

NO. 37588-9-III

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,

Respondent,

v.

HUGH ALLEN PUTNAM

Appellant.

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BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION  
OF WASHINGTON, COLUMBIA LEGAL SERVICES, DISABILITY  
RIGHTS WASHINGTON, PUBLIC DEFENDER ASSOCIATION, FRED  
T. KOREMATSU CENTER FOR LAW AND EQUALITY,  
WASHINGTON DEFENDER ASSOCIATION, WASHINGTON  
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, and  
WASHINGTON INNOCENCE PROJECT  
IN SUPPORT OF APPELLANT.

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**I. IDENTITY AND INTEREST OF *AMICI CURIAE***

The identity of amici curiae and their statements of interest are provided in the Motion of Amici Curiae for Leave to File Amici Curiae Brief which accompanies this brief.

**II. ISSUE ADDRESSED BY *AMICI CURIAE***

Whether CrR 7.8(b)(5) grants trial courts the discretion to vacate judgments for incarcerated individuals sentenced prior to the COVID-19 pandemic who are at high-risk for dying of, or developing serious medical complications from, COVID-19.

**III. INTRODUCTION**

Prisons are not made for social distancing. Many of the basic precautions non-incarcerated persons can take, such as wearing a mask or using hand sanitizer, have been severely restricted or even denied to incarcerated individuals. Unsurprisingly, these conditions have caused an explosion of COVID-19 rates in prisons and jails nationwide. The infections and deaths are only increasing, sparing neither inmate nor guard. In August 2020, the COVID-19 cumulative case rate among incarcerated individuals was nearly five times higher than the general

population, and for guards, the rate was three times as high.<sup>1</sup> Currently, there are over 480,000 confirmed COVID infections among incarcerated individuals and guards in prisons, jails, and detention centers, and at least 2,100 deaths.<sup>2</sup> Corrections officers represent 100,000 of the confirmed cases and 170 deaths. These numbers do not account for the community spread that results because of corrections staff and released incarcerated individuals coming into contact with individuals in the community.

Prisons and jails in several other states have been forced to take extreme measures to manage the crisis. The *New York Times*, in an article dated January 1, 2021, reports that North Carolina, Missouri, and Wisconsin are shutting down prisons.<sup>3</sup> Ohio and New Hampshire have called in the National Guard to bolster their depleted corrections staff.<sup>4</sup>

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<sup>1</sup>*Decarcerating Correctional Facilities during COVID-19: Advancing Health, Equity, and Safety*,” (Nat’l Acad. Press 2020), <https://www.nap.edu/read/25945/chapter/2> (last visited January 1, 2021).

<sup>2</sup>Derr et al., *States are Shutting Down Prisons as Guards are Crippled by Covid-19*, N.Y. Times, Jan. 1, 2021, <https://www.nytimes.com/2021/01/01/us/coronavirus-prisons-jails-closing.html>

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

<sup>4</sup> *Id.*

COVID-19 is similarly rampant through the Washington State Department of Corrections (DOC) prison system. As of November 2020, the DOC prison and work release population was 15,093.<sup>5</sup> As of December 28, 2020, there are 4277 confirmed cases of COVID-19, 2,595 active cases, 1,677 recovered cases, and 5 inmate deaths in the DOC inmate population.<sup>6</sup> As of January 7, 2021—10 days later—there are 664 new confirmed cases and 2 additional deaths, bringing the total to 4941 confirmed cases, and 7 deaths.<sup>7</sup> As of December 23, 2020, 23.7% of the Washington State prison population has tested positive for COVID.<sup>8</sup> There are 2,343 incarcerated individuals in isolation, and 2,837

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<sup>5</sup>Wash. Dep’t of Corr., *DOC Population/Caseload vs. Forecast Report*, (November 2020) <https://www.doc.wa.gov/docs/publications/reports/400-RE001.pdf>.

