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Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

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| In the Matter of the Personal Restraint |) | No. 37589-7-III |
| of: |) | |
| |) | |
| MICHAEL ORREN GORSKI, |) | ORDER DISMISSING PERSONAL |
| |) | RESTRAINT PETITION |
| Petitioner. |) | |
| |) | |

Michael Gorski seeks relief from claimed unlawful personal restraint by the Department of Corrections (DOC). Mr. Gorski is serving a 244 month sentence for murder in the second degree. Mr. Gorski's current expected early release date is in March of 2029. Mr. Gorski is currently 70 years old and suffers from severe hypertension and other cardiac-related ailments. The relief that Mr. Gorski seeks is release from prison due to his undeniably high risk of lasting organ damage and even death should he contract COVID-19. For the reasons stated below, the law requires dismissal of Mr. Gorski's petition.

Mr. Gorski filed this petition on May 26, 2020. This court called for a response from the DOC and also called for supplemental briefing from both parties following the Supreme Court's decision in *Colvin*. *Colvin v. Inslee*, 195 Wn.2d 879, 467 P.3d 953

(2020). The court received the final briefs in this matter on August 17, 2020.

Because he is challenging a DOC decision for which he has had “no previous or alternative avenue for obtaining state judicial review,” Mr. Gorski must show that he is under restraint and that the restraint is unlawful. *See In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994); RAP 16.4(a)-(c). In such instances, “the petitioner need not make the threshold showing of actual prejudice or complete miscarriage of justice.” *In re Pierce*, 173 Wn.2d 372, 377, 268 P.3d 907, 909 (2011) (quoting *In re Pers. Restraint of Gentry*, 170 Wn.2d 711, 714-15, 245 P.3d 766 (2010)). “It is enough if the petitioner can demonstrate unlawful restraint under RAP 16.4.” *Id.* A petitioner can meet that burden by showing a federal or state constitutional violation or violation of the laws of the State of Washington. RAP 16.4(c)(2). A petition will be dismissed as frivolous if it “fails to present an arguable basis for relief in law or in fact, given the constraints of the personal restraint petition vehicle.” *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015).

Mr. Gorski raises two distinct grounds for relief: the “cruel and unusual punishment” clause of the Eighth Amendment to the United States Constitution and the “cruel punishment” clause of Article I, § 14, of the Washington State Constitution. This court analyzes the claims separately.

Eighth Amendment

To sustain a complaint for violation of the Eighth Amendment, the petitioner must

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show “a substantial risk of serious harm and deliberate indifference to that risk.” *Colvin*, 195 Wn.2d at 900 (citing *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)).

The Supreme Court and the other divisions of the Court of Appeals have all found the “substantial risk of serious harm” element met when considering similar petitions. *Colvin*, 195 Wn.2d at 900;¹ *In re Pers. Restraint of Pauley*, 13 Wn. App. 2d 292, 312, 466 P.3d 145 (2020); *In re Pers. Restraint of Williams*, __ Wn. App. 2d __, __ P. 3d __, slip op. at 17 (Wash. Ct. App., filed Dec. 1, 2020). Notably, the petitioner in *Pauley* appears to have had fewer risk factors than Mr. Gorski. *Pauley*, 3 Wn. App. 2d at 296. Mr. Gorski’s underlying health conditions appear to be comparable to, and in some respects more severe than, the petitioners in *Colvin*. *Colvin*, 95 Wn.2d at 886. Thus, this court considers the “substantial risk of serious harm” element met for all the reasons stated in those opinions.

Turning to “deliberate indifference,” that element is satisfied where the petitioner shows that officials acted with “subjective recklessness or deliberate indifference; that is, the official must know of and disregard the risk.” *Colvin*, 195 Wn.2d at 900. “[P]rison officials are not liable for known risks if they have responded reasonably to the risk,

‘even if the harm ultimately was not averted.’” *Pauley*, 13 Wn. App. 2d at 311 (quoting *Farmer*, 511 U.S. at 844).

Pauley concerned an inmate at the Monroe Correctional Complex (MCC). *Williams* concerned an inmate at Coyote Ridge Corrections Center. *Colvin* concerned inmates from the Washington Corrections Center for Women, the MCC, and the Stafford Creek Corrections Center. In all three cases, the reviewing court found that the DOC has reasonably responded to the risk presented by the current pandemic. Even now, “the mortality rate within Washington prisons has remained lower than the state’s mortality rate overall, as well as the mortality rates of most other correctional agencies publicly reporting data.” *Williams*, slip op. at 4. Under this record, which largely mirrors the record described in *Colvin* and *Pauley*, this court can only reach the same conclusions as those other cases: the DOC has not disregarded the extreme risk presented by COVID-19. Although, this court takes into consideration the community transmission that is presently occurring at Stafford Creek,² where Mr. Williams is incarcerated, the existence of the outbreak is not in itself proof of deliberate indifference. *Williams* demonstrates that fact; *see also Farmer*, 511 U.S. at 844.

¹ Mr. Gorski attempts to distinguish *Colvin* on the grounds that it only dealt with a petition for a writ of mandamus, not a personal restraint petition. Mr. Gorski is incorrect. *Colvin* also considered whether to grant alternative relief by converting the mandamus petition to a personal restraint petition. *Colvin*’s analysis of the Eighth Amendment is therefore authoritative in this context.

² 85 confirmed cases among inmates as of December 4, 2020.

