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**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

In the Matter of the Personal Restraint of

AMBER F. KIM,

Petitioner.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Washington Department of Corrections strives to ensure all transgender individuals can live authentically and without fear. The challenges of a prison environment are unique, however, and, as with other prison administrative decisions, gender-affirming processes require a careful balancing of interests.

Amber Kim is a transgender woman serving two life sentences in Department custody. In 2021, the Department granted Kim's request for gender-affirming housing in its women's prison. But after Kim repeatedly engaged in sexual relationships with vulnerable incarcerated women, the Department transferred her back to a men's prison where she had been safely housed in the past.

Kim now brings a personal restraint petition alleging that her confinement in a men's prison is unlawful due to the generalized risk of violence to transgender women. Kim presents no evidence that she is at a heightened risk of violence,

however, and all documentary evidence from her previous confinement in men's prisons consistently shows she had no objective safety concerns.

Further, Kim's housing placement is constitutionally permissible because it is reasonably necessary to accomplish the Department's legitimate goal of preventing Kim from engaging in harmful sexual relationships. Kim provides no arguable basis for relief and her petition should be dismissed.

II. ISSUES PRESENTED FOR REVIEW

1. Whether Kim can safely be housed at the Twin Rivers Unit, which provides protections for transgender women and full access to gender-affirming care.
2. Whether the Department of Corrections' individualized decision to house Kim at the Twin Rivers Unit was reasonably necessary to accomplish its legitimate penological goals.

III. STATEMENT OF THE CASE

A. The Department of Corrections Has Established Policies and Procedures That Ensure the Equitable Treatment of Transgender Incarcerated Individuals

In recent years, the Department has transformed its approach to managing transgender individuals in its custody,

implementing policies and procedures that recognize the diverse gender identities of transgender, intersex, and gender nonconforming incarcerated individuals.

1. The Department provides gender-affirming health care regardless of an individual's housing assignment

The Department delivers individualized gender-affirming medical and mental health care to all individuals in its custody consistent with the Washington Health Care Authority's Transhealth program. Ex. 3, Decl. of Michelle Webb (Webb Decl.), ¶ 6; Attach. B at 2. Medical necessity of any gender-affirming treatment is determined in line with state standards. Webb Decl., Attach. B at 2. Hormone replacement therapy is available to any patient who identifies as transgender if they have no major medical contraindications. *Id.* at 8. A gender dysphoria diagnosis is not required. *Id.* Further, incarcerated individuals have access to the same medically necessary gender-affirming surgeries that are available in the community. *Id.* at 10. Access to medically necessary gender-affirming

treatment is not contingent on an individual's housing placement. Webb Decl. ¶¶ 6, 10.

In addition, all Department facilities—whether designated as a women's prison or a men's prison—provide access to personal property that correspond to the individual's gender identity, including clothing and personal hygiene items such as makeup and hair removal products. Ex. 1, Decl. of Dianna Rule (Rule Decl.), Attach. Z at 2-3; Webb Decl., Attach. A at 10. These items transfer with the individual when they change facilities. Rule Decl., Attach. Z at 6.

2. The Department implements all standards under the Prison Rape Elimination Act

The Prison Rape Elimination Act (PREA) sets standards to eliminate sexual abuse and sexual harassment in carceral settings including adult prisons and jails. *See* 28 C.F.R. §§ 115.11-.93. PREA prohibits sexual assault, sexual abuse, sexual harassment, and other sexual misconduct. Ex. 2, Decl. of Michelle Duncan (Duncan Decl.), Attach. A at 3. Prohibited sexual harassment includes comments and actions of a sexual

nature, as well as demeaning references to gender. Duncan Decl., Attach. A at 23.

While PREA protects all incarcerated persons, it establishes specific standards to protect transgender and intersex individuals. *See* § 115.15 (limits to cross-gender viewing and searches), § 115.31 (employee training), § 115.41 (screening for risk of victimization and abusiveness), § 115.42 (use of screening information), § 115.86 (sexual abuse incident reviews).

PREA does not require gender-affirming housing for transgender individuals; rather, it requires that housing decisions be made on a case-by-case basis, considering the individual's health and safety as well as management or security concerns. § 115.42(c). Housing decisions must be reassessed at least twice a year to review safety concerns. § 115.42(d).

The Department has implemented multiple policies to comply with PREA. Duncan Decl., Attachs. A-D. It screens all

incarcerated individuals for risk as a potential predator or a potential victim; individuals with incompatible risk assessments cannot be housed together. Duncan Decl., Attach. B at 2-3, 8. The Department develops PREA monitoring plans for all transgender individuals and takes immediate action to protect any individual if they are at risk of sexual assault or abuse. *Id.* at 6.

Anyone—incarcerated individuals, visitors, family members, or other members of the community—may report PREA violations through the PREA hotline, verbally to staff members, or in writing. Duncan Decl., Attach. A at 18-19. The Department triages all PREA complaints to evaluate whether the allegations, if true, would constitute prohibited conduct under PREA. Duncan Decl., ¶ 3. If the allegations meet the definition of prohibited conduct, the facility's superintendent initiates an investigation. *Id.* Investigations result in one of three outcomes: substantiated, when the preponderance of the evidence supports the allegation; unsubstantiated, when the

evidence was insufficient to make a final determination of the truth of the allegation; and unfounded, when the evidence is sufficient to determine the allegation is false. *Id.* ¶ 4.

The Department has also implemented policies that are more protective than PREA. For example, PREA requires only that cross-gender pat searches of transgender individuals be conducted professionally, respectfully, and in the least intrusive manner possible. 28 C.F.R. § 115.15(f). The Department, by contrast, requires pat searches for transgender individuals be conducted by the gender requested by the individual except in emergency situations. Rule Decl., Attach. Y at 3-4.

3. The Department considers an individual's safety and other needs when making gender-affirming housing decisions

The Department considers a variety of factors in making housing decisions for any incarcerated individual. These factors include the individual's custody level, safety and security issues, the individual's physical and mental health needs, and access to programming and treatment. Rule Decl., Attach. X

at 13-14. Individuals are typically transferred to a new facility only if they change custody levels, if there are safety concerns, or if they have significant medical, mental health, or programming needs. *Id.* at 14.

Housing decisions for transgender individuals are separate from the standard classification process and have two components. The Housing Protocol for Transgender, Intersex, and Non-Binary Individuals (form DOC 02-384) is a holistic assessment of an individual's housing assignment, while the Housing Review for Transgender Intersex and Non-Binary Individuals (form DOC 02-385) is a more limited review that is conducted every six months, in line with PREA standards. Decl. of Adrien G. Leavitt (Leavitt Decl.), Ex. A at 6-7; *see also* 28 C.F.R. § 115.42(d). Both are conducted by a facility-level multidisciplinary team including supervisory corrections officers, medical and mental health providers, and a PREA specialist. Leavitt Decl., Ex. A at 4.

