No. 408817

COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION III

IN RE THE PERSONAL RESTRAINT OF

Amber F. Kim,

Petitioner.

REPLY BRIEF OF PETITIONER

ACLU OF WASHINGTON FOUNDATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Statutes

Court Rules

Regulations

Constitutional Provisions

Books and Publications

I. INTRODUCTION

In 2021, the Washington State Department of Corrections ("DOC") transferred Ms. Kim—a transgender woman—from a men's prison to Washington Corrections Center for Women ("WCCW"). In reaching its decision, DOC recognized that placement at a women's prison was best for Ms. Kim—both for her physical safety and emotional well-being—and appropriate under DOC's policies. At WCCW, free from the overwhelming onslaught of harassment and threats of violence, Ms. Kim thrived. She attended college, worked, and engaged with the community around her.

In April 2024, after Ms. Kim received a "504" infraction for engaging in consensual sexual contact with her roommate, DOC reviewed Ms. Kim's housing placement. DOC determined that Ms. Kim's continued placement at WCCW was both safe and appropriate. This decision was correct. DOC rightly determined it had the capability of addressing the infraction at

WCCW, just as it did for Ms. Kim's roommate, who received a 20-day sanction and then returned to her previous custody level.

Yet for Ms. Kim, DOC remarkably reversed course. Without explanation, DOC determined that Ms. Kim was a danger to others and must be transferred out of WCCW. Now, Ms. Kim is forced to live in a single-sex institution that does not align with her gender identity. Not only does this place her in imminent risk of violence, it deprives her of basic human dignity by forcing her to into an impossible choice:

> If I am eventually placed in men's general population, I will live in constant fear. I am afraid of physical assault, sexual assault, and the constant harassment. I will face the ultimate paradox: my continued physical transition helps address my debilitating gender dysphoria, but the more female-presenting I become in appearance, the more unwanted, nonconsensual attention I will receive from the men in prison. If I do not continue my transition, my gender dysphoria will rear its ugly head, fueling my depression and making my life miserable. But, being victimized by incarcerated men—or spending all of my time hiding from them in [solitary confinement]—also makes my life as miserable.

Kim Decl. ¶ 74.

The conditions of confinement DOC subjects Ms. Kim to violates Washington's prohibition against cruel punishment. There is no better evidence that DOC's placement of Ms. Kim in a men's facility constitutes cruel punishment than Ms. Kim's own decision to stay in solitary confinement rather than face the danger of being imprisoned with men who constantly harassed and targeted Ms. Kim previously. Even so, DOC attempts to justify its placement of Ms. Kim in a men's facility by inuendo and rumor, citing previous unfounded and false allegations against Ms. Kim. Further, DOC now has seemingly taken the position that Ms. Kim must wait until she is sexually assaulted or physically attacked before the question of whether DOC's removing her from a women's facility and forcing her to live again in a men's facility can warrant constitutional scrutiny. This is legally incorrect, dangerous, and draconian. Ms. Kim is not required to wait until she is physically harmed to seek intervention. Ms. Kim may seek redress now because the cruel

conditions the DOC is forcing her to live in violates article I, section 14.

II. ARGUMENT

A. DOC Misstates the Legal Standard Governing Cruel Punishment Claims under Article I, Section 14

DOC seeks to justify its decision to move Ms. Kim to a men's facility—thereby subjecting her to cruel punishment—by wrongly attempting to limit the robust protections afforded under article I, section 14 of the Washington State Constitution. Wash. Const. art. I, § 14. However, DOC's characterization of article I, section 14's requirements minimizes its actual protections. In *Williams,* the Washington State Supreme Court made Washington's cruel punishment standard abundantly clear: "article I, section 14 of the Washington Constitution is more protective than the Eighth Amendment to the United States Constitution regarding conditions of confinement." *Matter of Pers. Restraint of Williams*, 198 Wn.2d 342, 346, 496 P.3d 289 (2021).

In spite of the clear delineation the Washington State Supreme Court articulated between article I, section 14 and the Eighth Amendment, DOC attempts to import the federal "deliberate indifference" standard into Washington law by arguing that *Williams* "endorsed" aspects of the federal test, despite the clear holding of *Williams*. *See* Brief of Respondent, at 37. In *Williams*, the Washington State Supreme Court took great care to explain why the Eighth Amendment's "deliberate indifference" standard is not tolerated under Washington's more protective constitutional provision. The Court explained that:

> The text of article I, section 14 provides, 'Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.' This is similar to but distinct from the Eighth Amendment, which states that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'

Id. at 354 (internal citations omitted). Then, after an exhaustive *Gunwall* analysis, the Court articulated that the Eighth Amendment test does not apply to Washington's cruel

punishment claims because it impermissibly "allow[s] conditions of confinement to persist—even if those conditions are unquestionably cruel—so long as the relevant official pleads ignorance or good intentions." *Id*. at 365. The Washington State Supreme Court explicitly recognized that cruel conditions can result "from institutional policies and practices." *Id.* (citing *Wilson v. Seiter*, 501 U.S. 294, 300, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991) (White, J., concurring in judgment) ("Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined .... In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.")).

Indeed, the Court in *Williams* was at pains to point out the more expansive protections of Washington's provision: "[T]he text and history of Washington law recognizes that the State has a nondelegable obligation to provide for the health, safety, and

well-being of prisoners under its jurisdiction . . . Washington prisons may not cause 'the deprivation of human dignity by conditions ... which are so base, inhumane and barbaric they offend the dignity of any human being,' whether intentionally or accidentally." *Williams*, 198 Wn.2d at 366 (quoting *Woods v. Burton*, 8 Wn. App. 13, 16-17, 503 P.2d 1079 (1972)).

