

Supreme Court No. 98317-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents.

**AMICUS CURIAE BRIEF OF DISABILITY RIGHTS
WASHINGTON IN SUPPORT OF PETITIONERS' WRIT
OF MANDAMUS**

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I. INTERESTS AND IDENTITY OF AMICUS CURIAE

Amicus Disability Rights Washington (DRW) is the organization designated by federal law and the Governor of Washington to provide protection and advocacy services to people in Washington with mental, developmental, physical, and sensory disabilities. *See* RCW 71A.10.080. Disability Rights Washington has a federal mandate to monitor conditions of facilities, investigate abuse and neglect, and advocate on behalf of people with disabilities through the provision of a full range of legal assistance including legal representation, regulatory and legislative advocacy, and education and training. *See* 42 U.S.C. §§ 15041-45; 42 U.S.C. §§ 10801-51; 29 U.S.C. § 794e. DRW has federal authority to access people with disabilities in the places they live and receive services. *See* 42 C.F.R. § 51.42(b). We use this authority to fulfill our mandate to monitor conditions in prison and jails, where our staff see conditions of these facilities firsthand and talk to people in all areas of prisons, including solitary confinement, suicide watch, and infirmaries.

Because of the high percentage of people with disabilities involved in the criminal justice system, Disability Rights Washington created a program dedicated to protecting the rights of people with disabilities experiencing incarceration and reentering society. This program is called AVID, which stands for Amplifying Voices of Inmates with Disabilities.

AVID has extensive experience representing the interests of people with a variety of disabilities and fields hundreds of calls and letters annually from individuals with disabilities who are incarcerated in our state prisons.

A. AVID'S LONGSTANDING CONCERNS ABOUT OVERCROWDING, INHUMANE CONDITIONS, AND INADEQUATE MEDICAL CARE IN WASHINGTON PRISONS HAVE BEEN EXACERBATED BY COVID-19

Through the course of its advocacy, AVID has become increasingly concerned about the overcrowding in DOC's facilities, noting in multiple monitoring letters to the Department of Corrections that the Washington Corrections Center and Washington Corrections Center for Women, the facilities that receive newly incarcerated people from the community, are both routinely over capacity, forcing newly-arrived people to sleep on the floor of rooms that are designed for two people, but used for three. AVID has also repeatedly raised the lack of departmental capacity to care for aging and medically fragile individuals and the limited access to medical care in the system. For the past two legislative sessions AVID has worked with a coalition of other advocates to educate state lawmakers about this rising crisis, pushing for legislation that would provide post-conviction review for those aging in prison. *See Disability Rights Washington, Coalition to End Death By Imprisonment, <https://www.disabilityrightswa.org/collaborations/second-look-coalition/>.*

These longstanding systemic concerns are only heightened by the current pandemic.

Since COVID-19 was discovered in Washington, AVID has been receiving calls from incarcerated people distressed about their potential exposure to the virus. These alarming calls have come from incarcerated individuals with disabilities living in general population, segregation, quarantine, and isolation. People in isolation have reported they are offered only one shower per week and otherwise limited to a cold “birdbath” in their cell. Individuals with conditions such as cerebral palsy and multiple sclerosis that put them at heightened risk of harm from the virus report they are not receiving additional screening or interventions. People who are aging and chronically ill report being in large groups; some report doing the laundry from isolation units without any protection. AVID has also received calls from family members of people who are months from release, people who have housing and supports ready but remain incarcerated as COVID-19 spreads through the system.

B. AVID'S RECOMMENDATION TO RELEASE PEOPLE AT HIGHEST RISK FOR COVID-19 IS NOT REFLECTED IN RESPONDENTS' PLAN

Throughout the COVID-19 outbreak, AVID has engaged in advocacy with the Department of Corrections, as well as the Office of the Governor, to limited result. *See Disability Rights Washington, AVID*

Program Calls for Action to Stop the Spread of COVID19 in WA

Prisons/Jails, <https://www.disabilityrightswa.org/2020/03/30/call-for-action-to-stop-the-spread-of-covid-19-in-the-states-prisons-and-jails/>. On March 16, 2020 AVID joined a coalition of other advocacy organizations in sending letters to Respondents, urging an immediate reduction in the prison population, as well as increased testing and social distancing measures. *Id.* Having received no official response from either entity, AVID again reached out to Respondents, requesting a phone call to discuss these requests; representatives from the DOC and the Governor's Office participated in a call on March 23, 2020 but no plan was offered regarding potential releases. Out of a growing fear that Respondents' inaction would lead to a health crisis in our prisons, on March 27, 2020 AVID joined with the ACLU of Washington to again reach out to the Governor, this time with a proposed executive order in which various options for release and furlough were outlined. *Id.* Although AVID did finally talk to Governor's Office staff on April 10, 2020 about the Governor's plans for releasing prisoners, the plans described by staff did not address most of Disability Rights Washington's concerns.