Transfer recommendations must be made through the longer Housing Protocol; if the team recommends transfer, a multidisciplinary team at the proposed receiving facility conducts its own assessment of whether placement at the facility is appropriate. *Id.* at 6-7. The Deputy Secretary makes the final determination on housing transfers. *Id.* at 8.

Consistent with PREA standards, the team considers the individual's views about personal safety along with other objective security issues including infraction history, criminal record, and completion of therapeutic programming. *Id.* at 5. If an individual's request for gender-affirming housing is denied, they may submit another request at their next review. *Id.* at 8. As with all other housing placements, an individual who has been placed in a gender-affirming facility may be transferred away from that facility due to documented, objective safety and security concerns. *Id.*

B. Amber Kim Was Safely Housed in Men’s Facilities as a Transgender Woman, but Her Behavior Could Not be Managed Effectively at a Women’s Prison

Petitioner Amber Kim killed her parents in 2006. *State v. Kim*, noted at 149 Wn. App. 1058, 2009 WL 1114598, at *1 (2009).¹ She was convicted by a jury of two counts of premeditated murder in the first degree with the aggravating circumstance of domestic violence. Rule Decl., Attach. A. The trial court sentenced her to two consecutive life sentences without the possibility of parole.² *Id.* Kim has been in Department custody since 2008. Rule Decl., Attach. B at 11-12.

1. Kim was safely housed in men’s facilities as a transgender woman before transferring to the Twin Rivers Unit

All individuals with first degree murder or life without parole sentences are assigned to close custody for at least two years upon entering Department custody. Rule Decl., Attach. X

¹ Cited as evidence of facts established in earlier proceedings and not for persuasive value under GR 14.1(a).

² Kim has resentencing proceedings pending in superior court under *In re Personal Restraint of Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021).

at 9. Kim spent most of her first eight years in prison housed in close custody at the Washington State Penitentiary. Rule Decl., Attach. B at 8-12.

In January 2016, after Kim disclosed her transgender status to the Department, it assessed her housing placement using the Protocol for the Housing of Transgender and Intersex Offenders. Rule Decl., Attach. C. At the time, records indicated Kim had not been involved in any known PREA-related incidents. *Id.* at 1. She reported feeling safe and asked to return to a two-person cell in her housing unit. *Id.* at 2. Accordingly, the team recommended Kim's continued placement in close custody at the Penitentiary. *Id.* at 3.

Kim received a custody promotion in May 2016. Rule Decl., Attach. B at 8. She was transferred to the Washington State Reformatory Unit at the Monroe Correctional Complex. *Id.*

When Kim arrived, the Department completed another Protocol to assess the suitability of her housing assignment.

Department staff members again noted that there was no evidence suggesting that Kim was a potential PREA victim. Rule Decl., Attach. D at 2. Kim reported she was primarily attracted to women and had no desire to engage in sexual activity in prison. *Id.* at 3. She also reported no history of sexual abuse in or out of prison and did not disclose any voluntary sexual encounters in prison. *Id.*

Although she reported no specific risks, Kim agreed to work with Department staff members on a PREA monitoring plan. *Id.* She was housed directly in front of the officer's booth and near the guard station for increased visibility and monitoring. *Id.* at 4.

At her first six-month housing review, Kim said she felt safe in her housing unit. Rule Decl., Attach. E at 2. Before her next review, Kim asked to move away from the officer's booth. Rule Decl., Attach. F at 2. Staff members approved the request because Kim had reported no safety issues in the unit. *Id.* Although Kim said she would not feel completely safe until she

transferred to the main women's prison,³ Washington Corrections Center for Women, she reported "no major issues." *Id.*

Kim began hormone replacement therapy in 2017. Webb Decl., ¶ 9. Later that year, the Department reassessed Kim's housing assignment after repeated disciplinary issues. Rule Decl., Attach. G at 3. Kim reported no history of victimization while in prison. *Id.* at 2. Staff members confirmed there was no evidence that Kim had been sexually assaulted or subjected to other conduct prohibited by PREA. *Id.* The Department ultimately continued Kim's housing at the Washington State Reformatory Unit. *Id.* at 4; Rule Decl., Attach. B at 7.

Kim was again placed in a single cell in front of the officer's booth for increased visibility. At her next housing

³ The Department has only two women's facilities, Washington Corrections Center for Women and Mission Creek Corrections Center for Women. The latter is a minimum-security facility dedicated to preparing individuals for release. Ex. 4, Decl. of Deborah Wofford, ¶ 4.

review, she complained that this protective placement was “annoying.” Rule Decl., Attach. H at 2. Kim reported that she had had an issue with another individual yelling transphobic slurs, but that individual had been transferred. *Id.* Kim also expressed concerns that she may be faced with “peeping toms” while showering due to her body changing while on hormone replacement therapy. *Id.* Although she again stated she would not feel completely safe unless she was transferred to the women’s prison, staff members again noted that Kim had not reported any abuse. *Id.*

In April 2018, Kim made a PREA complaint to report that a male correctional officer conducted an inappropriate pat search despite informing him she was transgender. Duncan Decl. ¶ 5, Attach. E. Investigators determined the allegation was unfounded based on interviews with Kim and the officer and a review of video footage. *Id.*

At her next housing review in June 2018, Kim again complained about being assigned a cell in front of the officer’s

booth for increased visibility. Rule Decl. Attach. I at 2. She again indicated she would feel safer at the women's prison but reported no incidents of sexual abuse. *Id.* She felt the peeping tom situation in the showers was improving. *Id.*

At the next six-month review, Kim reported that she was happy because she had recently been moved away from the officer's booth. Rule Decl., Attach. J at 2. She reported no issues of sexual abuse and stated she was safe in medium custody but thought she would be safer at the women's prison, where she believed she would not be harassed for being transgender. *Id.*

At her housing review in June 2019, Kim again reported being happy with her cell assignment away from the officer's booth. Rule Decl., Attach. K at 2. She disliked that other individuals made derogatory remarks, but she indicated that would be the same in any prison environment. *Id.* She reported improved community support, although there were still issues with people being disrespectful and misgendering her. *Id.* She

again reported no issues of sexual abuse when asked and said she felt safe in medium custody. Again, though, she said she felt that she would not get harassed for being transgender at the women's prison. *Id.*

In July 2019, Kim received an infraction for showering with another incarcerated individual in a single person shower stall. Rule Decl., Attach. R. While the infraction was pending adjudication, the mail room intercepted a piece of mail from Kim to a person in the community. In it, Kim asked the recipient to forward an enclosed letter to another incarcerated individual. Rule Decl., Attach. S. Based on its content, the letter was clearly intended for the individual with whom Kim had been showering. *Id.* Kim was then infractioned for sending written communications to another incarcerated individual without the prior approval of the superintendent. *Id.*

After Kim received a keep-separate order from the individual with whom she had been showering, the Department completed a new Protocol to assess Kim's housing. Rule Decl.,

Attach. L at 2. With respect to past victimization, Kim reported inappropriate comments, comprising verbal harassment and misgendering, and incidents in which male officers had touched her breasts during pat searches. *Id.* at 1. Kim indicated she feared assaults from other incarcerated individuals because of transphobia at any close custody facility and medium custody at certain facilities. *Id.* at 2. Staff members noted that, despite Kim's statements to them about past victimization, there was no evidence that Kim had been victimized or taken advantage of in a men's facility. *Id.* at 1-2.