DOC attempts here to plead good intentions, ignoring the holding in *Williams* that the correctional facility's intentions do not matter in determining whether a condition is cruel under the Washington State Constitution. Setting aside the fact that DOC only implemented its inclusive policies when it was sued for utterly failing to meet the minimum standard of care for transgender people in their custody[1], it is no defense to a cruel punishment claim that a prison adopted inclusive policies or that there is not a singular responsible actor for the conditions of

[1] *See Disability Rights Washington v. Washington State Department of Corrections, et. al*, W.D. Wash. 2:23-cv-01553 (Oct. 11, 2023), available at https://disabilityrightswa.org/cases/drw-v-doc/.

confinement. The article I, section 14 standard is clear: "To prevail on a PRP challenging conditions of confinement, a petitioner must demonstrate that (1) those conditions create an objectively significant risk of serious harm or otherwise deprive them of the basic necessities of human dignity and (2) those conditions are not reasonably necessary to accomplish any legitimate penological goal." *Id*. at 368.

The deprivation of human dignity is inclusive of the most basic needs—like bathroom access and water—but are not limited to only these threshold needs and include a prisoner's well-being, not just survival. Despite the Washington State Supreme Court's unequivocal rejection of arguments that people who are incarcerated are only guaranteed the minimal rights like access to that which keeps our bodies alive and functioning, DOC attempts to limit the applicability of *Williams* to only "deprivations of the minimal civilized measure of life's necessities, such as adequate food, clothing, shelter, and medical care." Brief of Respondent at 37-39. While these conditions are

unquestionably deplorable and cruel, the protections of Washington State's constitutional bar against cruel punishment provides much greater protections.

Accepting DOC's misleading characterization of Washington's cruel punishment standard under *Williams* would lead to the absurd result that only deprivation as severe as failing to provide access to bathroom and water constitutes cruel punishment of constitutional magnitude. Under such logic, even the violent rape Ms. Farmer suffered would not be a violation of Washington's constitutional prohibition on cruel punishment, despite the fact the United States Supreme Court left open the question of whether Ms. Farmer's conditions of confinement violated the less protective Eighth Amendment cruel and unusual punishment standard based solely on the question of the subjective knowledge and intent of prison officials. *See Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct 1970, 128 L. Ed. 2d 811 (1994). Such an interpretation of *Williams* is wrong and ignores the Washington State Supreme Court's careful articulation of the

protections afforded to Washingtonians under article I, section 14.

B. DOC Mischaracterizes Facts and Incidents to Support Its Decision to Move Ms. Kim to a Men's Facility

In an attempt to support its cruel transfer and subsequent confinement of Ms. Kim to a men's prison, DOC cites to Ms. Kim's record during her incarceration to argue her transfer was justified. However, DOC relies upon dismissed infractions that were found not to be supported by even the most minimal evidence. DOC then misuses Ms. Kim's remaining, minimal infraction history in an attempt to excuse its forcible transfer. DOC further distorts Ms. Kim's history of accessing gender-affirming care in an attempt to suggest she is manipulating her care. All of DOC's arguments fail. DOC's transfer of Ms. Kim to a men's prison due to a single, non-violent infraction is without excuse.

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1. DOC Misrepresents Ms. Kim's Infraction and PREA History to Unfairly Label her a Security Risk to Provide a Post Hac Justification for their Cruel Actions

In 2021, after years of self-advocacy and subsequent intervention by legal advocates, Ms. Kim's request for gender-affirming housing was finally granted. *See* Kim Decl. ¶ 39-49; *see also* Personal Restraint Petition ("PRP"), Exhibit E. By DOC's own admission, it employed its policies for transgender inmates to determine that Ms. Kim's placement at WCCW was safe and appropriate.[2] *See* Brief of Respondent at 25.

[2] While DOC has adopted housing policies that purport to provide transgender inmates who wish to be placed in gender-affirming housing that opportunity, in reality such placement is rarely granted. *See* Jessica Schulberg, *Washington Moves Trans Woman Back To Men's Prison In Unprecedented Act*, HuffPost, Jun. 28 2024, https://www.huffpost.com/entry/washington-moves-trans-woman-to-mens-prison_n_667ef30ee4b0d079dd459357 ("Of the approximately 250 openly trans men and women in DOC prisons, 11 are currently in gender-affirming housing . . ."); see *also* Lauren Girgis, *Trans woman argues move to WA men's prison is cruel punishment*, THE SEATTLE TIMES, Dec. 17 2024, https://www.seattletimes.com/seattle-news/law-justice/trans-woman-argues-move-to-wa-mens-prison-is-cruel-punishment.

Over three years later, without explanation and in secret, DOC arbitrarily overruled its previous decision and removed Ms. Kim from gender-affirming housing. *See* PRP, Exhibit I. Now, in an attempt to justify its actions, DOC materially misrepresents Ms. Kim's infraction history, relying on dismissed infractions and false PREA reports. The majority of DOC's justifications are simply false, and what is left is grossly inadequate to support its cruel transfer and subsequent conditions of confinement.

a. Ms. Kim's 504 infraction was the result of consensual sexual contact

In her 17 years of incarceration, Ms. Kim has a single infraction for engaging in consensual sexual activity with another incarcerated person. Nothing in DOC's records shows otherwise. While DOC takes issue with the term "consensual" due to prison regulations barring sexual contact between incarcerated persons, there is absolutely no allegation that Ms. Kim sexually assaulted her roommate.[3]

[3] Not only is this unsupported by DOC's own records, the very nature of a 504 infraction combined with DOC's minimal

DOC now claims Ms. Kim's 504 infraction was more serious than the exact same infraction issued to her roommate after the same incident because Ms. Kim's roommate "had significant mental health needs," "a history of being exploited," and "had been [Ms.] Kim's cellmate for less than a day." Brief of Respondent, at 10. In support of its conclusion that Ms. Kim's roommate "had significant mental health needs," DOC relies on a declaration of Deborah Wofford, who holds the position of Deputy Assistant Secretary with DOC. Wofford Decl, ¶ 2. But Ms. Wofford is not an expert in mental health—her declaration is devoid of any education credentials, background knowledge, or relevant work experience concerning mental health or sexual exploitation. Yet, in her declaration, Ms. Wofford explains

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standard of proof required at an infraction hearing makes this clear. Infractions finding sexual assault are not categorized as "504" infractions, but rather through more serious infraction codes such at "635"—"[c]ommitting sexual assault against another incarcerated individual, as defined in department policy (i.e., aggravated sexual assault or incarcerated individual on incarcerated individual, sexual assault)"—or "637"—"[c]ommitting sexual abuse against another incarcerated individual, as defined in department policy." WAC 137-25-030.