On April 13, 2020, in response to this Court's order, Respondents finally publically announced their plan to release close to 1,000 people from prison. However, this initiative focuses on people convicted of

nonviolent offenses who are already close to release and does not address the thousands of people who are aging or medically vulnerable and remain at high risk of infection due to their continued incarceration. And, while releases are necessary in order to reduce the overall prison population, Respondents' current focus on people convicted of non-violent offenses within months of their release amplifies the racial bias within our criminal justice system. Specifically, the people that are not included in Respondents' eleventh hour release plan, namely people who have spent decades in prison and who are now aging and vulnerable but nowhere near release due to an exceptionally long sentence, are disproportionately people of color. *See Katherine Beckett et al., About Time: How Life and Long Sentences Fuel Mass Incarceration in Washington State* 27-30 (2020), <https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state>. Similarly, the Respondents' focus on people who have committed "nonviolent" offenses disproportionately benefits white people, who are routinely under-charged in comparison to people of color. The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* 7 (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

In light of AVID’s prior advocacy regarding the conditions in our state prisons, and Respondents’ glacial response to the COVID-19 crisis in the prisons, amicus Disability Rights Washington joins Petitioners’ request for relief from this Court.

II. STATEMENT OF THE CASE

Amicus Disability Rights Washington joins generally in Petitioners’ Statement of the Case.

III. ARGUMENT

Disability Rights Washington agrees with the argument and request for relief set forth by Petitioners, and writes to offer additional insight regarding the Department’s current response to the COVID-19 epidemic. First, Disability Rights Washington sets forth the general composition of our state’s prison population, including those older people and people with disabilities who are most at risk of infection. Second, Disability Rights Washington describes our longstanding concerns relating to the Department’s provision of medical care, and how those concerns are heightened by the COVID-19 outbreak. Third, Disability Rights Washington focuses on the solitary-like conditions being imposed due to the Department’s quarantine and isolation measures, and the damage those measures inure, particularly to people with disabilities.

**A. WASHINGTON'S PRISONS ARE FILLED WITH
PEOPLE AT HEIGHTENED RISK OF INFECTION
FROM COVID-19**

According to the Centers for Disease Control and Prevention, people of advanced age and/or people with certain medical conditions or disabilities are at higher risk for severe illness from COVID-19. *See* Centers for Disease Control and Prevention, *People Who Are at Higher Risk for Severe Illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last visited Apr. 15, 2020). Washington's prisons are packed with people who meet these criteria.

Washington State's prison system is greying. Almost twenty percent of the people who are currently incarcerated in Washington's state prisons, or approximately 3,281 people, are over the age of 50; more than two hundred of those people are over 70. *See* Washington State Department of Corrections, *Agency Fact Card* (Dec. 31, 2019), <https://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf>. Social science research has long shown that recidivism rates decline with age, most dramatically after the age of 50, and many of these aging individuals could be safely released to the community. *See* Katherine Beckett et al., *About Time: How Life and Long Sentences Fuel Mass Incarceration in Washington State* 49 (2020), <https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state>.

Because Washington has no system of parole or post-conviction review, these aging individuals are increasing in number every year, taxing the overall medical and staffing resources of the Department. *See CGL Company, Washington Department of Corrections Prison Staffing Model Review 2-6 (2019),* https://d3n8a8pro7vhmx.cloudfront.net/teamsters117/pages/4431/attachments/original/1567807636/Washington_DOC_Staffing_Model_Review.pdf?156780/7636.