The review team recommended demoting Kim to close custody due to her infraction and transferring her to another facility, Clallam Bay Corrections Center. *Id.* at 3-4. After Department headquarters reviewed the recommendation, it recommended an override to medium custody in the Twin Rivers Unit at Monroe, which would allow the Department to enforce the keep-separate order while minimizing disruption to Kim. Rule Decl., Attach. M at 4. Kim stated she had no safety

concerns with the Twin Rivers Unit other than her potential cellmate if she was placed in a double occupancy cell. *Id.* at 3-4. Kim was transferred to Twin Rivers Unit on October 1, 2019. Rule Decl., Attach. B at 6-7.

2. Kim was safely housed in the Twin Rivers Unit from 2019 to 2021

Kim states in her declaration that on her transfer to Twin Rivers Unit, her cellmate made her feel unsafe. Declaration of Amber Kim (Kim Decl.) ¶ 48. However, while housed with that cellmate, she repeatedly told multiple Department officials she did not have imminent safety concerns. Although she did have conflict with her cellmate, she did not tell anyone the conflict was due to the risk of sexual assault.

After the first Housing Protocol recommended transfer to Clallam Bay, but before she was transferred to the Twin Rivers Unit, Kim sent a letter to the headquarters classification unit stating her complaints of sexual assault and harassment were ignored. Duncan Decl., Attach. F at 6. In January 2020, after

Kim was transferred to the Twin Rivers Unit, Kim's allegation was forwarded to the PREA unit for investigation. *Id.* at 9.

When interviewed, Kim explained the statements in the letter were just generalities used to explain her frustrations with the Housing Protocol recommending transfer to Clallam Bay. *Id.* at 3-4. When reinterviewed at the end of January 2020 to again try to get more information about when and where she had been sexually assaulted or harassed, Kim explained that her only issue was her inability to get a cellmate who respected her privacy. *Id.* at 1.

Meanwhile, the Department completed a new Protocol to assess Kim's Twin Rivers Unit housing assignment before her first six-month review. Rule Decl., Attach. N. Kim again reported that in her time in Department custody, she had received inappropriate sexual comments from incarcerated individuals and staff members and that male officers had touched her breasts during pat searches. *Id.* at 2. She indicated she had initiated PREA complaints regarding some of the

incidents. *Id.* However, her only complaint about conduct covered by PREA was the 2018 allegation of an improper pat search, which was unfounded. Duncan Decl. ¶ 5, Attach. E.

Kim described having to be vigilant in men's facilities to avoid victimization, but her classification counselor was unable to find evidence that Kim had been victimized. Rule Decl., Attach. N at 2. Kim again reported disinterest in sexual activity in prison. *Id.* She had generalized safety concerns due to transphobia and sexism, and particular fears of being housed at certain other facilities due to concerns about assault by white supremacists. *Id.* at 3.

Kim's psychologist noted her primary complaints were focused on having a cellmate. *Id.* Kim said she was not comfortable living with a cisgender man "because of their toxic masculinity." *Id.* at 3-4. She expressed fear of being victimized in the showers and concerns about men trying to catch glimpses of her while showering, although she acknowledged she had been showering on the upper tier where no one could see down

into the shower stalls. *Id.* at 4. Kim told her psychologist that all men's facilities came with the risk of sexual victimization, but, despite additional questioning, she reported no imminent safety concerns or threats. *Id.* at 5.

The multidisciplinary team noted that although there was not "a significant safety concern" regarding Kim's housing at the Twin Rivers Unit, they ultimately recommended that Kim be transferred to the women's prison to allow her to continue her social transition as a transgender woman. *Id.* The team submitted its recommendation on January 31, 2020. *Id.* at 6.

The same day, Kim called the PREA hotline to complain about her cellmate. Duncan Decl., Attach. G. Kim reported that the first thing in the morning, she had an issue with her cellmate refusing to leave the cell so she could change and use the bathroom. *Id.* at 3. She reported having "many, many, many issues" with her cellmate, but that morning had been the "the first time that he's [done] something that falls under PREA." *Id.* Kim reported that it was "a toxic situation" and she "need[ed]

to be in a different unit where the staff will actually like, listen to me when I say, ‘Hey, I have a problem. You need to fix [i]t.’” *Id.* Because Kim did not allege sexual abuse, sexual harassment, or other sexual misconduct by her cellmate, the PREA unit sent the complaint to the facility for local action. *Id.* at 1.

Two days after calling the PREA hotline, Kim declared a mental health emergency and met with a mental health provider. Rule Decl., Attach. U. She indicated she was not getting along with her cellmate, who she referred to “as an ‘old redneck jackass.’” *Id.* She did not express fear for her own safety, but said she was “terrified” she would harm her cellmate if she returned to the cell. *Id.* The provider infringed Kim for threatening another person with bodily harm and recommended Kim be placed in segregation. *Id.*; Rule Decl., Attach. T at 8.

In her infraction defense, Kim said she had been trying for months to get moved to a different cell, and that she had been on the edge of mental health issues and could not

remember exactly what she said to the mental health provider. Rule Decl., Attach. T at 6. Kim did not claim her cellmate had made her fear for her own safety. *Id.*

After she was found guilty, Kim appealed the infraction, arguing that her statements to her mental health provider should not be used as evidence in an infraction. *Id.* at 5. She said she had “acted in good faith reporting the toxic situation” to staff members and she had become mentally unstable due to her inability to cope. *Id.* Again, Kim did not suggest that her cellmate had made her fear for her own safety. *Id.*

While she was in segregation, Kim made another PREA complaint. Duncan Decl., Attach. H. She reported that a correctional officer screamed at her when she was getting dressed after a strip search, *Id.* at 3. Again, because Kim did not allege sexual abuse, sexual harassment, or other sexual misconduct by the officer, the PREA unit sent the complaint to the facility for action. *Id.* at 1.

After Kim's infraction for threatening her cellmate was finalized, a multidisciplinary team at the women's prison considered Kim's proposed transfer to that facility. Rule Decl., Attach. N at 6-7. It rejected the transfer because Kim had continued to display "negative and aggressive" behavior after beginning hormone replacement therapy, such as the threats to her cellmate. *Id.* at 9. The team also pointed to sexual incidents between Kim and other incarcerated individuals, including her infraction for showering with another individual. *Id.*

Kim requested gender-affirming surgery in February 2020 and began the process for approval, which at the time required a psychosocial evaluation and approval by a medical care review committee. Webb Decl., ¶ 10. She also completed a form documenting her preferred pronouns and preferred officer gender for searches. Rule Decl., Attach. Q. Kim again indicated on the form that she felt safe in the general population at the Twin Rivers Unit. *Id.*

At her next housing review, Kim reported no issues with her housing. Leavitt Decl., Ex. E at 2. But Kim's psychologist and classification counselor both suggested that the women's prison would be a better fit for Kim because it would be a gender-affirming housing assignment and Kim would feel safer there. *Id.* at 3. Although the facility multidisciplinary team recommended that Kim remain at the Twin Rivers Unit, the headquarters team approved Kim's transfer to the women's facility. *Id.* at 5. This decision was based on Kim's mental health provider's recommendation, Kim's request, and Kim's suitable adjustment while in general population at the Twin Rivers Unit. *Id.* at 5-6. She was transferred on February 3, 2021. *Id.* at 7-8; Rule Decl., Attach. B at 6.

