international law but has not shown how these broad principles are being violated by Williams's current confinement.[1] For example, the NLG repeatedly references the right to health care but does not appear to acknowledge that Williams has received medical treatment for COVID-19 and his other medical conditions while in Department custody, and continues to have on-going access to health care. Nor has the NLG explained how these international principles should affect the Court's analysis of the constitutional issues or the question about whether article I, section 14 is broader than the Eighth Amendment. The international law issues raised by the NLG are not helpful to resolve this case as a result.

3. The Health Experts Provide No Legal Analysis and No Cogent Discussion of the Risk to Williams in Light of His Vaccination

In a brief nearly identical to one filed in *Colvin v. Inslee*, 195 Wn.2d 879, 467 P.3d 953 (2020), amici Public Health and Human Rights Experts urge the Court to release Williams – who they concede they have not examined – based on generalizations about prison conditions and speculation about the risk Williams may face while incarcerated in a facility they have not visited. Pub. Health Br. at 13-14. They largely ignore the fact that Williams has been vaccinated and that the Department continues to

[1] The NLG repeatedly implies that Williams did not have access to drinking water. NLG's Br. at 8, 13, 17. The NLG does not cite any portion of the record to support this argument. It is unsupported and inaccurate.

vaccinate other inmates and staff, citing only a news article for the proposition that vaccines "may be" less effective against new variants of the virus. Public Health Br. at 8. They also fail to acknowledge any of DOC's significant mitigation efforts, basing their arguments on assumptions and misconceptions about prison conditions that conflict with extensive evidence in the record.

For example, visitors do not pass between communities and DOC facilities; DOC suspended all in-person visitation one year ago, and staff routinely are tested. COA Response Br. at 10; The Department's Motion to Supplement in COA (filed 11/20/20), Ex. 1, Second Dec. of Scott Russell, at ¶ 6. Access to hygiene supplies is not limited; incarcerated individuals have had access to soap, disinfectant cleaners, and supervised access to hand sanitizer during the pandemic. COA Response Br. at 15-16. Staff do not "often only sporadically clean or sanitize high-touch surfaces" – DOC long ago implemented stringent cleaning and sanitizing protocols that have inmates and staff frequently cleaning commonly touched surfaces COA Response Br. at 15. And finally, generalizations about inadequate clinical management of COVID-19 cases in prisons ignore the prompt and effective care Williams received, as well

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as the fact that the mortality rate among the COVID-19 positive incarcerated population is substantially lower than that in the community.[2]

Claims of unlawful restraint must be supported by facts, not speculation or conjecture. *In re Gronquist*, 138 Wn.2d 388, 396, 978 P.2d 1083 (1999). The Public Health and Human Rights Experts offer no facts to aid the Court in deciding this matter. They similarly provide no legal authority or non-conclusory analysis to support their assertion that Williams currently faces heightened risk of further harm and death. Indeed, their brief does not provide any meaningful discussion of the legal questions before the Court. Instead, they merely conclude that *all* high risk individuals should be released to the community without regard to public safety. The Court should reject such an argument.

C. To the Extent That It Is Properly Raised, the Court Should Reject the ACLU's Novel Test

The ACLU's Brief suggests that the Court should focus on "objective cruelty." ACLU's Br. at 2-5. Like Williams's proposed test, the ACLU cannot cite to any authority, nationwide, that adopts its test. Even if the Court were to consider the ACLU's newly raised argument, the ACLU's brief does not provide a clear test nor authority for its adoption, and the

[2] The mortality rate, i.e., the number deaths among those testing positive for COVID-19, in the Department is 0.227%. https://www.doc.wa.gov/corrections/covid-19/data-comparative-jurisdictions.htm. The mortality rate for the community in Washington is 1.5%. https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard

Court should reject it. The ACLU does not provide any workable method or test for reaching a determination about whether something is objectively cruel. This alone provides a basis for rejecting this argument because a party arguing for independent constitutional analysis must adequately explain how the independent interpretation affects the constitutional analysis. *See, e.g.*, *State v. Ramos*, 187 Wn.2d 420, 454, 387 P.3d 650 (2017).

The ACLU's proposed test also suffers from the same fundamental problem that Williams's test does. It does not clearly take into consideration the actions by correctional officials to mitigate a risk of harm. Instead, it would impose some form of strict liability based on the existence of those conditions and regardless of the steps taken to address the conditions. In doing so, it would entangle courts into running the day-to-day operations of the prison system. And the ACLU does not explain how such a test comports with the use of the word "punishment" in article I, section 14. As the United States Supreme Court has recognized, the word "punishment" necessarily requires a mental element: "'The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word . . . .'" *Wilson v. Seiter*, 501 U.S. 294, 300, 111 S. Ct. 2321, 115 L. Ed. 2d 271

(1991) (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652, (7th Cir. 1985)). The ACLU suggests that its interpretation is based on some objective considerations, but it proposes no clear test for courts to determine whether something is "objectively cruel." Without such factors, the test would simply reflect the subjective perspective of an individual judge.