DOC's "S" code protocol, which she states indicates the general level of a person's mental health symptoms. Ms. Wofford states that Ms. Kim's roommate had an a "S3 code." *Id*. at ¶ 8. DOC uses this generalized assertion to baselessly argue that Ms. Kim exploited her roommate.[4] Not only does Ms. Wofford's statements lack proper foundation to provide such an opinion, the generalized information regarding Ms. Kim's roommate's "S" code tells this Court nothing about the types of mental health issues, her relative stability, or her ability to consent.

DOC further suggests that Ms. Kim knew of her roommate's purported vulnerabilities and poor boundaries and

[4] DOC fails to include Ms. Kim's "S" code in its recitation of facts, but Ms. Kim herself is particularly vulnerable at least because of her status as a transgender woman. Moreover, if 90% of the population of WCCW has a code of S2 or above, it logically follows that Ms. Kim likely does as well. *See* Wofford Decl., ¶ 7. Like the 84% of the women at WCCW that self-report having experienced trauma, Ms. Kim has experienced profound trauma including extreme abuse and neglect as a child. *See Id*. at ¶ 6. Like the 42% of the population at WCCW, Ms. Kim has been diagnosed with PTSD. *See Id*. In part because of Ms. Kim's history of trauma and abuse, she is considered to be vulnerable based on PREA standards.

took advantage of her. This allegation is unsupported and inflammatory. DOC attempts to bolster this argument by stating that the roommate "had been [Ms.] Kim's cellmate for less than a day," ignoring the fact that the two had known each other for quite some time and the roommate requested to share a cell with Ms. Kim.

Notably absent from DOC's evidence is any statement from Ms. Kim's roommate—or anyone else—that suggests actual exploitation. DOC simply cannot present any admissible evidence that Ms. Kim's roommate felt coerced in any way or that any other person saw any form of coercion. Instead, DOC relies on a generalized statement that consent is complicated in an incarceration setting without any evidence that this broad assertion is related in any way to Ms. Kim's case.

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b. DOC Misrepresents Ms. Kim's Remaining Infraction History, Relying on Dismissed Infractions, False PREA Reports, and Minimal Evidence

DOC parades a series of claims suggesting that Ms. Kim has a pattern of sexual-based infractions and targets vulnerable inmates. However, DOC grossly misstates the factual record of Ms. Kim's infractions, including raising allegations that have been deemed false, in order to support its decision to forcibly transfer Ms. Kim to a men's prison.

As a threshold matter, the evidentiary standard applied in disciplinary proceedings is the extremely low "some evidence" standard. *See* Washington State Department of Corrections Statewide Orientation Handbook, https://www.doc.wa.gov/docs/publications/400-HA002.pdf. To find an incarcerated person guilty of an infraction, DOC must only offer "some evidence" to support its allegation. *Id*. This standard permits "a fact finder to find an individual guilty with any amount of evidence, even when overwhelming evidence

indicates [the person is] innocent." Emily Parker, *Due Process in Prison Disciplinary Hearings: How the "Some Evidence" Standard of Proof Violates the Constitution*, 96 Wash. L. Rev. 1613 (2021).

While DOC may argue this minimal standard supports the effective functioning of prison infraction systems[5], the "some evidence" standard should be viewed as a dubious here, when DOC is relying on such minimal standards to support its decision to pull Ms. Kim from gender-affirming housing and subject her to incarceration in a men's prison. In its response, DOC fails to specify the shocking low standard of proof required to find an

[5] Although, in 2023, Washington's Office of the Corrections Ombuds ("OCO") recommended that DOC update its low "some evidence" standard to a more balanced "preponderance of the evidence standard." In its analysis, OCO notes that the "some evidence" standard is not defined by DOC policy, leaving hearing officers "a tremendous amount of discretion when evaluating evidence." OCO also notes that many other states "use a more robust evidentiary standard," including Oregon, Hawaii, Minnesota, Massachusetts, and Vermont. *See* Office of the Corrections Ombuds, *Prison-Initiated Disciplinary Process Recommendations,* Oct. 30, 2023, https://oco.wa.gov/sites/default/files/OCO_Prison-Initiated%20Disciplinary%20Process%20_10302023.pdf.

infraction because such a disclosure would highlight its untenable claims.

i. July 2019 Infraction Issued for Being "Out of Bounds"

DOC begins its procession of Ms. Kim's minimal infraction history in 2019, over 11 years after Ms. Kim was originally incarcerated. At this time, Ms. Kim was housed at the Washington State Reformatory Unit at the Monroe Correctional Complex—a men's prison. *See also*, Webb Decl., ¶ 9; *see also* Brief of Respondent, at 13-16 (citing Rule Decl.).

In July of 2019, Ms. Kim received an infraction for being in the same shower stall as another inmate. *See* Rule Decl., Attachment R. Ms. Kim was not infracted for engaging in sexual contact with the other inmate because there was no evidence that Ms. Kim was engaged in sexual acts, even based on DOC's minimal "some evidence" standard. *Id*. Moreover, DOC's reliance on this infraction is illogical because DOC considered this infraction when it decided to transfer Ms. Kim to WCCW

two years after the event occurred. Now, DOC argues that this Court should consider this infraction in the totality of Ms. Kim's sexual behavior even though there was no finding of sexual contact and the infraction occurred before her placement at WCCW.

ii. January 2020 Infraction Issued After Ms. Kim Made a PREA Allegation Against Her Roommate After He Consistently Refused to Leave Their Cell While Ms. Kim Changed Her Clothes

DOC notes that Ms. Kim was infracted for "threatening" her roommate in January of 2020. At time, Ms. Kim was housed at the Monroe Correctional Complex's Twin Rivers Unit ("TRU")—a men's prison. She openly identified as a transgender woman and had been on hormone replacement therapy for three years, causing her physical appearance to become more stereotypically feminine. *See* Kim Decl. ¶ 39, 43-46.