3. While at the women's prison, Kim canceled her gender-affirming surgery and repeatedly engaged in sexual relationships with other incarcerated individuals

Kim was approved for gender-affirming surgery shortly after her transfer to the women's prison. Webb Decl. ¶ 10. At her surgical preoperative consultation, Kim chose to undergo a

penile inversion vaginoplasty, which required presurgical genital electrolysis. *Id.* ¶ 12. She also chose to undergo a tracheal shave to remove her Adam's apple. *Id.* ¶ 14.

Kim reported a good transition to the women's prison. Rule Decl., Attach. O at 2. However, staff members noted Kim was again infraacted for threatening a cellmate, although the infraction was dismissed between Kim's August 2022 and March 2023 housing reviews. Rule Decl., Attach. P at 2; Leavitt Decl., Ex. G at 2. Kim was also infraacted for engaging in a sex act after a staff member found Kim in bed with another incarcerated individual. Ex. 4, Decl. of Deborah Wofford (Wofford Decl.), ¶ 9. Although witnesses reported that Kim had a sexual relationship with the other individual, the infraction was dismissed due to insufficient evidence, as the staff member had not witnessed a sex act while the two were in bed together. *Id.*

In 2022, Kim was investigated by the PREA unit after a report that she was coercing another incarcerated individual into

a sexual relationship. Duncan Decl. ¶ 6; Wofford Decl. ¶ 8. The alleged victim had serious mental health issues. Wofford Decl. ¶¶ 7-8. Although the allegation against Kim was determined to be unfounded, the alleged victim admitted having an intimate relationship with Kim. *Id.* ¶ 8. During a routine search, staff members also found bite marks on Kim's neck and shoulder; Kim refused to identify the source of the marks. Leavitt Decl., Ex. I at 3.⁴ Due to the investigation, however, Kim was moved to a different housing pod. Rule Decl., Attach. P at 2.

After the PREA investigation concluded, Kim asked to return to her previous housing pod. *Id.* Staff members believed she had become excessively attached to another incarcerated individual there.⁵ *Id.* They noted Kim's persistence in her requests to be housed with the individual. *Id.* Staff members

⁴ As Attorney Leavitt notes, the pagination for this form is incorrect. Page references herein are to the actual pages, not the page numbers noted at the bottom of the form.

⁵ Staff members' notes are unclear whether this individual is the alleged victim from the PREA investigation or a new individual.

also noted that the other individual had reported concerns about Kim to her counselor, but she had also indicated that she felt safe. *Id.* Kim's request to return to her previous housing pod was approved before her next housing review in March 2023. Leavitt Decl., Ex. G at 1.

In April 2023, shortly after beginning presurgical electrolysis, Kim cancelled her vaginoplasty, telling her medical provider she would continue to pursue the tracheal shave and facial hair removal first and then reassess her gender dysphoria after those interventions. Webb Decl. ¶ 12. Kim continued receiving facial electrolysis until the Department paused its facial electrolysis program to find a new provider. *Id.* ¶ 13.

In February 2024, a staff member directly saw Kim engaged in a sex act with another incarcerated individual. Rule Decl., Attach. V. The individual involved had significant mental health needs and a history of being exploited; she had been Kim's cellmate for less than a day. Wofford Decl. ¶ 10.

Both Kim and her cellmate received infractions. Rule

Decl. ¶ 12, Attach. V.

At her infraction hearing, Kim submitted a statement in which she denied having sex with her cellmate. *Id.* at 10. Kim also argued that the infraction should not exist in the first place since consensual gay sex is not a crime. *Id.* at 11. She wrote that it was “cru[el] [and] unusual beyond all belief” to tell someone serving a life sentence like her that she was “never allowed to have love” and she would “have to say no every time forever” when someone was interested in her. *Id.* After she was found guilty, Kim appealed the infraction, but her appeal was denied. *Id.* at 12-17. Kim later admitted to having sex with her cellmate on a recorded telephone call. Leavitt Decl., Ex. I at 4.

Kim’s statements in her infraction defense and in later correspondence raised concerns that Kim’s infraction would not deter her from continuing to pursue sexual relationships.

Wofford Decl. ¶¶ 11-12. Thus, although Kim’s six-month review, which was conducted while her infraction appeal was

pending, recommended keeping Kim at the women's prison, the Department conducted a new housing protocol after Kim's appeal was denied. Leavitt Decl., Ex. I.

Given that Kim had received physical injuries in a previous relationship and her history of sexual relationships with vulnerable individuals, Kim presented security concerns that could no longer be effectively managed at the women's prison. Leavitt Decl., Ex. I at 3-4. Since she had been safely housed at men's facilities, the multidisciplinary team recommended transfer. *Id.* at 5. Department headquarters ultimately decided to transfer Kim back to the Twin Rivers Unit, which has a sizable population of transgender and nonbinary individuals. *Id.* at 8; Duncan Decl. ¶ 16. Kim was transferred on June 21, 2024. Rule Decl., Attach. B at 3.

4. Kim refused to leave the Intensive Management Unit after her transfer

When Kim arrived at the Monroe Correctional Complex, she refused housing in the Twin Rivers Unit, choosing instead to remain in the Intensive Management Unit, and began a

hunger strike. Rule Decl., Attach. B at 3; Webb Decl. ¶ 15. Her tracheal shave surgery was scheduled for August, however, and her hunger strike made general anesthesia too risky. Webb Decl. ¶ 15. Kim agreed to end her hunger strike so she would be medically stable for the tracheal shave surgery, which was successfully completed in August 2024. *Id.*

In July 2024, shortly after returning to Monroe Correctional Complex, Kim requested an orchiectomy, a procedure to remove her testicles. *Id.* ¶ 16. She had her consultation for the procedure in November 2024, and the Department is currently waiting for a surgery date from the provider. *Id.*

Kim continues to be voluntarily housed in the Intensive Management Unit at Monroe Correctional Complex. Rule Decl., Attach. B at 1.