The ACLU also criticizes the fact that the deliberate indifference test is "intent-based."[3] In doing so, the ACLU questions the ability of courts to determine the mental state of prison administrators and expresses the opinion that the intent-based requirement will not lead to an end to objective cruelty. ACLU's Br. at 9-11. The former argument is significantly undermined by the various contexts in which courts are called upon and able to evaluate the actions or mental states of individuals and entities in a variety of contexts. *See, e,g.*, RCW 42.17A.780 (requiring court to evaluate whether Fair Campaign Practices Act violation was intentional); RCW 42.56.565(1) (asking court to evaluate bad faith of agency); RCW 9.95.204(4) (requiring court to evaluate whether agency was grossly negligent). The ACLU does not explain why applying an intent standard is

[3] Curiously, the ACLU appears to acknowledge that prison administrators "made no decision at all that led to the danger springing from the virus." ACLU's Br. at 11. Rather than weighing in favor of finding cruel punishment, this weighs heavily against it. How can the Court find that state officials inflicted "cruel punishment" on an individual when the circumstances were not created by the state and the state is expending significant resources and taking significant steps to attempt to avoid the danger?

more difficult than the range of other circumstances where such standards apply.

In terms of the concern that intent is not required to decide whether something is objectively cruel, this argument demonstrates that the ACLU's interpretation of article I, section 14 would simply read the word "punishment" out of the provision. As the United States Supreme Court recognized in *Wilson*, the infliction of punishment describes some kind of deliberate act. *Wilson*, 501 U.S. at 300. The deliberate indifference standard helps separates accidents from deliberate acts. Having not conducted any analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), the ACLU does not provide a principled basis for the Court to interpret the word "punishment" in a manner so fundamentally inconsistent with United States Supreme Court precedent. To reject an intent-based standard and impose strict liability would expand the provision to apply to situations that cannot be reasonably described as punishment.

The ACLU also claims that the objective cruelty standard is based on early United States Supreme Court precedent. ACLU's Brief, at 6 (claiming that the United States Supreme Court applied an objective cruelty test for many years). But the ACLU does not identify any conditions-of-confinement cases where the United States Supreme Court applied such a standard. The United States Supreme Court adopted a deliberate

indifference standard in 1976 in *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). In that case, Justice Marshall indicated that negligent medical care was not sufficient to constitute an unnecessary and wanton infliction of pain so a higher standard, i.e. deliberate indifference, was required for such claims. *Estelle*, 429 U.S. at 105-06.[4] In other words, the deliberate indifference standard has existed since the first conditions-of-confinement case decided by the Supreme Court. Since that time, federal courts have consistently applied the deliberate indifference standard across numerous conditions-of-confinement cases, and the ACLU points to no evidence that the application of such a standard has led to substandard or inhumane prison conditions. Indeed, elsewhere in its brief, the ACLU relies on federal cases interpreting the Eighth Amendment to support its argument that courts can intervene to release inmates. ACLU's Brief, at 14 (citing *Brown v. Plata*, 563 U.S. 493, 502, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011)).

Like Williams's test, the ACLU proposal is unprecedented. Williams points to no other states that have adopted it. And other states that

[4] The ACLU claims that this standard was adopted due to the claim being premised on the case being a suit for monetary damages. ACLU's Br. at 11 n.6. But the opinion does not support this assertion. The Supreme Court did not discuss the relief being sought at all in its analysis. *Estelle*, 429 U.S. at 99-108. And the lower court opinion makes clear that the incarcerated individual sought monetary relief and injunctive relief. *Gamble v. Estelle*, 516 F.2d 937, 938 (5th Cir. 1975), *reversed by* 429 U.S. 97 (1976).

have generally interpreted their state cruel or unusual punishment clauses to be broader in other contexts, have not done so in the context of conditions-of-confinement cases. *See Johnson v. Wayne Cnty.*, 213 Mich. App. 143, 152-53, 540 N.W.2d 66 (1995); *Inmates of the Riverside Cnty. Jail v. Clark*, 192 Cal. Rptr. 823, 828, 144 Cal. App. 3d 850 (1983).

In addition to the fact that adoption of the "objectively cruel" standard is raised only by amicus, relies on a mistaken analysis of U.S. Supreme Court case law regarding conditions-of-confinement cases, and has not been adopted by any state, there is another reason why this Court should not consider the standard in this case: the ACLU fails to show that requiring Williams to serve the sentence imposed by court would be objectively cruel punishment. When Williams was 65 years old, he brutally attacked his ex-girlfriend, beating her with a metal pipe. *State v. Williams*, 160 Wn. App. 1036, 2011 WL 1004554, at *1 (2011). Williams inflicted serious, life-threatening injuries, and the victim was discovered lying unresponsive and covered in blood. *Id.* at *2. After trial, Williams was found guilty of attempting to murder her and was sentenced to 22.5 years of imprisonment.

The fact that the State is not willing to agree to release Williams prior to the end of his sentence does not suggest such actions are objectively cruel. To the extent that the ACLU's test proposes that release is required

whenever an inmate develops medical risks or issues in prison, ACLU's Br. at 15, this test would require the Department to release a potentially significant number of individuals who, because of age or medical conditions, are medically vulnerable. Like Williams's proposed test, it would fundamentally transform the criminal justice system under the guise of constitutional interpretation. It likewise ignores the important penological interests served by continued incarceration, including not only protecting community safety but serving as justice for the victims of serious crimes, like the brutal crime committed by Williams. Therefore, the Court should reject the ACLU's test that has not been proposed by any party.

III. CONCLUSION

The Court should not entertain the issues raised in the amici briefs because they have not be adequately raised by Williams. To the extent that amici raises issues germane to issues raised by Williams, they do not present a persuasive reason to grant Williams release to Florida.

RESPECTFULLY SUBMITTED this 5th day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the RESPONSE OF THE DEPARTMENT OF CORRECTIONS TO THE BRIEFS OF AMICI CURIAE to be electronically filed with the Clerk of the Court, which will send notification of such filing to the following parties and all other attorneys of record not specifically listed below.

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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.

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

EXECUTED this 5th day of March, 2021, at Olympia, WA.

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