Not only is the State's prison population aging, but people with disabilities are overrepresented in our criminal justice system. *See Jennifer Bronson et al., Bureau of Justice Statistics, U.S. Dep't of Justice, Special Report: Disabilities Among Prison and Jail Inmates, 2011-12* 1 (2015), <http://www.bjs.gov/content/pub/pdf/dpii1112.pdf>. National surveys show that approximately 32 percent of individuals in state prisons report having at least one disability. *Id.* According to the Department's own data, approximately 25 percent of Washington's prison population has one of the medical conditions that the Centers for Disease Control (CDC) has found put people at high risk for COVID-19 infection. *See Index of Resp't Ct. R., App. C, Decl. of David D. Luxton 3; Centers for Disease Control and Prevention, What You Can do if You are at Higher Risk of Severe Illness from COVID-19,* <https://www.cdc.gov/coronavirus/2019->

ncov/downloads/COVID19-What-You-Can-Do-High-Risk.pdf (last visited Apr. 15, 2020).

In recent weeks the CDC has also determined that certain people with disabilities may also be at increased risk of COVID-19, such as people who have “limited mobility or who cannot avoid coming into close contact with others who may be infected....” See Centers for Disease Control and Prevention, *People with Disabilities*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html> (last visited April 15, 2020). The CDC has also found that people who have trouble understanding information or practicing preventive measures due to a cognitive disability may also be at higher risk for infection. *Id.* Like some people with disabilities in the community, incarcerated people with limited mobility often rely on others for assistance and many are assigned “access assistants” to push them in wheelchairs or otherwise assist them in moving about the facility. None of the guidance on personal protective equipment issued by the Department during this pandemic indicates that these access assistants, or the people they help, are being provided personal protective gear, despite their close and frequent proximity to each other. DOC also has hundreds of incarcerated individuals with cognitive disabilities and serious mental illness living in its facilities, many of whom may have trouble reading and

understanding the written notifications DOC has used to provide information to the incarcerated population. Due to their cognitive disabilities, these individuals may also have difficulties following the hygiene and social distancing directives in those memos and there is no standardized process in place to ensure that these individuals are getting additional support during this public health crisis.

While Respondents attempt to stoke fear by focusing on the tiny percentage of people in custody who have committed highly publicized crimes or could present an immediate and serious threat to the community if released, the Department fails to recount the many hundreds of people who are over 50 and have been deemed low-risk. Nor does the Department disclose the more than one dozen people who have been granted clemency by the Clemency and Pardons Board who are still in prison because the Governor has not signed their petitions, or those who have been medically recommended for Extraordinary Medical Placement in the community but who await a final determination by the Department. *See* Washington State Department of Corrections, *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. These are just some of the many vulnerable people who should be evaluated for release pursuant to Petitioners' writ

and instead of doing those evaluations, the Department is spreading misinformation about unchecked, high-risk releases.

In sum, the state prisons have a disproportionate number of people who are at high risk of COVID-19 infection and the Department has numerous mechanisms by which they could immediately begin releasing those people *safely*. Similarly, the Governor has extraordinary leeway to take action under his emergency powers, as Petitioners state, and those powers could be used in any number of ways to identify people within the DOC system that are suitable for release. Despite this expansive power, Respondents have failed to release those most vulnerable to COVID-19 infection in the prisons, including the thousands of people with disabilities in the system.

B. WASHINGTON'S PRISONS ARE TOO CROWDED AND MEDICAL CARE TOO LIMITED TO ADEQUATELY RESPOND TO COVID-19 WITHOUT A REDUCTION IN POPULATION

DOC is currently over 100 percent capacity. *See* Washington State Department of Corrections, *Agency Fact Card* (Dec. 31, 2019), <https://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf>. Due to this capacity issue, the receiving units at Washington Corrections Center and Washington Corrections Center for Women have long been overcrowded, with three people packed into two person cells, one person

relegated to sleeping on a mattress on the floor, near the communal toilet.

Declarations submitted by Petitioners indicate the situation has not changed, despite the current pandemic and calls for social distancing. *See, e.g.*, Pet’rs’ Set of Docs. Submitted for the R. 288. Notably, these overcrowded receiving units are where people coming from local jails and the community, where COVID-19 is rampant, are first incarcerated, making these close conditions even more dangerous.