The "threat" occurred after Ms. Kim made a PREA complaint about her roommate, explaining that he refused to

leave the cell when she changed her clothes and used the bathroom. *See* Brief of Respondent, at 21-23 (citing Rule Decl.). When Ms. Kim made this PREA complaint, she was in the throes of a mental health crisis due to her roommate's behavior that caused her grave concern for her safety. *Id*. Nonetheless, instead of acting out violently, she went to her mental health counselor, an appropriate response. *Id*. Yet, it was Ms. Kim who was infracted when she expressed fear that she may harm her roommate if his behavior continued. Now, DOC uses this infraction to support its transfer of Ms. Kim back to a men's prison, even though this infraction was known to DOC when it approved Ms. Kim's transfer to WCCW.

iii. 2022 Dismissed Infraction for Alleged Threats

DOC continues its misleading enumeration of Ms. Kim's infractions by turning to an allegation that occurred once Ms. Kim was transferred to WCCW. In 2022, Ms. Kim allegedly threatened her roommate, but that infraction that was later

dismissed. *See* Brief of Respondent, at 26. Given the low standard, this means that there was not even "some evidence" this incident occurred. Yet now, DOC asks this Court to rely on this dismissed infraction. The evidence of this infraction is so lacking that the month of its alleged occurrence is unknown, because DOC does not maintain records of dismissed infractions. *See id*.

iv. Unfounded PREA Investigations Against Ms. Kim

DOC cites to a 2022 PREA investigation that originally identified Ms. Kim as the perpetrator, alleging that Ms. Kim coerced another inmate into a sexual relationship. Brief of Respondent, at 26. However, that PREA investigation was determined to be "unfounded." *Id*. at 27. Under DOC's PREA Investigation Policy, a determination that a report is "unfounded" means that "the allegation was determined not to have occurred." *See* DOC 490.860[6]. Despite a finding that the allegation did not

[6] According to DOC's policy, for each allegation contained in a PREA investigation, the Appointing Authority will determine

occur, DOC's response refers to the other party as the "victim" who has "serious mental health issues," completely ignoring the fact that DOC itself found that this report was untrue. Brief of Respondent, at 27.

DOC cites yet another dismissed PREA investigation, arguing that Ms. Kim was "infracted for engaging in a sex act after a staff member found [Ms.] Kim in bed with another incarcerated individual." *Id*. at 26. Again, that infraction was dismissed, meaning there was not even "some evidence" to support it. *Id.* Nonetheless, DOC pairs this with unsubstantiated rumors to create the impression that Ms. Kim was having sexual contact with several people at WCCW. *See e.g.*, Wofford Decl. ¶ 9 ("There continued to be discussions about Ms. Kim being

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whether the allegation is substantiated, unsubstantiated, or unfounded. Substantiated means "[t]he allegation was determined to have occurred by a preponderance of the evidence." Unsubstantiated means the "evidence was insufficient to make a final determination that the allegation was true or false." Unfounded means "[t]he allegation was determined not to have occurred." DOC 490.860.

involved with other women, for which DOC had insufficient proof.")

Then, DOC cites a report that Ms. Kim was determined to have "bite marks" on her neck and shoulder. Brief of Respondent, at 27. While it is unclear if this was a part of the same PREA investigation discussed above, DOC relies on the opinion of a DOC officer who is not a medical provider and has no relevant medical training, to conclude Ms. Kim's bruising was "bite mark." *Id*. DOC apparently never considered the obvious scenario that Ms. Kim, who had bruise marks on her neck, could have been the victim of an assault or strangulation. Remarkably, in its response, DOC described this incident in support of its decision to transfer Ms. Kim back to a men's prison by stating that "[Ms.] Kim had received physical injuries in a previous relationship," a passive description used against Ms. Kim by the entity charged with protecting victims of abuse confined to its custody. *Id*. at 29.

c. Ms. Kim's Statements During the Infraction Proceedings Are Unremarkable in Light of her Long-Term Incarceration and Irrelevant to DOC's Imposition of Cruel Conditions of Confinement

During the 504 infraction hearing and resulting appeal, Ms. Kim denied engaging in sexual contact with her roommate. For an incarcerated person, let alone a transgender woman who knows she will face increased scrutiny, this denial is simply unremarkable. It is a reflexive denial; an attempt to avoid an infraction and resulting discipline. Like Ms. Kim, her roommate also denied the incident. While her roommate's denial is simply excused by DOC, Ms. Kim's denial is now used to paint her as deviant and untrustworthy. Here, despite DOC's excuses, there is only one difference between Ms. Kim and her roommate—Ms. Kim is a transgender woman and her roommate is not.

Ms. Kim's statements voicing the impact of DOC's policies prohibiting consensual sex are sentiments not uncommon to incarcerated persons, especially those serving life and long sentences. The prospect of never having physical

intimacy with another person for the rest of a person's life is a difficult truth to confront. Ms. Kim simply voiced this painful reality. Her statements do not indicate an intent to rebuke DOC's policies for the rest of her sentence, as DOC baselessly argues.

2. DOC Distorts Ms. Kim's History of Gender-Affirming Medical Care

DOC's recitation of Ms. Kim's engagement with gender-affirming medical care is misleading and appears to suggest that Ms. Kim is misrepresenting her transgender identity or otherwise manipulating her access to gender-affirming care. DOC's implicit argument draws upon harmful and inaccurate anti-transgender rhetoric about "men" faking transgender identity to access women's spaces to sexually assault women. This deplorable rhetoric has been overwhelmingly debunked[7], yet DOC covertly draws upon these harmful tropes to attack Ms. Kim.

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[7] *See* GLAAD, *Debunking the "Bathroom Bill" Myth*, April 2017, https://media.glaad.org/wp-content/uploads/2016/02/25203412/Debunking_the_Bathroom_Bill_Myth_2017-305.pdf.