C. Material Disputed Questions of Fact

While the Department disputes many of Kim's factual assertions, the only *material* questions of fact are whether Kim

is at an objectively intolerable risk of harm in her current housing assignment and whether Kim's transfer was reasonably necessary to accomplish the Department's goal of safety. *See* RAP 16.9(a). Given Kim's inclusion in her personal restraint petition of a wide variety of immaterial facts and the compressed timeline for the Department's response, the Department has not attempted to refute every false or misleading statement in Kim's petition. Should the Court identify additional material questions of fact, the Department respectfully asks the Court to grant it the opportunity to file a supplemental response addressing those issues.

IV. ARGUMENT

A. Legal Standards for Personal Restraint Petitions Challenging Conditions of Confinement

To succeed in her personal restraint petition, Kim must show her restraint is unlawful. RAP 16.4. Under article I, section 14 of the Washington Constitution her restraint is unlawful if her conditions of confinement create an objectively intolerable risk of harm that is not reasonably necessary to

accomplish legitimate penological goals. WASH. CONST. art. I, § 14; *In re Pers. Restraint of Williams*, 198 Wn.2d 342, 368, 496 P.3d 289 (2021).

1. **Kim has a threshold burden to provide facts and evidence demonstrating her unlawful restraint**

To obtain relief in a personal restraint petition, petitioners challenging the conditions of their confinement must show they are being unlawfully restrained under RAP 16.4. *In re Pers. Restraint of Gentry*, 170 Wn.2d 711, 715, 245 P.3d 766 (2010). Unlawful restraint includes conditions of confinement that violate the Washington State Constitution. RAP 16.4(c)(6).

In support of her claim of unlawful restraint, Kim must state “the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations.” RAP 16.7(a)(2)(i). Moreover, Kim must demonstrate she has “competent, admissible evidence” supporting her factual allegations. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

“Where the record does not provide any facts or evidence on which to decide the issue and the petition instead relies solely on conclusory allegations, a court should decline to determine the validity of a personal restraint petition.” *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990). This is a mandatory, threshold burden for Kim, and noncompliance “will necessarily result in a refusal to reach the merits.” *Id.*

While a reference hearing may be necessary to resolve disputed material facts, not “every set of allegations which is not meritless on its face entitles a petition to a reference hearing.” *Rice*, 118 Wn.2d at 886. “Bald assertions and conclusory allegations will not support the holding of a hearing.” *Id.* Instead, to even reach the hearing stage, Kim must make a threshold showing that the factual allegations demonstrating her unlawful restraint “are based on more than speculation, conjecture, or inadmissible hearsay.” *Id.*

2. **Federal jurisprudence has established a two-pronged test for unconstitutionally cruel conditions of confinement**

Under the Eighth Amendment to the United States Constitution, inhumane conditions of confinement are not cruel and unusual unless a prison official “knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.” *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). This requires both an “objectively, ‘sufficiently serious’” injury and a “‘sufficiently culpable state of mind.’” *Id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298, 297, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991)).

Considering the objective prong of the standard, the *Farmer* court observed that prison officials had a duty to protect prisoners from violence at the hands of other prisoners, including sexual assault. 511 U.S. at 834. But while the Eighth Amendment guarantees prisoners “the right to be free from sexual abuse, whether at the hands of fellow inmates or prison

guards, the Eighth Amendment's protections do not necessarily extend to mere verbal sexual harassment." *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004) (internal citations omitted) (holding that another inmate's 30-40 second exposure of his penis to plaintiff, accompanied by racist and sexual remarks and sexual gestures, was not a "sufficiently serious" injury under the Eighth Amendment); *see also Schwenk v. Hartford*, 204 F.3d 1187, 1198 (9th Cir. 2000) (distinguishing between purely verbal sexual harassment and sexual harassment involving physical contact under the Eighth Amendment).

3. Washington's Constitution does not require a showing of subjective intent to demonstrate cruel conditions of confinement

Our Supreme Court has recognized that article I, section 14 of the Washington Constitution "is more protective than the federal constitution in the context of prison conditions," as it is in other contexts. *Williams*, 198 Wn.2d at 346. The Court held "that when a prisoner established that the conditions of their confinement create an objectively intolerable risk of harm or

otherwise deprive them of the basic necessities of human dignity, those conditions can be justified only when they are reasonably necessary to accomplish legitimate penological goals.” *Id.* at 368.

While *Williams* is the sole published decision interpreting article I, section 14 in this context, the opinion offers considerable guidance. First, the Court departed only from the subjective prong of federal jurisprudence. The Court endorsed the federal formulation of the objective prong, which requires that a prisoner “show the challenged conditions create ‘an objectively intolerable risk of harm.’” *Id.* at 364 (quoting *Farmer*, 511 U.S. at 846). The Court highlighted that conditions creating an objectively intolerable risk of harm under the federal standard included “deprivations of ‘the minimal civilized measure of life’s necessities,’ such as ‘adequate food, clothing, shelter, and medical care.’” *Id.* (quoting *Farmer*, 511 U.S. at 834).

Second, the *Williams* court implicitly—but necessarily—recognized that even where there is a heightened risk faced by the petitioner, that risk may nonetheless be insufficient to state a violation of Washington’s Constitution if the Department has reasonably responded to manage the risk. While *Williams* brought his petition challenging the risk he faced from COVID-19, the Court did not find that risk constituted cruel punishment under Washington’s Constitution. *Id.* at 348-52. In rejecting *Williams*’s claims regarding COVID-19, the Court noted his risks as a 77-year-old Black man suffering from diabetes, hypertension, and partial immobility after a massive stroke. *Id.* at 350. It further observed that COVID-19 was especially dangerous in prisons because of “the close quarters in which inmates live, the crowding, and the recirculated air.” *Id.* at 348.

The Court detailed, however, the Department’s ongoing efforts to stop the spread of COVID-19 within its facilities. *Id.* at 348-49. And even though *Williams* had been infected and

hospitalized with COVID-19 during the pendency of his case, the Court declined to find his continued incarceration cruel based on the risk posed by the virus. *Id.* at 350-52. Rather, the cruel punishment found by the Court in *Williams* was his housing in a cell without bathroom facilities or running water, given his disabilities and inadequate assistance from the Department. *Id.* at 352; Order, *In re Pers. Restraint of Williams*, No. 99344-1 (Wash. Sup. Ct. Mar. 12, 2021) (*Williams* Order) (“The Court specifically finds that confining Petitioner Williams in a space that does not include reasonable access to a bathroom and running water, and failing to provide him appropriate assistance in light of his physical disabilities, is cruel.”). Although the risk of COVID-19 was raised and argued by the parties and discussed by the Court, the Court did not find COVID-19 rendered Williams’s confinement cruel or order the Department to take any ameliorative action regarding his COVID-19 risk. *Id.* The Court thus necessarily found the risk was constitutional.

Third, the *Williams* Court recognized that even unconstitutionally cruel conditions can be swiftly remedied. The Court granted Williams’s petition on March 12, 2021, and called for a report from the Department regarding its compliance with the order on or before March 25, 2021. *See Williams* Order. The Department filed its report as directed, and the Court recognized that the unconstitutionally cruel conditions had been remedied in less than two weeks such that release of Williams was not warranted. *See* Report of Dep’t of Corrs. Regarding Its Compliance with Mar. 12, 2021 Order, *In re Pers. Restraint of Williams*, No. 99344-1 (Wash. Sup. Ct. Mar. 25, 2021); *see also Williams*, 198 Wn.2d at 346 (“We concluded that these actions remedied the unconstitutional conditions and declined to order Williams’s release”).