This overcrowding makes it impossible for DOC to comply with the social distancing guidance issued by the CDC in relation to prisons and jails. *See* Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (“CDC Guidance”), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf> (last visited Apr. 15, 2020). In that guidance, the CDC recommends six feet of space between all individuals. *Id.*, at 11. This amount of space is impossible when housing people three to a cell. Moreover, while DOC has some designated units for older, acutely ill people, most incarcerated people with underlying medical conditions or those who are older are still being housed with cellmates in a general population setting, thereby limiting their ability to self-isolate. Indeed, even those people housed in specialized units such as the assisted living

unit at Coyote Ridge Corrections Center often live in close proximity to each other in open dorm settings, where social distancing and self-quarantine are largely impossible.¹

These crowded conditions are exacerbated by a lack of available medical care. Long an area of concern for amicus Disability Rights Washington, in recent years the Department has been under near-constant scrutiny for its provision of medical services, or lack thereof. *See, e.g.*, Joanna Carns, Office of the Corrections Ombuds, *Annual Report* 19 (2019), <https://oco.wa.gov/sites/default/files/public/Annual%20Report%202019%20Final.pdf>; Jim Brunner, *The head doctor at Monroe prison was fired over alleged negligent care. Now seven inmate deaths are under investigation*, Seattle Times (July 13, 2019), <https://www.seattletimes.com/seattle-news/the-head-doctor-at-monroe-state-prison-was-fired-over-alleged-negligent-care-now-seven-deaths-are-under-investigation/> (last visited Apr. 13, 2020). Consistent across these complaints are allegations that medical care is difficult to access, routine care is often denied, and many individuals deteriorate, even die, waiting

¹ The prisons do not currently have enough accessible cells, assisted living units, or medical supports to address the needs of its aging population and even before COVID-19, Disability Rights Washington was advocating for a system of post-conviction review that would evaluate aging inmates for potential release to the community. *See* Disability Rights Washington, *Coalition to End Death By Imprisonment*, <https://www.disabilityrightswa.org/collaborations/second-look-coalition/>.

for appropriate medical care. Treating 144 people with suspected COVID-19 symptoms while also monitoring more than 1,000 quarantined people who have been exposed to the virus will only further tax this overburdened system. As DOC's medical and custodial staffing decreases with COVID-19's spread through the community, these limited resources may well reach a crisis point and decreasing the overall population, particularly those most vulnerable to infection, is the only reasonable way to protect these limited resources.

C. THE SOLITARY-LIKE CONDITIONS OF ISOLATION RESULT IN PERMANENT HARM TO INCARCERATED PEOPLE

In an attempt to limit the spread of COVID-19, the Department has created numerous quarantine and isolation units. As of April 15, 2020, there were 144 people in isolation, and another 1099 in quarantine. Not only is this intervention unsustainable given DOC's current capacity but the solitary-like conditions imposed on individuals in these units have been found to cause serious and permanent injury and therefore should not be used as a primary line of defense against COVID-19.

There is a general consensus within the medical and legal community that solitary confinement, commonly defined as locking a person in their cell for more than 22 hours per day, is psychologically harmful, particularly for people with disabilities. *See, e.g., Disability*

Rights Montana v. Batista, 930 F.3d 1090, 1099 (9th Cir. 2019)

(allegations that the conditions of solitary are harmful are “thoroughly consistent with common sense and legal experience”); *Brown v. Plata*, 563 U.S. 493, 503-04 (2011); Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, Crime Justice, Vol. 47 (1) 365–416 (2018); United Nations Human Rights, *United States: prolonged solitary confinement amounts to psychological torture, says UN expert* (Feb. 28, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25633&LangID=E> (Nils Melzer, UN Special Rapporteur on Torture for the UN Human Rights Commission, deriding solitary as “psychological torture”). Presciently, on April 9, 2020 AMEND, an international prison reform project with whom the DOC has been working to reform its solitary practices, recently issued guidance warning corrections systems of the dangers of using solitary conditions to respond to COVID-19. See David Cloud et al., AMEND, *The Ethical Use of Medical Isolation- Not Solitary Confinement- to Reduce COVID-19 Transmission in Correctional Settings* (2020), https://amend.us/wp-content/uploads/2020/04/Medical-Isolation-vs-Solitary_Amend.pdf; Washington State Department of Corrections, *Corrections looks to Norway for inspiration on reforms* (Feb. 12, 2020), <https://www.doc.wa.gov/news/2020/02122020.htm> (last visited Apr. 15, 2020). Even the

Department's own Director of Psychiatry acknowledges the potential harms of isolation in response to COVID-19, despite its widespread use by Respondent. *See Dr. Bruce Gage, Supplemental Report Regarding COVID-19 Risks in Riverside County Jails*, submitted as Exhibit K in March 31, 2020 Emergency Motion to Enforce or, in the Alternative, Modify Consent Decree in *Gray v. Cty. of Riverside*, EDCV 13-00444-VAP, 2014 WL 5304915, at *1 (C.D. Cal. Sept. 2, 2014), *available at* <https://prisonlaw.com/wp-content/uploads/2020/04/20.04.06-Doc-178-1-Exhibits-A-K-to-Norman-Decl..pdf> (“Gage Supplemental Report”).