Without context or any possible relevance to the current litigation, DOC asserts that, "[w]hile at the women's prison, [Ms.] Kim canceled her gender affirming surgery" leaving the clear implication that her reasons for canceling were nefarious. Brief of Respondent, at 25. DOC itself acknowledges that Ms. Kim's surgery status is wholly irrelevant to DOC's housing determination. *See* Webb Decl. ¶ 10 ("Although Ms. Kim was approved for surgery shortly after her transfer to a women's prison, the approval was not contingent on the transfer or otherwise related to Ms. Kim's placement in a women's prison."). Inclusion of Ms. Kim's purposed "canceled" surgery only serves to implicitly suggest that Ms. Kim has nefarious motives.

All of Ms. Kim's gender-affirming medical care is overseen by both DOC and medical providers, pursuant to widely-acceptable standards for transgender medical care. Ms. Kim then made specific medical decisions that were properly informed by her own experience with gender dysphoria and the

lack of availability of DOC's electrolysis providers. Ms. Kim did not simply decide "not to move forward" with a vaginoplasty as DOC opines, but rather determined that she would first try "less invasive procedures to her face and neck" and then "assess her gender dysphoria." Webb Decl. ¶ 12. During this time, DOC suspended electrolysis treatment. *Id*. at ¶ 13. Ms. Kim did not "cancel[]" her genital surgery simply upon arrival to WCCW; rather, Ms. Kim sought to assess her mental health and gender dysphoria after facial feminization surgery. Certainly, gender-affirming genital surgery is not a prerequisite for any transgender person's identity. For Ms. Kim, addressing her gender dysphoria in a step-by-step manner is reasonable and appropriate, particularly given her change in social space from a men's prison to women's prison, significance of these medical interventions, plan for other upcoming gender-affirming procedures, and continued hormone replacement therapy.

Meanwhile, DOC did not "pause[]" only "its facial electrolysis program," as its response suggests: DOC halted all

electrolysis—including facial and genital—in April of 2023 and those medical services are still not available. *See* Brief of Respondent, at 28. This not only impacts Ms. Kim's access to facial electrolysis, which itself constitutes important gender-affirming medical care, but it impedes her ability to seek certain genital surgeries—including vaginoplasty—because hair removal is a medical prerequisite to this surgery. Facing the inability to choose the surgery of her choice, Ms. Kim has instead elected to pursue an orchiectomy.[8] Brief of Respondent, at 31. While Ms. Kim's decision-making regarding gender-affirming medical procedures is simply not relevant to this Court's analysis of her cruel punishment claim, DOC's distortion of Ms. Kim's medical history and its relationship to this case is cause for concern.

[8] An orchiectomy is a gender-affirming surgery that removes the testicles. This procedure also preserves a person's ability to pursue a vaginoplasty at a later date.

C. DOC's Forcible Transfer of Ms. Kim From a Women's Prison to a Men's Prison Is Objectively Cruel

DOC's attempts to minimize that its forcible transfer of Ms. Kim to a men's prison places her at imminent risk of harm and deprives her of human dignity. Under article I, section 14, conditions a confinement are cruel when there is an "objectively intolerable risk of harm or otherwise deprive them of the basic necessities of human dignity. *Williams*, 194 Wn.2d at 368.

Ms. Kim's transfer to and subsequent confinement at a men's prison creates an objectively significant risk of serious harm and deprives her of the basic necessities of human dignity and, as such, constitutes cruel punishment. Contrary to DOC's assertions, cruel conditions of confinement can arise from more than lack of access to bathrooms and water. For Ms. Kim, she lives every day in solitary confinement rather than face the risk of sexual assault, physical violence, and ongoing harassment that will be her daily existence in men's general population. Ms. Kim's fears are more than just speculative.

During her previous placement at men's prisons, Ms. Kim faced attempted sexual assaults, physical violence, and overwhelming harassment that defined her daily existence. Now, over four years have passed since Ms. Kim's last placement in a men's facility. During this time, her physical transition has progressed. Now, her more feminine physical appearance and psychological changes make her even more at risk of violence and harassment.

DOC claims that there were no safety concerns for Ms. Kim in men's prisons only by ignoring her repeated statements articulating her safety concerns, both at the time she reported them and now, and manipulating Ms. Kim's tactics of self-protection against her. DOC's arguments fail.

1. Ms. Kim Makes Credible Statements About Her Experiences of Attempted Sexual Violence, Physical Violence

DOC attempts to attack the veracity of Ms. Kim's claims by arguing that she failed to contemporaneously disclose safety concerns to DOC. This argument is severely flawed. First,

DOC's own records show that, over the course of years, Ms. Kim repeatedly told DOC about her safety concerns. *See* Rule Decl., Attachment F ("Kim states that there is a safety issue with the continuation of housing here [Monroe Correctional Complex] but there would be at any male facility. Kim states that the only way to feel safe in a housing facility would to be to be transferred to WCCW.") (Transgender Housing Review dated June 20, 2017); *see also* Rule Decl., Attachment G ("Kim states that the only way to feel safe is to be housed in a women's facility") (Transgender Housing Review dated October 25, 2017); *see also* Rule Decl., Attachments H, J, K, L, N, T, W.

Next, DOC's argument rests on the assumption that incarcerated people report all violence and harassment to DOC. However, just as violence is unreported in the community[9],

[9] *See* Laura C. Wilson & Katherine E. Miller, *Meta-Analysis of the Prevalence of Unacknowledged Rape*, 17 Trauma, Violence, & Abuse 149 (2016) (Reviewed 28 peer-reviewed studies; of nearly 6,000 women who had been raped, 60.4% did not recognize their experience as rape even though it fit the definition — an unwanted sexual experience obtained through force or the threat of force or a sexual experience they did not consent to

violence is even more underreported in jails and prisons.[10] PREA's reporting mechanisms do not cure underreporting.[11]

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because they were incapacitated. "This finding has important implications because it suggests that our awareness of the scope of the problem may underestimate its true occurrence rate, depending on the type of measurement," the authors write. "This impacts policy reform, allocations of mental health services, survivors' perceptions of their experiences, and society's attitudes toward survivors."); *see also* Karen G. Weiss, *"You just don't report that kind of stuff": investigating teens' ambivalence toward peer-perpetrated, unwanted sexual incidents*, 28 Violence & Victims 288 (2013); *see also* Karen G. Weiss, *Too Ashamed to Report: Deconstructing the Shame of Sexual Victimization*, 5 Feminist Criminology 286 (2010).