B. Kim Can Safely Be Housed in the Twin Rivers Unit, Which Safely Houses Transgender Women and Provides Full Access to Gender-Affirming Care

Kim fails to meet her threshold burden to provide competent, admissible evidence showing that her present

restraint is unlawful because of an objectively intolerable risk of harm. The Department safely houses other transgender women in the Twin Rivers Unit and Kim consistently reported being safe while previously housed there and in other men's prisons. She continues to have full access to medically necessary treatment regardless of where she is housed. Her generalized statistics and subjective fear of harm are insufficient to prove a constitutional violation unless the Court is willing to announce a sweeping per se rule requiring the Department to make housing decisions based solely on gender identity.

1. **Kim provides nothing more than speculation that housing her at the Twin Rivers Unit creates an objectively intolerable risk of harm**

In deciding whether Kim's restraint is unlawful, the question before the Court is whether Kim's placement in the Twin Rivers Unit puts *her* at an intolerable risk of harm⁶ such

⁶ Kim does not allege housing her at a men's facility otherwise deprives her of the basic necessities of human dignity. *See* PRP at 24; *Williams*, 198 Wn.2d at 368.

that her housing placement violates Washington’s Constitution. *Williams*, 198 Wn.2d at 368. As the *Williams* court recognized in finding the petitioner’s unconstitutional conditions were remedied within two weeks, cruel conditions of confinement are not immutable, and evidence of past harm is insufficient to show current unlawful restraint. Significantly, however, Kim’s petition is devoid of *any* evidence regarding Kim’s current conditions of confinement in the Twin Rivers Unit.

The Twin Rivers Unit complies with the exact provisions Kim identifies as necessary to keep transgender individuals safe. As Kim herself highlights, PREA contains specific protections for transgender individuals, all of which the Twin Rivers Unit has implemented. *See* Personal Restraint Petition (PRP) at 27. While the Monroe Correctional Complex’s 2024 PREA audit is currently ongoing, the interim report found that it met all relevant standards for protection of transgender individuals. Duncan Decl., ¶ 12, Attach. J. The Twin Rivers Unit has safeguards in place—the same safeguards identified by

Kim—to protect transgender individuals from the generalized risk of sexual assault and abuse.

While Kim points to the harms of solitary confinement, Kim is in the Intensive Management Unit by choice. The restraint she claims is unlawful is not her voluntary segregation, but her assignment to the Twin Rivers Unit, a facility in which she was safely housed until 2021. And while Kim need not subject herself to harm to succeed on her petition, she must nonetheless present some competent evidence that the conditions at the Twin Rivers Unit today would place her at an objective, sufficiently serious risk of harm.

Kim provides no evidence whatsoever regarding the current conditions for transgender individuals at the Twin Rivers Unit, which as of December 2024, safely houses 18 transgender women and another 16 nonbinary individuals. Duncan Decl., ¶ 16. She exclusively relies on generalized

statistics based on decade-old, nationwide data,⁷ which are not sufficient to show that Kim specifically faces an intolerable risk of harm at the Twin Rivers Unit today. *See* PRP at 24-26.

Kim’s sole evidence of the risk she faces today is her ongoing fear of assault. But this subjective fear does not establish a constitutional violation such that her restraint is unlawful. She must demonstrate she is at an *objectively* intolerable risk of harm in her current housing assignment. In the absence of any current, objective evidence of her experience in the Twin Rivers Unit, Kim cannot demonstrate that her housing assignment puts her at substantial risk of serious harm.

⁷ Kim’s cited authority also undercuts her argument, noting that transferring transgender women to a women’s prison “might reduce risk but not eliminate risk of sexual assault as studies have shown female incarcerated persons as having perpetrated half of all incidents of sexual abuse upon other female incarcerated persons.” Elida Ledesma & Chandra L. Ford, 110 PERSPECTIVES FROM THE SOC. SCIS. 650, 653 (2020); *see also* PRP at 26.

2. **Kim consistently reported to prison officials that she had no safety concerns or history of sexual abuse while in men's facilities**

While Kim's failure to demonstrate current harm is enough to dismiss her petition, her allegations regarding past harm are also too generalized and conclusory to demonstrate she has ever faced an objectively intolerable risk of harm in Department custody. Her current allegations of past victimization are unsupported by evidence and contradicted by her own contemporaneous statements.

Although Kim now asserts that she was subject to attempted sexual assaults in men's facilities, *see* Kim Decl. ¶¶ 25, 44-46, 48, she did not report them at the time. To the contrary, she consistently reported to multiple Department officials that she had no specific safety concerns and had not been the victim of sexual assault or abuse while housed at men's prisons. *See* Rule Decl., Attachs. D-N. In her 13 years in men's prisons, she made a single, unfounded allegation of behavior that, if true, would have constituted a PREA violation:

that a male officer conducted an inappropriate pat search on her. Duncan Decl. ¶ 5. And far from showing constant fear of assault, Kim objected to the safety measures put in place in response to her PREA classification as a potential victim, repeatedly asking to be moved out of cells that had increased staff visibility. Rule Decl., Attachs. F-J.

The only specific concerns Kim raised to prison officials were about pat searches by male officers; “peeping toms” while showering; and verbal harassment. *See* Rule Decl., Attachs. H-N. Cross-gender searches have been addressed in later policy changes, which prohibit cross-gender pat searches in all but exigent circumstances and ensure facilities housing transgender women are staffed with sufficient women correctional officers trained in strip searches and pat searches. *See* Rule Decl., Attachs. Y, BB.

Showers in the Twin Rivers Unit are single stalls, individuals are permitted to shower on the top tier so no one can see into the shower from upstairs, and transgender

individuals are permitted to shower during daily headcounts when other individuals are confined in their cells. *See* Ex. 5, Decl. of Kenneth Bratten, ¶¶ 3-6, Attach. A; *see also* Rule Decl., Attach. AA.

And verbal harassment, while deplorable and unacceptable, is not a sufficiently serious harm to render a prisoner's confinement unconstitutionally cruel. *See Austin*, 367 F.3d at 1171. Further, staff receive antiharassment and PREA training, which now includes increased focus on issues affecting transgender individuals, such as misgendering. *See* Rule Decl., Attach. W. Incarcerated individuals can also file PREA complaints or resolution requests regarding harassment, depending on the perpetrator and circumstances. Leavitt Decl., Ex. A at 2; 28 C.F.R. § 115.31.

