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No. 99344-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In Re the Personal Restraint Petition of

ROBERT R. WILLIAMS,

Petitioner.

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MEMORANDUM OF AMICI CURIAE FRED T. KOREMATSU  
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LIBERTIES UNION OF WASHINGTON, COLUMBIA LEGAL  
SERVICES, SEATTLE CHAPTER OF THE NATIONAL LAWYERS  
GUILD, WASHINGTON DEFENDER ASSOCIATION, AND JOE  
GOLDENSON, M.D., IN SUPPORT OF PETITIONER'S MOTION FOR  
DISCRETIONARY REVIEW

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## IDENTITY AND INTEREST OF AMICI

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

## INTRODUCTION

The explosion of COVID-19 in Washington prisons and the jeopardy it creates for Mr. Williams and others like him who are vulnerable because of age, race, and certain medical conditions lead amici to urge the Court to take review and set an expedited briefing schedule to decide if Mr. Williams is entitled to relief. As of the filing of this memorandum, 3,655 incarcerated people across Department of Corrections (“DOC”) facilities have tested positive for COVID-19, and five have died.<sup>1</sup> Of the 3,655, 1,313 are reported as having recovered, with 2,337 reported as being active COVID-19 cases.<sup>2</sup> At Coyote Ridge Corrections Center (“CRCC”), where Mr. Williams resides, 351 people contracted the virus.<sup>3</sup> The largest outbreak is at Airway Heights Corrections Center, which has seen a recent dramatic increase such that approximately 2/3 of its residents having tested positive for the virus.<sup>4</sup>

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<sup>1</sup> Wash. Dep’t of Corr., *Covid-19 Data*, <https://www.doc.wa.gov/corrections/covid-19/data.htm> (last visited Dec. 21, 2020) (“DOC COVID-19 Data”).

<sup>2</sup> *Id.* Amici have not been able to ascertain how DOC determines that someone has recovered.

<sup>3</sup> *Id.*

<sup>4</sup> *Airway Heights Corrections Center COVID Outbreak Swells to 1,261 Infections*, KXLY.com (Dec. 18, 2020), <https://www.kxly.com/airway-heights-corrections-center-covid-outbreak-swells-to-1261-infections/>.

These numbers present a picture of COVID-19 in Washington prisons dramatically different from when this Court issued its opinion on July 23, 2020, in which it observed that “the prison system faces a daunting challenge from a serious public health threat” in trying to contain the public health emergency of COVID-19 among people in confinement, *Colvin v. Inslee*, 195 Wn.2d 879, 886, 467 P.3d 953 (2020). DOC has failed to meet this challenge. Review is required to address these very different circumstances and to consider state constitutional arguments not raised or considered in *Colvin*. *Cf. id.* at 900 (applying Eighth Amendment standards because petitioners did not argue for independent state constitutional analysis).

Though the lower court correctly found that article I, section 14 of the Washington constitution is more protective in this context, its test is flawed because it effectively defers to DOC’s determination of whether a petitioner poses a risk to public safety without due regard for medical vulnerability. Review is required to address whether to leave intact a test that allows DOC’s conclusory determination regarding public safety to be outcome-determinative, which abdicates the judicial function to an administrative/executive agency.

In addition, amici urge the Court to grant review so that it may consider the complicated relationship between systemic racism as it



impacts both incarceration and health. The immediate outbreak of the virus in Washington prisons and its disproportionate impact on certain minority groups raise important constitutional concerns and issues of substantial public interest requiring review by this Court. *See* RAP 13.5A(b) (referring to considerations set forth in rule 13.4(b)).

### **ARGUMENT**

I. Review Is Warranted to Allow this Court to Consider Whether the Current Approach Accounts Sufficiently for COVID’s Disproportionate Impact on People of Color and Existing Race Disproportionalities in Incarceration.

The effects of continued outbreaks of COVID-19 in Washington’s prisons will likely not be felt equally. The Centers for Disease Control’s most recent information, updated Nov. 30, 2020, on COVID-19 and hospitalization and death shows that “Black or African American, Non-Hispanic persons,” when compared to “White Non-Hispanic persons,” have hospitalization rates (3.7 times) and death rates (2.8 times) that exceed the relative rate of COVID-19 cases (1.4 times).<sup>5</sup>

Importantly, these numbers are different from the numbers the court below relied upon in assessing and understanding the disproportionate impact: “Black or African American people are 2.6 times

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<sup>5</sup> Centers for Disease Control, *COVID-19 Hospitalization and Death by Race/Ethnicity* (updated Nov. 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> (last visited Dec. 21, 2020). Similar differences in health outcomes exist for other minorities. *Id.*

more likely to contract COVID-19 than white people and 2.1 times more likely to die from it.” *In re Pers. Restraint of Williams*, 54629-9-II, 2020 WL 7040655 at \*14 (Wash. Ct. App. Dec. 1, 2020) (citing CDC website cited *supra* note 5, but based on numbers CDC reported in its Aug. 18, 2020 update). The more recent CDC data is suggestive that Black or African American persons have worse health outcomes and higher rates of death once they have contracted the virus.