[10] *See* Kristine Levan Miller, *The Darkest Figure of Crime: Perceptions of Reasons for Male Inmates to Not Report Sexual Assault*, 27 Jus. Q. 692 (2010) (Survey of hundreds of incarcerated people at a men's-designated prison in Texas. Of 396 respondents, the three most common reasons prisoners may not report sexual assault are embarrassment, retaliation from other inmates and a fear of harassment and abuse from other inmates.); *see also* Shannon K. Fowler et al., *Would They Officially Report an In-Prison Sexual Assault? An Examination of Inmate Perceptions*, 90 Prison J. 220 (2010).

[11] *See* Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues Torture*, 3 Crim. L. Brief 10 (2008) ("There is significant underreporting of all sexual offenses, in general. . . reporting sexual victimization in custody often exposes victims to additional victimization and retaliation."); *see also* Richard Tewksbury & Margaret J. Mahoney, *Sexual Victimization and Requests for Assistance in Inmates' Letters to the National Prison Rape Elimination Commission*, 73 Fed. Probation (2009).

This is likely even more profound for transgender women, who may be hesitant to report violence and harassment to prison officials out of a fear of retaliation or simply because they do not think the prison will take action.[12]

DOC continues its baseless argument by repeatedly noting that, while placed at men's prisons, Ms. Kim requested to move away from observation stations. DOC claims this undercuts Ms. Kim's stated safety concerns. Yet, officer observation stations are typically located in central areas based on panopticon design. Such placement puts Ms. Kim on display to guards and other inmates and thus increases the occurrences of harassment.

For Ms. Kim, because DOC knew she was at-risk, it targeted her for housing placement near correctional staff, which only caused Ms. Kim greater stress. In this "increased visibility" housing location, Ms. Kim was under constant watch of guards,

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[12] *See* Vera Institute of Justice, *Advancing Transgender Justice: Illuminating Trans Lives Behind and Beyond Bars*, Feb. 2024, https://vera-institute.files.svdcdn.com/production/downloads/publications/advancing-transgender-justice.pdf.

who she had complained about, and her cell was at the center of everything so men would often harass her. *See* Kim Decl. ¶ 43-44. It was during this time that Ms. Kim's physical appearance began to change, yet her "high visibility" location meant that she was front-and-center for the mostly male correctional staff monitoring the housing unit. *See* Rule Decl., Attachment I ("Kim states that Kim doesn't like being in front of the booth as it's usually a male officer working there so the inmate has to put of up a privacy curtain to change."). Such "high visibility" housing location only made Ms. Kim more likely to underreport harassment, particularly after experiences where correctional staff ignored her reports of harassment. *See Id*. ¶ 45 ("I tried to tell the corrections staff about the constant onslaught of proposition notes and the distress it was causing me, but DOC did not take any action."). DOC also ignored Ms. Kim's complaints about staff, including being misgendered and being subjected to pat-down searches by male correctional staff. *See* Rule Decl., Attachment I ("Kim is still having issues with staff

regarding pat searches and being called Mr. or he. Kim feels like being transgender[] it should be a female conducting the searches." [sic]).

2. Ms. Kim's Safety Concerns Are Not Undercut by DOC's Purported Lack of Records

DOC's argument that Ms. Kim's claims are spurious because there is a dearth of notes regarding Ms. Kim's feeling unsafe presumes that prison officials are avid notetakers who transcribe every statement made to them. This is simply not true or practical. It is further unrealistic that DOC would keep notes acknowledging the risk of harm facing Ms. Kim, let alone produce them in this litigation, when those notes could subject them to liability. And while PREA mandates investigations when an incarcerated person reports sexual abuse, PREA only became effective in Washington State in August of 2012. *See* 28 CFR §115. Because Ms. Kim was incarcerated for four years prior to PREA's requirements, DOC's records are necessarily incomplete.

Even when DOC's own policies mandates production of written reports—like when an incarcerated person reports safety concerns—DOC has likely not consistently done this when it comes to Ms. Kim. DOC's response points to Ms. Kim's statements in her 2022 PREA complaint where she stated she "need[ed] to be in a different unit where staff will actually like, listen to me when I say, 'Hey, I have a problem. You need to fix i[t].'" Brief of Respondent, at 21-22. Ms. Kim's statements to the PREA hotline show that staff are not listening to her safety concerns, and DOC's records show that staff is not only not listening, but not even documenting them.

3. Ms. Kim's Hypervigilance Protected Her from Harm, and DOC Now Weaponizes This Against Her

As DOC acknowledged in its response, "[Ms.] Kim described having to be vigilant in men's facilities to avoid victimization." Brief of Respondent, at 20. Ms. Kim's hypervigilance and self-protection aided her safety in men's prisons. Now, Ms. Kim's hypervigilance is being weaponized

against her, as DOC argues that the lack of "evidence that [Ms.] Kim had been victimized" suggests there is not an objective significant risk of future victimization. *Id*. This is simply groundless.

Ms. Kim's describes how she kept herself safe in men's prisons through hypervigilance. After receiving endless sexually explicit notes, Ms. Kim explained:

> I feared that if I went to the showers, I would be sexually assaulted by an inmate who was there "waiting for me." I became hyper-vigilant about showering—I would be sure to only shower when no one was else was in the shower area because I was so fearful. I kept track of the times stated in the letters to be sure to avoid the showers at those times. I also became hypervigilant about who I was around. If someone showed any interest in me, I took that to be a threat and avoided them.

Kim Decl. ¶ 44. Ms. Kim also described in detail two attempted sexual assaults, that she prevented be warding off her assailants. *Id*. at ¶ 22. Now, DOC uses Ms. Kim's own self-protection to suggest that she is not actually at risk—when really it was Ms. Kim who was able to keep herself safe in the face of real danger.