<sup>6</sup> Wash. Dep’t of Corr., *COVID-19 Data*, <https://www.doc.wa.gov/corrections/covid-19/data.htm#confirmed> (last visited December 29, 2020).

<sup>7</sup> *Id.* (last visited January 7, 2021).

<sup>8</sup> Wash. Dep’t of Corr., *COVID-9 Data, Comparative Jurisdictions*, <https://www.doc.wa.gov/corrections/covid-19/data-comparative-jurisdictions.htm> (last visited December 29, 2020).

incarcerated individuals in quarantine.<sup>9</sup> Accordingly, nearly one-third of the prison population is in isolation or quarantine as a result of the virus.

DOC cannot implement the precautions necessary to stop the spread of COVID in its facilities. For example, as the Corrections Ombuds noted in its investigation of the outbreak at Coyote Ridge Correctional Center, people incarcerated in the main complex must break social distancing and have close contact with others to access the toilets and showers.<sup>10</sup>

The dire situation in Washington State has caught the attention of the national media. In a *Washington Post* op-ed piece published December 11, 2020, Christopher Blackwell, an inmate incarcerated at Monroe Correctional Complex, paints a sobering account of a prisoner's experience of the DOC prison system:

This past week, my unit entered its third quarantine since March, because two prisoners tested positive — meaning classes and other activities are canceled. Still, to retrieve meals from the chow hall — which is closed for in-person eating — I must walk shoulder to shoulder with 20 to 50 other men up and down two stairwells that

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<sup>9</sup> Wash. Dep't of Corr., *COVID-9 Data, Testing, Isolation & Quarantine*, <https://www.doc.wa.gov/corrections/covid-19/data.htm#testing> (last visited December 29, 2020).

<sup>10</sup> Office of the Corrections Ombuds, *Coyote Ridge Correctional Center Outbreak Investigation*, (Nov. 30, 2020), <https://oco.wa.gov/sites/default/files/CRCC%20Outbreak%20Investigation%20Final.pdf>

are about five feet across. For a half-hour a day, I am let out of my cell with 20 other prisoners to make a phone call. If I'm not lucky enough to be among the first in line for the 10 phones, I stand and wait with the others in front of open-barred occupied cells. And when I do get to a phone, I put my face next to a receiver someone else has just used, with no cleaning between calls. (I've seen people take one of their socks off and put it over the receiver.) Alcohol-based hand sanitizer is banned in the prison, except for use by guards, as if the chance that someone might drink it for a buzz is a bigger risk than contracting the virus.<sup>11</sup>

Mr. Blackwell adds that at Monroe, "Masks are required, but the last time my unit received any was Sept. 1. We've each gotten six masks during the entire pandemic. And while all prisoners are required to wear our ragged masks or risk getting an infraction, guards often wear theirs improperly. Our temperatures are taken twice daily, but that is an ineffectual measure against asymptomatic spread."<sup>12</sup>

#### **IV. SUMMARY OF THE ARGUMENT**

Judges who now sentence incarcerated individuals can consider the conditions of DOC and the vulnerability of the individual defendant in making bail and sentencing decisions. Incarcerated individuals sentenced

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<sup>11</sup> Christopher Blackwell, *Covid-19 is spreading wildly in prisons like mine. We should get the vaccine early*, Wash. Post, Dec. 11, 2020, [https://www.washingtonpost.com/outlook/covid-prison-vaccine-priority/2020/12/11/0484c6cc-3a58-11eb-bc68-96af0daae728\\_story.html](https://www.washingtonpost.com/outlook/covid-prison-vaccine-priority/2020/12/11/0484c6cc-3a58-11eb-bc68-96af0daae728_story.html).