Similarly, Kim's history of PREA complaints contradicts her current assertions. During her previous time in the Twin Rivers Unit, Kim made PREA complaints through the PREA hotline, the headquarters classification team, the grievance

(now resolutions) office, and the Department's out-of-state agency partner, demonstrating that she had access to the reporting system and was not constrained from using it. Duncan Decl., ¶¶ 5, 8-11. None, however, involved allegations of sexual abuse or sexual harassment. Indeed, Kim repeatedly denied past victimization *or* current risk when PREA investigators tried to identify specifics regarding one of her complaints. Duncan Decl., Attach. F.

And while Kim states in her declaration that she felt “terrified” her cellmate was going to sexually assault her, *see* Kim Decl. ¶ 48, she never made this known to the Department even after multiple opportunities to report complaints. Her contemporaneous housing review, PREA complaint, mental health session, and infraction defense contained no mention of possible sexual assault. To the contrary, her PREA complaint explicitly stated that when her cellmate refused to leave the cell when Kim wanted to dress, it was “the first time” he had done something that could fall under PREA. Duncan Decl., Attach. G

at 3. Kim’s concern at the time instead focused on her cellmate’s “toxic masculinity” and “redneck” attitude. Rule Decl., Attachs. N, U.

Kim has not presented evidence from her past periods of being housed in men’s prisons establishing that her return to Twin Rivers Unit places her at an intolerable risk of harm, and the contemporaneous evidence does not support her current assertions.

3. Kim will have full access to gender-affirming health care in the Twin Rivers Unit

Kim suggests that she will be unable to pursue her gender transition while housed in the Twin Rivers Unit. Federal courts have recognized that a failure to provide medically necessary treatment for gender dysphoria may violate the Eighth Amendment. *See, e.g., Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019). But Kim provides no evidence that her access to gender-affirming care will be limited in the Twin Rivers Unit.

Kim's access to gender-affirming health care is not contingent on her housing placement. Although Kim's declaration suggests her approval for gender-affirming surgery was tied to her transfer to the women's prison, *see* Kim Decl. ¶ 58, that timing was coincidental; medically necessary gender-affirming surgeries are available regardless of an individual's location. Webb Decl. ¶ 10.

Further, Kim's suggestion that she feels unable to pursue additional gender-affirming treatment while at a men's facility stands in stark contrast to her documented history of gender-affirming care. *See* Kim Decl. ¶ 74. Kim began hormone replacement therapy at a men's facility, and she requested gender-affirming surgery while housed at a men's facility. Webb Decl. ¶¶ 9-10. After being approved for surgery shortly after her transfer to the women's prison, Kim canceled her requested vaginoplasty a few months after beginning presurgical electrolysis. *Id.* ¶ 12. She then decided to move

forward with an orchiectomy within one month of her transfer to a men's facility. *Id.* ¶ 16.

Kim's stated concerns about transitioning in a men's facility are contradicted by her own actions, and she has access to the same gender-affirming treatment at all Department facilities. Her current housing placement does not render her conditions of confinement cruel based on access to gender-affirming health care.

4. **Kim's requested relief would require transfers for all transgender and gender nonconforming individuals, eighty percent of whom are not requesting gender-affirming housing**

Kim's generalized statistics and subjective fear of harm fail to establish that housing her in the Twin Rivers Unit is unconstitutionally cruel unless the Court concludes housing *anyone* in a facility that does not align with their gender identity is unconstitutionally cruel. Such a conclusion is not legally required and would be unworkable in practice.

In line with federal law and accepted best practices, the Department conducts an individualized housing assessment for

transgender individuals, considering factors including the individual's preference, their safety and security, and the safety and security of other incarcerated individuals. As Kim's own authority explains, a per se rule assigning housing based on gender identity is a poor approach because the criteria used "must strike a balance between recognizing the variety of diverse identities that exist in the population versus establishing discrete, unambiguous categories." Elida Ledesma & Chandra L. Ford, 110 PERSPECTIVES FROM THE SOC. SCIS. 650, 653 (2020). Additionally, assigning housing based solely on gender identity may "out" an individual "to other incarcerated persons, family members, and members of their home community." *Id.* That same authority recommends evaluating housing assignments for transgender individuals on a case-by-case basis—precisely the approach taken by the Department. *Id.* at 652; *see also* Leavitt Decl., Ex. A at 6-9; 28 C.F.R. § 115.42(c).

The Department's gender-affirming housing policies also recognize that housing involves an element of personal choice

for transgender individuals. Indeed, of the 293 transgender, nonbinary, and intersex individuals in Department custody in December 2024, only 47 have requested gender-affirming housing, which is less than 20 percent of the population. Duncan Decl., ¶ 15.

Kim asks this Court to conclude that her housing placement is unconstitutionally cruel, but she has not shown objective evidence of an intolerable risk of harm. Kim's argument would therefore require the Court to conclude that the housing placement of all transgender persons who have not requested housing in accordance with their gender identity is also unconstitutionally cruel. This would force the Department to override the preferences of the individuals in question, despite the harms associated with a per se rule based on gender identity.

Because Kim provides nothing more than speculation and conjecture regarding her conditions of confinement in the Twin Rivers Unit, this Court can grant relief only if it is willing to

conclude that housing an individual in a facility that does not align with their gender identity is per se cruel punishment under the Washington Constitution. This Court should reject Kim's invitation and permit the Department to continue making individualized housing determinations, consistent with PREA standards, for those transgender and gender nonconforming individuals who request gender-affirming housing.

C. Housing Kim in The Twin Rivers Unit Was Reasonably Necessary to Accomplish Legitimate Penological Goals

Kim has not shown objective evidence she faces an intolerable risk of harm at the Twin Rivers Unit, and her petition should be dismissed on that basis. Regardless, her housing at Twin Rivers Unit is constitutionally permissible because her transfer out of the only women's facility where she could be housed was reasonably necessary to accomplish the Department's legitimate penological goals.

1. The unique problems of correctional environments demand special deference when

evaluating the Department's penological interests

Prison administrators have unique challenges. “A prison is ‘a tightly controlled environment populated by persons who have chosen to violate the criminal law, many of whom have employed violence to achieve their ends.’” *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 215, 227 P.3d 285 (2010) (quoting *In re Pers. Restraint of Reismiller*, 101 Wn.2d 291, 294, 678 P.2d 323 (1984)). Accordingly, the *Williams* court “recognize[d] the practical challenge facing prison administrators and acknowledge[d] that some harsh conditions of confinement that might otherwise be cruel may sometimes be justified by legitimate penological interests.” 198 Wn.2d at 367. Under the Washington Constitution, otherwise cruel conditions are permissible “only when they are reasonably necessary to accomplish legitimate penological goals.” *Id.*

As our Supreme Court has observed, “It is not in the best interest of the courts to involve themselves in the ‘day-to-day management of prisons, often squandering judicial resources

with little offsetting benefit to anyone.” *In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 393, 20 P.3d 907 (2001) (quoting *Sandin v. Conner*, 515 U.S. 472, 482, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995)).