This is consistent with the most recent Washington data. When examining hospitalization and death among confirmed cases, the Washington State Department of Health reports that “Black populations” with COVID-19 have hospitalization rates three times higher and death rates approximately two times higher than “white populations” with COVID-19.<sup>6</sup> Thus, when considering “Black populations” and “white populations” after they have a positive COVID-19 diagnosis, “Black populations” have worse health outcomes than “white populations.”<sup>7</sup>

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<sup>6</sup> Wash. Dep’t of Health, *Covid-19 morbidity and mortality by race, ethnicity, and spoken language in Washington state*, (Dec. 9, 2020), <https://www.doh.wa.gov/Portals/1/Documents/1600/coronavirus/data-tables/COVID-19MorbidityMortalityRaceEthnicityLanguageWAState.pdf> (last visited Dec. 21, 2020). This document lacks pagination but the relative rates appear on p. 4 and graphs on pp. 6-7 of the PDF. Similar differences in health outcomes exist for other minorities. *Id.*

<sup>7</sup> One recent study conducted in New York City came to a different conclusion, though it noted that its observations were contrary to other studies, including in Louisiana and California that reported disproportionalities in hospitalization consistent with the data reported by the Washington State Department of Health. *See* Gbenga Ogedegbe et al., *Assessment of Racial/Ethnic Disparities in Hospitalization and Mortality in Patients With*

Thus, even though the relative rate of infection might not show racially disproportionate rates of infection for those residing in DOC facilities,<sup>8</sup> CDC and Washington Department of Health data suggests that Black residents will be disproportionately impacted by COVID-19.

In addition, the criminal legal system itself may be partially responsible for the disparate rates of infection and death among communities of color. As recently as 2018, this Court took “judicial notice of implicit and overt racial bias against black defendants in this state” and discussed examples from “[o]ur case law and history of racial discrimination.” *State v. Gregory*, 192 Wn.2d 1, 22-23, 427 P.3d 621 (2018) (citing and quoting from numerous cases and sources, including the Task Force on Race & Criminal Justice Sys., Preliminary Report on Race and Washington's Criminal Justice System (2011)<sup>9</sup>). Race disproportionality exists in incarceration. Black persons constitute 4.4% of Washington’s population<sup>10</sup> but make up 17.9% of DOC residents.<sup>11</sup>

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*COVID-19 in New York City*, JAMA Network Open (Dec. 4, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2773538> (noting that its results were contrary to several other studies, including large-scale studies conducted in Louisiana and California).

<sup>8</sup> See DOC COVID-19 Data, *supra* (Demographics table: 68% of incarcerated population is white; 71.1% of confirmed cases are white; 17.8% of incarcerated population is Black; 15.5% of confirmed cases are Black) (last visited Dec. 21, 2020).

<sup>9</sup> <https://perma.cc/6BV4-RBB8>.

<sup>10</sup> U.S. Census, Quick Facts: Washington, <https://www.census.gov/quickfacts/WA> (last visited Dec. 21, 2020).

<sup>11</sup> Wash. Dep’t of Corr., Agency Fact Card (Sept. 2020), <https://doc.wa.gov/docs/publications/reports/100-QA002d.pdf> (last visited Dec. 21, 2020).

COVID-19 outbreaks in Washington prisons, even if there is no racially disproportionate rate of transmission among those who are confined, will produce a racially disproportionate outcome from the very fact that certain racial minorities are overrepresented in those facilities. The extent to which this overrepresentation is traceable to “[o]ur case law and history of racial discrimination,” *Gregory*, 192 Wn.2d at 22, requires careful consideration by this Court as it weighs and gives guidance to lower courts that are assessing, on a case-by-case basis, the appropriateness of relief for those who are vulnerable because of age, race, and medical conditions.