<sup>12</sup> *Id.*

prior to COVID, however, have not been provided that consideration. In the absence of a systemic remedy to the rampant spread of COVID-19 in prisons, there must be an individual remedy. Trial courts must have the opportunity to revisit sentencing decisions for medically vulnerable incarcerated individuals in light of the pandemic. CrR 7.8(b)(5) is the appropriate vehicle to provide this individual remedy, as the rule already gives courts the discretion to set aside judgments when there are unforeseen circumstances that change the manner of confinement post-sentencing. Amicus asks this Court to interpret CrR 7.8(b)(5) to permit sentencing judges to exercise their discretion to set aside judgments for medically vulnerable incarcerated individuals and impose new sentences which take into account their heightened risk of dying from, or developing serious medical complications from, COVID-19.

## V. ARGUMENT

### A. CrR 7.8(b)(5) allows sentencing judges to vacate judgments because of confinement changes that were not anticipated at the time of the sentencing hearing and that materially alter the situation of the defendant.

A court has authority to relieve a party from a final judgment for any reason justifying relief from the operation of that judgment. CrR 7.8(b)(5). *State v. Smith*, 159 Wn. App. 694, 700, 247 P.3d 775 (2011).

“Relief under CrR 7.8(b)(5) is limited to extraordinary circumstances not covered by any other section of the rule.” *Id.* (citing *State v. Brand*, 120 Wn.2d 365, 369, 842 P.2d 470 (1992)); *State v. Olivera-Avila*, 89 Wn. App. 313, 319, 949 P.2d 824 (1997); *State v. Cortez*, 73 Wn. App. 838, 841-42, 871 P.2d 660 (1994). Extraordinary circumstances include “fundamental and substantial irregularities in the court’s proceedings or irregularities extraneous to the court’s action... final judgments should be vacated or altered only in those limited circumstances where the interests of justice most urgently require.” *Id.* (internal citations omitted).

In *State v. Smith*, the Court of Appeals affirmed that CrR 7.8(b)(5) is the appropriate vehicle to correct a sentence based on unforeseen circumstances outside the control of the parties. There, the named defendants failed to comply with a drug diversion program, were terminated from the program in 2009, and were each ordered to serve nine months in jail with the option of serving these sentences as partial confinement, such as home detention, work crew or work release. *State v. Smith*, 159 Wn. App. at 697. Spokane County eliminated partial confinement programs as a result of budget cuts. *Id.* The defendants’ requests for relief from their sentences resulted in the case coming before the Court of Appeals. *Id.* The trial court relieved the defendants of their original sentences, stating that they “didn’t contemplate” that the programs

would be terminated, and that if the option had been total confinement for the entire sentence, then they “would have done something different.” *Id.*

The Court found that the trial courts had the discretion to do what they did under the circumstances. *Id.* at 699. “The SRA prohibits early release. But it does not, or at least does not appear to, prohibit the traditional discretion extended to a sentencing judge to correct a sentence based on unforeseen circumstances, here the unanticipated termination of the partial confinement programs.” *Id.*

The COVID-19 pandemic is nothing if not an “extraordinary circumstance.” Hugh Allen Putnam is now serving a sentence that could result in serious medical complications or his death.<sup>13</sup> Like all DOC incarcerated individuals, he does not get to decide how to best protect himself from COVID-19. Instead, Mr. Putnam and all medically vulnerable incarcerated individuals are at the mercy of a prison system that is not designed for the one thing that best mitigates against COVID-19 spread: social distancing. Consequently, DOC, as with the rest of the federal and state prisons and jails, cannot gain control over the spread of

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<sup>13</sup> Mr. Putnam’s medical issues are listed in detail in Plaintiff’s Opening Brief.

the virus, and as a result, medically vulnerable incarcerated individuals like Mr. Putnam are now serving sentences that could end their lives.

None of these circumstances—the pandemic, the risk of serious complications and death, the inability of DOC to control the pandemic—could have been anticipated by the sentencing judge. These circumstances have materially altered the manner in which prison-based sentences are carried out. Because Mr. Putnam is serving a sentence under conditions that could not have been anticipated at the time of his sentencing, he is entitled to relief under CrR 7.8(b)(5) and *Smith*.