D. The Cruel Conditions of Ms. Kim's Confinement Are Not Reasonably Necessary to Accomplish any Legitimate Penological Interest

Under article I, section 14, cruel conditions of confinement are unconstitutional unless they are reasonably necessary to accomplish a legitimate penological goal. *Williams*, 198 Wn.2d at 363. In order for DOC to evade liability for the cruel punishment it is subjecting Ms. Kim to, it would have to assert a legitimate penological interest and show that Ms. Kim's conditions of confinement are proportionate to its stated penological interest. *See id*. at 367. However, no matter how many pages of briefing and documentation DOC submitted to this Court, it failed to assert such an interest.

DOC attempts to shroud itself in an unpierceable cloak of judicial deference under the guise of fulfilling "legitimate penological goals." *See* Brief of Respondent, 54-55 (arguing that the "unique problems" of prisons "depend special deference when evaluating [DOC's] penological interests."). While prisons are afforded deference to adopt policies and procedures for

prison administration, this deference is not limitless, and it does not relieve DOC from judicial review or constitutional limitations. *See In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 393, 20 P.3d 907 (2001). As the Court held in *Williams*, the Washington Constitution permits examination of systemic prison conditions that give rise to cruel punishment. *See Williams*, 198 Wn.2d at 365. DOC's recitation of its purported legitimate penological interest fails to support the cruel conditions of confinement DOC imposes on Ms. Kim because it distorts Ms. Kim's history to wrongly label her a security risk.

This Court is required to look at the specific purported "penological goals" and determine whether the goals are "legitimate" and whether an incarcerated person's conditions of confinement are "reasonably necessary" to accomplish such goals. *See id*. at 369. This is necessarily a shifting balancing test applied on a case-by-case basis. Here, DOC is forcing Ms. Kim to live in a men's prison, where she will be subjected to harassment and constant fear of physical abuse, or suffer in

solitary confinement. DOC's conditions of confinement it forces Ms. Kim to live under is not reasonably necessary to effectuate prison security. This is particularly true when DOC's actions are viewed in the context of the single infraction that caused her transfer, DOC's vastly different treatment of Ms. Kim's cisgender roommate, and DOC's capacity to house Ms. Kim in a more restrictive custody status at WCCW. DOC's placement of Ms. Kim at a men's prison is simply not reasonably necessary to achieve any of its stated penological interests.

DOC argues that it has a "legitimate penological interest in preventing *any* sexual activity within its prisons." Brief of Respondent at 56-57. Assuming, arguendo, this is true, Ms. Kim's conditions are not reasonably necessary to accomplish this penological goal. If DOC wishes to ensure Ms. Kim does not have sexual contact with another inmate, she can be housed without a roommate or in close custody at WCCW, with ongoing reviews to re-assess her custody status.

If DOC actually sought to wholly eradicate the risk of consensual sex between incarcerated people, DOC would have to create a prison structure where incarcerated people simply never interact. This is clearly impracticable. Instead, DOC takes reasonable efforts to avoid most situations that permit consensual sexual contact. Yet, DOC's forcible transfer of Ms. Kim to a men's prison is far beyond proportionate in response to Ms. Kim's 504 infraction. Ms. Kim's roommate, for example, was not moved to a men's prison, despite committing the same infraction—instead, she was moved to more restrictive custody status for just 20 days. DOC could have imposed the same sanction upon Ms. Kim, but instead imposed the most severe sanction—moving Ms. Kim to a men's prison. Moreover, if DOC believed that Ms. Kim will engage in consensual sex any time she is placed with other inmates, it would not be so willing to place her in men's general population. DOC is simply more willing to accept sexual contact in this context. Transferring Ms.

Kim to a men's prison is simply not reasonably necessary to accomplish this purported goal.

In an attempt to invent a legitimate penological interest to apply ex post facto, DOC makes its most outrageous argument—that it has a particular interest in "preventing an individual with a penis from having penetrative sex in a women's prison." Brief of Respondent at 56. DOC asserts that it has an interest in avoiding pregnancies, and Ms. Kim presents a risk of impregnating other incarcerated women. *Id*. at 57. To support this assertion, DOC relies on the declaration of Michelle Webb, DOC's Gender Affirming Program Administrator for Gender Affirming Healthcare. Ms. Webb is not a clinical provider, and she does not appear to have any specialized medical credentials. *See* Webb Decl. Rather, Ms. Webb "help[s] coordinate care for transgender patients and ha[s] access to healthcare policies and records kept by the facility in the ordinary course of business." *Id*. at ¶ 2. Ms. Webb is not an expert witness. Yet, DOC relies on Ms. Webb's non-expert declaration to make the overbroad,

unsupported argument that "transgender women with a penis and testicles retain their fertility while taking hormone replacement therapy, presenting an additional risk of pregnancy in a women's prison." Webb Decl. at ¶ 17. Ms. Webb is not an expert capable of making such a medical statement.[13] Most relevant here, there is no evidence that Ms. Kim has a sexually transmittable

[13] Ms. Webb also states that Ms. Kim "takes a single medication, progesterone, as HRT." Webb Decl. ¶ 9. This is incorrect. Like Ms. Webb acknowledged, "HRT for transgender women is generally intended to suppress natural testosterone production and supplement female hormones." *Id*. As such, like the vast majority of transgender women who have yet to undergo an orchiectomy or other gender-affirming surgery that removes the testicles, Ms. Kim takes two medications—an anti-androgen medication and estrogen. *See e.g. Feminizing hormone therapy,* Mayo Clinic, https://www.mayoclinic.org/tests-procedures/feminizing-hormone-therapy/about/pac-20385096.

infection[14] or is capable of producing sperm, making this argument fully irrelevant. [15]

[14] DOC's reliance on the argument that Ms. Kim can be safe in a men's general population unit also undercuts its argument about SDI risk. At the risk of stating the absurd, all people, regardless of genitals, can get a SDI. While some SDIs may be more transmittable via penile penetrative sex, such sexual acts can occur—and often do—in men's prisons. DOC uses this argument only when it is fitting to excuse its transfer of Ms. Kim to a men's prison, without regard for the exact same risk that could occur in a men's prison regarding Ms. Kim or any other incarcerated person there with a penis.