II. Review and a Different Approach Are Necessary Because Courts Have Relied on DOC Policies that Look and Sound Good on Paper but Do Not Reflect Actual Practices as Experienced by DOC Residents and Confirmed by the Corrections Ombuds.

Division Two found that continued confinement did not subject Mr. Williams to an unacceptable risk of serious injury or death in part because DOC “demonstrated an ability to respond aggressively to outbreaks, and [its] response overall has been effective.” *Williams*, 2020 WL 7040655 at \*14. Specifically, the lower court relied on DOC’s representations that it required the use of masks, implemented social distancing, monitored staff and inmates for infections, and quarantined infective inmates to find that it effectively controlled the outbreak. *Id.*

However, recent reports from inside DOC undermine these conclusions. An investigation by the Office of the Corrections Ombuds into the outbreak at CRCC found that DOC leadership delayed requiring prison staff to wear masks and, even after the first infection, did not intervene when staff members carpooled to work without masks on.<sup>12</sup> Many incarcerated people also reported waiting days after reporting their symptoms to be tested for the virus, and CRCC leadership did not begin implementing any kind of widespread quarantine protocol until almost a month after the first resident tested positive for the virus.<sup>13</sup> Perhaps most troublingly, the report suggests that it may be physically impossible to enforce social distancing at CRCC because of the design of the building.<sup>14</sup> For example, cells in the minimum units in the main complex do not have running water or toilets, meaning that residents must routinely break social distancing to mix with others in the unit.<sup>15</sup>

In light of DOC's demonstrated inability to control the spread of COVID-19, intervention is necessary to prevent further loss of life.

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<sup>12</sup> Wash. Office of Corr. Ombuds, *Investigation of Coronavirus Disease 2019 (COVID-19) Outbreak at Coyote Ridge Corrections Center (CRCC)*, at 6-7 (Nov. 13, 2020), <https://oco.wa.gov/sites/default/files/CRCC%20Outbreak%20Investigation%20Final.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 7.

<sup>15</sup> *Id.*

III. Review Is Warranted Because the Lower Court’s Test Makes Judicial Oversight an Empty Gesture, Allowing DOC’s Determination Regarding Public Safety to Be Outcome-Determinative.

The lower court’s test is ill-suited to address Mr. Williams’s claim that he is being subjected to cruel punishment. Using what it described as an “adapted categorical analysis,” Division Two considered three factors to determine that Mr. Williams’s sentence did not create an “unreasonable and unacceptable” risk of death or serious injury: (1) whether there is a clear national consensus against incarcerating people with similar conditions and underlying convictions; (2) the severity of the risk for Mr. Williams; and (3) whether legitimate penological purposes are served by his incarceration. *Williams*, 2020 WL 7040655 at \*16. In evaluating the third factor, the lower court deferred to the DOC’s assessment of Mr. Williams’s risk to public safety in order to find that his incarceration served a penological purpose. *Id.* By relying on DOC’s assessment instead of conducting its own evaluation of Mr. Williams’s risk to the community, the lower court’s reasoning forecloses judicial consideration of whether a petitioner’s continued incarceration serves a legitimate penological purpose and, if allowed to stand, will effectively prevent courts from granting release to others whose lives are endangered by the spread of COVID-19.

In adopting this analysis, the Division Two's approach forecloses lower courts' ability to address the recent outbreak in DOC by granting necessary relief to medically vulnerable people who may be endangered by the virus and by reducing the size of the incarcerated population.

However, despite clear need for intervention, the lower court's decision in this case effectively prevents judges from granting potentially life-saving relief to medically vulnerable people in DOC custody, like Mr. Williams. Specifically, in considering the third factor of its adapted categorical analysis, it deferred to DOC's assessment of whether Mr. Williams posed a risk to the community based on his eligibility for extraordinary medical placement under the existing statutory provisions for emergency medical placement, RCW 9.94A.728(1)(c)(i), instead of engaging in its own analysis. *Williams*, 2020 WL 7040655 at \*15-16. This standard, if applied in other cases, would effectively block judges from considering the claims of other petitioners who have already been denied an extraordinary medical placement by DOC and would prevent courts from helping alleviate the outbreak in Washington prisons.

This Court should thus grant review to fashion a standard that empowers courts to meaningfully consider petitioners' claims and reduce the number of people inside correctional facilities.

## CONCLUSION

The Court should grant review for the foregoing reasons.

DATED this 22nd day of December, 2020.

Respectfully Submitted:

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I declare under penalty of perjury under the laws of the State of Washington, that on December 22nd, 2020, 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 22nd day of December, 2020.

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