Instead, courts should ““afford appropriate deference and flexibility to state officials trying to manage a volatile environment.”” *Dyer*, 143 Wn.2d at 393 (quoting *Sandin*, 515 U.S. at 482); *see also, e.g., Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (“Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”)

2. Kim’s history of sexual encounters with vulnerable individuals at the women’s prison created legitimate safety concerns for the prison’s entire population

The Department has a legitimate penological interest in preventing an individual with a penis from having penetrative sex in a women’s prison—indeed, it has a legitimate

penological interest in preventing *any* sexual activity within its prisons. As the *Williams* court recognized, “the health and safety of the prison population as a whole” may justify “harsh conditions of confinement that might otherwise be cruel.” 198 Wn.2d at 367. All individuals in Department custody should be free from the risk of sexual abuse, and Kim’s pattern of relationships with vulnerable individuals presented significant safety concerns given the risks of coercive sexual relationships in a prison setting.

Kim concedes that the Department has a legitimate penological interest in prison security. PRP at 29. And Kim’s sexual relationships at the women’s prison presented safety concerns both to herself and to other incarcerated individuals. In a prior relationship, Kim was found with bite marks on her shoulder and neck. Leavitt Decl., Ex. I at 3. She was found to be in sexual relationships with two different women with serious mental health needs. *Id.* at 4. And Kim was found engaging in sexual intercourse with her easily exploited

cellmate the day the cellmate moved in. *Id.*; Wofford Decl.

¶ 10. Kim’s sexual relationships were not healthy for her or for her partners.

While Kim concedes the Department has a legitimate interest in prison safety and security, she nonetheless attempts to downplay her infraction behavior as a single “consensual sexual encounter[]” that does not present safety concerns.

PRP at 31. This characterization is unsupportable in a prison setting. As Kim’s own authority explains, it is “hard to determine if a sexual relationship between people in jail and prison settings is coerced or consensual, because relations in these settings are often based on complicated, protective, and exploitive allegiances formed in an oppressive, confined culture.” Charles Herbert Lea III, et al., *An examination of consensual sex in a men’s jail*, 14 INT’L J. PRISON HEALTH 56 (2018) (ms. at 2); *see also* PRP at 31.

The concern about coercive sexual relationships is especially pressing at Washington Corrections Center for

Women. Ninety percent of women there have mental health needs, more than double the rate in the incarcerated population as a whole. Wofford Decl. ¶ 7. Most report a history of trauma, usually sexual trauma, and half the population is clinically diagnosed with post-traumatic stress disorder. *Id.* ¶ 6. The population at the women's facility is vulnerable to exploitation on a scale not present in other Department facilities.

Further, even if truly consensual sex were a “reality of life” in prison, *see* PRP 31, it nonetheless presents significant safety concerns for the entire prison population. Consensual sex includes the risk of disease transmission. *See* Lea, ms. at 5 (noting risks of consensual sex in jail including HIV transmission and enteric infections). Further, 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. ¶ 17, Attach. C at 3, 6-7. While truly consensual sexual relationships

are a rarity in the women's prison, the Department nonetheless has legitimate safety interests in preventing them.

3. Transferring Kim was the only reasonably effective means of addressing the safety and security concerns she created

Housing decisions are fact-specific inquiries that incorporate an individual's custody designation, safety concerns, and programming needs. Because the women's prison has different management concerns and policies than men's facilities, transferring Kim out of the women's facility was the only reasonably effective means of addressing Kim's repeated sexual encounters with other incarcerated individuals.

In her infraction defense, Kim argued that consensual sex should not be an infraction in the first place, and it was cruel and unusual "beyond all belief" to tell her she was "never allowed to have love" and she would "have to say no every time forever." Rule Decl., Attach. V; Wofford Decl. ¶ 11. Kim made similar statements in correspondence. Wofford Decl. ¶ 11. Her

statements made it clear that she believed she had the right to continue having sexual relationships. *Id.*

At the same time, management needs at the women's prison make it particularly difficult to prevent Kim from acting on her stated intention to continue having sexual relationships. Unlike men's facilities, the women's facility has been able to safely allow individuals from different custody levels to interact. *Id.* ¶ 5. Close custody and medium custody individuals attend programming, gym, and church together. *Id.* However, that also gives individuals opportunities to engage in sexual activity during those events. *See id.* ¶ 12 (noting that individuals have engaged in sex acts even in church). Simply moving Kim to a single cell in a higher custody level would not solve the problem of her continued sexual relationships.

The only way the Department could safely maintain Kim at the women's prison would be to place her in segregation, where she would be unable to socialize, work, or engage in positive programming, and which Kim herself identifies as

harmful. *Id.* ¶ 11; *see also* PRP at 27 (citing KAYLA JAMES & ELENA VANKO, VERA INST. OF JUST., THE IMPACTS OF SOLITARY CONFINEMENT (2021)). Instead, the Department placed Kim in a medium custody facility where it safely houses dozens of other transgender women and nonbinary individuals and where Kim can engage in rehabilitative activities. *See* Duncan Decl. ¶ 16. And Kim's housing will continue to be reviewed every six months to evaluate whether she remains safe in the Twin Rivers Unit and whether she can safely be placed in gender-affirming housing. Wofford Decl. ¶ 13; Leavitt Decl., Ex. A at 7. Given Kim's stated intentions, however, her continued housing in the women's prison was untenable.

Kim's continued incarceration in a women's facility presented safety risks to her and to the entire population. Transferring her out of the facility was reasonably necessary to accomplish the Department's goals of preventing sexual activity in prison, especially mutually harmful sexual

relationships, particularly given Kim’s stated belief that she had a right to continue having sexual relationships.

D. The Department of Corrections Has a Legitimate Penological Interest in Confining a Murderer Serving Two Life Sentences

Kim requests in passing complete release from confinement. *See* PRP at 35. Kim waives this issue, however, by failing to include any argument in support. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Should the Court nonetheless consider her request, Kim’s continued confinement is reasonably related to the penological goals of retribution, deterrence, incapacitation, and rehabilitation. *See Williams*, 198 Wn.2d at 369 (noting that despite the petitioner’s advanced age and limited vision and mobility, he “was not sufficiently incapacitated as to pose a low risk to community safety” given the “brutal” assault of which he was convicted). Kim was convicted of two brutal, premeditated murders of her own family members. Because of the violent nature of her crimes, her two life sentences, and her

young age, she poses as significant risk to community safety and this Court should not order her release from confinement.

V. CONCLUSION

Kim does not present an arguable basis for relief in fact or in law because she does not present evidence showing she is at an objectively intolerable risk of harm. Further, she concedes the Department of Corrections had legitimate penological interests supporting her transfer. This Court should dismiss the personal restraint petition under RAP 16.11(b).

CERTIFICATION

This document contains 10,240 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 3rd day of February, 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused the foregoing
BRIEF OF RESPONDENT to be filed with the Clerk of the
Court using the electronic filing system and that I caused the
document to be served as follows:

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

DATED this 3rd day of February, 2025, at Olympia,
Washington.

s/ Victoria Oller

VICTORIA OLLER
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