[15] DOC's argument here also suggests that the only people with penises at a men's prison are incarcerated transgender women. Yet, DOC employes cisgender men to work in all areas of WCCW. DOC's argument completely overlooks the risk of pregnancy to incarcerated cisgender women even though prison officials are responsible for almost equal the number of sexual misconduct against inmates as inmate-on-inmate sexual misconduct. *See* U.S Dept. of Justice Bureau of Justice Statistics, *Substantiated Incidents of Sexual Victimization Reported by Adult Correctional Authorities, 2016–2018*, Jan. 2023, https://bjs.ojp.gov/document/sisvraca1618.pdf. Moreover, WCCW permits family visits by spouses of incarcerated people, which include access to private spaces to engage in sexual activity. *See* https://www.doc.wa.gov/corrections/incarceration/visiting/prison-visits.htm. If DOC actually sought to avoid pregnancies and STIs, it would employ harm reduction strategies, such as access to condoms, in addition to its restrictive policies.

E. A Ruling for Ms. Kim Does Not Create a Blanket Rule Requiring DOC to House Transgender Inmates Based Solely on Their Gender Identity

DOC's argument that granting relief for Ms. Kim would result in a blanket rule that DOC must place all transgender people in housing that aligns with their gender identity is misplaced. Ms. Kim filed a Personal Restraint Petition, challenging the conditions of her confinement. This Court's analysis rests on the facts specific to Ms. Kim and a ruling addresses only Ms. Kim's conditions of confinement. Moreover, failing to house a transgender person in a place that person does not want to be housed could not be cruel.

F. This Court May Order a Reference Hearing to Provide an Opportunity for Further Factual Development of the Record

Petitioners bear the burden of proving unlawful restraint by a preponderance of the evidence. *In re Pers. Restraint of Cook*, 114 Wn.2d 208, 813-14, 792 P.2d 506 (1990). To obtain relief from a PRP based on constitutional error "where a petitioner raises a claim for which there was 'no previous

opportunity for judicial review, such as constitutional challenges to actions taken by prison officials,' . . . the petitioner must show the conditions or manner of restraint violate state law or the constitution." *Williams*, 198 Wn.2d at 353 (quoting *In re Pers. Restraint of Gentry*, 70 Wn.2d 711, 714-15, 245 P.3d 766 (2010)).

A "petitioner must state in his petition the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 885–86, 828 P.2d 1086, 1092 (1992). "[T]he petitioner must present evidence showing that [their] factual allegations are based on more than speculation, conjecture, or inadmissible hearsay." *Id*. at 886.

Next,

> Once the petitioner makes this threshold showing, the court will then examine the State's response to the petition. The State's response must answer the allegations of the petition and identify all material disputed questions of fact. In order to define disputed questions of fact, the State must meet the

> petitioner's evidence with its own competent evidence. If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions.

Id. at 886–87; *see also* RAP 16.11(b) ("If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing."); *see also* RAP 16.12 ("If the appellate court transfers the petition to a superior court, the transfer will be to the superior court for the county in which the decision was made resulting in the restraint of petitioner or, if petitioner is not being restrained on the basis of a decision, in the superior court in the county in which petitioner is located."). "[T]he purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations." *Rice*, 118 Wn.2d at 886.

Here, Ms. Kim meets her requisite initial threshold showing required by a PRP petitioner. She is restrained and

brings constitutional challenge to her restraint. She puts forth ample evidence supporting her claim of cruel conditions of confinement, through her declaration and DOC records. In its response, DOC relies upon declarations, many of which contain inadmissible hearsay and lack proper foundation. DOC further offers records, which although are incomplete, appear unadulterated.

This Court may be left with questions of material fact that necessitate clarification prior to ruling on the merits. Questions remain due to DOC's gross misrepresentations of facts throughout its response. DOC misrepresented the reasons for Ms. Kim's change in gender-affirming medical care, suggesting that Ms. Kim "canceled" surgery when she simply wished to undergo other procedures first, including after electrolysis treatment was no longer available. DOC relied upon false allegations and dismissed infractions to argue that Ms. Kim has a history of sexually exploitative behavior. DOC blatantly misrepresented Ms. Kim's actions in its report regarding her transfer from

WCCW to TRU, claiming she assaulted staff when such an assault never occurred. Although DOC retracted that statement, it never addresses this patent falsehood in its pleadings, which should raise significant questions for this Court.

Not only does DOC misrepresent material facts, DOC relies on non-experts to submit declarations filled with improper expert opinions and submits inadmissible hearsay throughout its declarations. DOC handpicked favored records to present to this Court while failing to submit a complete set of Ms. Kim's DOC records. Then, DOC relied on its culled records to suggest that Ms. Kim never reported safety or other concerns to prison officials. Ms. Kim is without access to her own records in order to present a more complete evidentiary record to this Court.

Any one of these reasons would support this Court remanding Ms. Kim's PRP for a reference hearing, in order to develop a complete, accurate record to more fully inform this Court's critical decision herein.

III. CONCLUSION

DOC's forcible transfer of Ms. Kim from WCCW and subsequent incarceration in a men's prison is cruel and without any legitimate penological justification. There is only reason Ms. Kim was singled out for this cruel, disproportionate treatment—because she is a transgender woman. This Court should grant Ms. Kim's Personal Restraint Petition, finding that her conditions of confinement a men's prison violation article I, section 14 of the Washington State Constitution. This Court should further order DOC to immediately remedy these cruel conditions by transferring Ms. Kim back to a women's facility or releasing her.

CERTIFICATE OF COMPLIANCE WITH RAP 18.17

This document contains 8,531 words per RAP 18.17.

RESPECTFULLY SUBMITTED February 18, 2025.

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CERTIFICATE OF SERVICE

I certify that on this 18th day of February, 2025, I caused a true and correct copy of this document to be served on all parties by electronically filing this document through the Washington State Appellate Courts Secure Portal.

Signed this 18th day of February, 2025 at Seattle, WA.

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