**B. Courts must be empowered with discretion to consider COVID-19 vulnerabilities, regardless of whether the sentence was imposed prior to or during the pandemic.**

Protecting the health and safety of all actors in the criminal justice system, including incarcerated individuals, is at the heart of every confinement-related Washington State criminal trial court decision since the start of the pandemic. That is by design. On March 20, 2020, the Washington State Supreme Court issued a sweeping order upending court operations overnight. *See* Amended Order, *In the Matter of Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency*, No. 25700-B-607. The Court immediately recognized the significant health risks COVID-19 posed to jail populations and took two

important steps to immediately reduce jail populations. First, it required trial courts to reopen bail hearings for vulnerable defendants and schedule those hearings within 5 days. Amended Order, § 12. Second, trial courts were required to prioritize plea and sentencing hearings “that result in the anticipated release of the defendant from pretrial detention within 30 days of the hearing.” This Order has been revised four times since March 20, 2020, and this language has never been modified.

Further, local courts have worked with corrections staff and other criminal justice partners to reduce jail populations significantly. ACLU-WA has tracked jail populations since the pandemic began. There has been a significant reduction in the average daily populations (ADP) throughout Washington brought on by the pandemic:

- Approximately 5,000 people were released between mid-March and April 2020;<sup>14</sup>
- Individual county jails reduced populations between 30-65%;

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<sup>14</sup> See Jaime Hawk, ACLU of Wash., *Don’t Go Back – Washington Jails Should Permanently Adopt Practices That Lead to Reductions in Populations Due to COVID-19* (August 31, 2020), <https://www.aclu-wa.org/story/don%E2%80%99t-go-back-washington-jails-should-permanently-adopt-practices-led-reductions-populations>.

- In 2019, the average daily population for Washington state jails was 11,435 incarcerated individuals. On April 29, 2020, the ADP was 6,335 incarcerated individuals—nearly a 50% reduction. The most recent ADP is 7,933 incarcerated individuals.<sup>15</sup>

When judges were given the discretion to reconsider their pretrial release decisions, they took it. Although some of the reductions in the jail populations can be attributed to changes in jail booking standards, those changes alone do not account for the enormous, and immediate, reduction in the jail populations.

Judges should have the same discretion to reconsider their sentencing decisions made prior to the pandemic and, in the exercise of sound discretion, vacate those decisions so that they can resentence medically vulnerable defendants and take their heightened COVID-19 risks into account. CrR 7.8(b)(5) provides an appropriate procedural vehicle to

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<sup>15</sup> See ACLU of Wash., *Jail Population Tracker*, <https://www.aclu-wa.org/pages/aclu-washington-jail-population-tracker> (last visited December 30, 2020). The population tracker allows the reader to view individual or multiple local jail populations throughout the State of Washington and provides a graph that shows the changes in the ADP over time.

allow judges to exercise this needed discretion in these extraordinary circumstances.

## **VI. CONCLUSION**

When judges sentence individuals with medical complications to prison, they do so expecting that DOC will be able to provide appropriate medical care and take all necessary precautions to protect the defendant's health. The COVID-19 pandemic has upended that expectation. The uncontrolled spread of a deadly and highly contagious virus through the Washington State Department of Corrections is the epitome of an unanticipated, extraordinary, and material circumstance that could not have been foreseen by a sentencing judge. CrR 7.8(b)(5) as interpreted in *State v. Smith* gives sentencing judges the discretion to vacate those judgments and sentence defendants anew, taking the individual defendant's unique COVID-19 vulnerabilities into account. Amici ask that this Court rule that CrR 7.8(b)(5), when read in conjunction with the *Smith* decision, grants trial courts the discretion to vacate judgments for incarcerated individuals sentenced prior to the COVID-19 pandemic who are at high-risk for developing serious COVID-related complications.

DATED this 8<sup>th</sup> day of January, 2021.

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**DECLARATION OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington, that on January 8, 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 8<sup>th</sup> day of January, 2021.

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