The Department has not heeded these calls and in many respects, the conditions imposed in its isolation units are even more restrictive than solitary confinement. Specifically, DOC guidance directs that “As a general rule, isolated patients will not be allowed out of the cell unless security or medical needs require it.” *See Washington State Department of Corrections, WA State DOC COVID-19 Screening, Testing, and Infection Control Guideline, Version 13, 9* (2020), <https://www.doc.wa.gov/news/2020/docs/wa-state-doc-covid-19-screening-testing-infection-control-guideline.pdf> (“*Infection Control Guideline*”). This medical directive has been interpreted by DOC to mean that people in isolation do not have access to the outdoors or phones and have access to a shower only once per week. *See Stephen Sinclair, Updated Employee PPE*

Protocols for Patients on Isolation or Quarantine (Apr. 1, 2020),
<https://www.doc.wa.gov/news/2020/docs/2020-0401-all-staff-updated-employee-ppe-protocols-for-patients-on-isolation-or-quarantine.pdf>.

In contrast, pursuant to DOC policy, people in solitary confinement must be offered three showers per week, access to the phone, and access to the yard or dayroom five days per week. *See* DOC Policy 320.255, <https://www.doc.wa.gov/information/policies/files/320255.pdf>. Individuals in solitary are also allowed to have limited personal property, including books of their choosing, radios, televisions, and other items, depending on their privilege level. *Id.* People who are in isolation are generally limited to the property DOC staff choose to provide. *See* *Infection Control Guideline* 11.

Access to programming and services is also seemingly more limited in isolation units than in solitary. While people in solitary confinement are able to access limited educational and rehabilitative programming, those in isolation are not offered such programming, despite the CDC's direction that "if group activities are discontinued, it will be important to identify alternative forms of activity to support the mental health of incarcerated/detained persons." CDC Guidance 12.

Relatedly, while individuals in solitary who require mental health services can access offender change programming and may have access to in

person meetings with mental health staff per DOC policy, people in the isolation units do not. *See* DOC Policy 630.500, <https://www.doc.wa.gov/information/policies/files/630500.pdf>. Instead, they are limited to walking “rounds” by mental health staff three times per week and journaling prompts. *See* Washington State Department of Corrections, *WA State DOC COVID-19 Mental Health/ Psychiatry Response Guideline Version 2* (March 26, 2020), <https://www.doc.wa.gov/news/2020/docs/2020-0326-mental-health-protocols-version-2.pdf>. Unlike people in the community, who can heed the CDC’s recommendation to exercise regularly and connect with others in order to manage mental health and stress in the face of COVID-19, incarcerated people in quarantine and isolation are locked in a small room for weeks on end, with few activities and virtually no contact with friends and family.

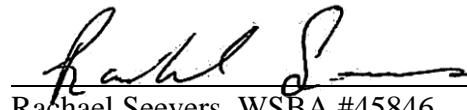
Despite warnings by AMEND that “turning to the punitive practice of solitary confinement in response to the COVID-19 crisis will only make things worse,” and the known psychological risks of solitary, the Department of Corrections has relied heavily on this restrictive intervention to control the spread of COVID-19 in the prisons. Cloud, *Ethical Use of Isolation* 3. Moreover, the fact that Dr. Gage has opined that isolation in other correctional systems is potentially damaging wholly undermines the Department’s claim here that their current isolation and

quarantine efforts are sufficient to control the spread of COVID-19. Gage Supplemental Report, ¶¶ 10-11. Rather than impose conditions that have been likened to torture, the Department should be taking immediate steps to decrease its overall population so that social distancing can be achieved without resorting to solitary confinement for large segments of its population.

IV. CONCLUSION

Amicus Disability Rights Washington respectfully asks this Court to order the relief requested by Petitioners.

Respectfully submitted this 16th day of April.



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