Specific to Stafford Creek, Mr. Gorski argues that prison is inadequate because it lacks a full-service hospital that could treat him if he should contract the virus. But, *Williams* shows that the Department's arrangements with outside hospitals are effective for treating inmates who contract the virus. Mr. Gorski has given this court no reason to believe that the arrangements that Stafford Creek has with area hospitals would be any less effective; Mr. Gorski readily admits in his declaration that the personnel at Stafford Creek routinely take him to see outside medical providers.

Mr. Gorski also contends that the DOC does not have adequate testing capacity. Mr. Gorski fails to completely analyze the issue. The Department's lack of adequate testing supplies is only remediable under the Eighth Amendment if the Department is recklessly or indifferently failing to test inmates or procure adequate supplies. In other words, Mr. Gorski would have to allege that the Department is under-testing, despite have the ability to test more widely, or that the Department is not attempting to procure sufficient testing supplies. Mr. Gorski does not claim that the Department's alleged testing deficiency is due to any recklessness or indifference by the Department.

Although the court need not address the testing contention further, the court notes that the Department has continuously worked to increase its testing capacity and "has now acquired sufficient tests and distributed them among their facilities." *Williams*, slip op. at 5. As of December 4, 2020, the DOC had tested 6,060 of its approximately 16,000

inmates, or a little over a third of it inmate population.³ This is a remarkable achievement considering the lack of adequate testing supplies Washington State and the United States have experienced, and continue to experience, throughout this pandemic.⁴ “Because the available remedy is relief from unlawful restraint, when evaluating a PRP alleging unlawful conditions of confinement, we look to the petitioner’s current conditions of confinement,” and do not limit our inquiry to the conditions as they existed on the date the petition was filed. *Williams*, slip op. at 7.

Related to the lack of testing claim, Mr. Gorski alleges that inmates under-report symptoms because they do not want to be moved out of general population and into isolation. But, the Department has taken steps in recent months to encourage self-reporting by limiting quarantine of suspected infectious individuals to the time needed to procure a negative test result and by providing quarantined inmates with amenities that they would not ordinarily have if put in solitary confinement as a sanction. Department personnel also actively monitor inmates for signs of illness.

Mr. Gorski also complains that Stafford Creek has reopened recreation facilities for sports such as basketball. That may have been true at the time Mr. Gorski filed his

³ See <https://www.doc.wa.gov/corrections/covid-19/data.htm#testing> (last visited Dec. 7, 2020).

⁴ The court finds that the fact of local and nationwide shortage of testing supplies is not subject to reasonable dispute and is capable of judicial notice under ER 201(b)(1) and (b)(2).

petition—when parts of the State were starting to reopen. More recently, the Department has shut down basketball and other sports where social distancing is impossible, and limited use of other recreational facilities to sports where distancing can be observed and where equipment can be sanitized between uses.⁵ The DOC’s ongoing monitoring of the pandemic and regular modifications of its response in light of new information and medical advice is evidence that the DOC is not acting indifferently.

Mr. Gorski also alleges that the DOC is not doing enough to ensure compliance with social distancing guidelines, mask mandates, and protection of vulnerable populations, which he considers himself to be a member of. However, the evidence supplied by the DOC shows that it has special housing units for its vulnerable populations, which include enhanced precautions that are not available in general population. Mr. Gorski cannot show deliberate indifference when he has not attempted to avail himself of the solutions the Department has devised to protect the most vulnerable inmates. Moreover, the Eighth Amendment only requires prison officials “to ensure reasonable safety.” *Farmer v. Brennan*, 511 U.S. 825, 844, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Perfect safety is not the standard. Inherent in this standard is understanding that ensuring perfect compliance is not feasible among a population that is not known for following the law. *Farmer*, 511 U.S. at 844 (The “reasonable safety” standard

⁵ See <<https://www.doc.wa.gov/corrections/covid-19/docs/2020-0911-all-incarcerated-individuals-english-memo-updated-recreation-protocols.pdf>>.

“incorporates due regard for prison officials’ unenviable task of keeping dangerous men in safe custody under humane conditions.”).

Mr. Gorski could potentially make out a meritorious claim,⁶ or at least merit an evidentiary hearing, if he could show that he was denied transfer to one of these two units. But, Mr. Gorski does not allege that he has ever requested transfer to one of these units. If Mr. Gorski does not wish to request a transfer to a different prison, this court believes that Mr. Gorski’s concerns about his bunkmate’s lack of similar concern and diligence could be remedied by requesting placement with an inmate who treats the virus as seriously as he does.

Ultimately, it is up to the individual inmates to follow the guidelines put in place by public health officials. Reckless indifference by individual inmates for the welfare of their fellow inmates can only translate to an Eighth Amendment violation if the Department does not take reasonable steps to coerce compliance. The Department has already taken extensive steps to urge inmates to comply and has spent tens of millions of dollars on infectious disease prevention. Mr. Gorski also does not allege any further steps the Department could take to coerce other inmates to comply with public health guidelines. Accordingly, Mr. Gorski’s complaints about his fellow inmates are not relevant to the court’s Eighth Amendment inquiry.

⁶ Although the appropriate remedy would not necessarily entail release as opposed to transfer to a more appropriate unit.

Mr. Gorski's claims about individual staff members' disregard of safety protocols is similarly not sufficient to sustain his claim. The same OCO report on which Mr. Gorski relies for anecdotes about staff failing to follow the Department's COVID-19 regulations also found an overall high level compliance among staff. The record shows that the DOC as an institution takes staff compliance seriously. At that point, there is nothing more that the Department can do to ensure individual compliance among outliers other than to investigate and discipline individual staff members when it learns of a violation. If the Department fails to do so, then its failure to take corrective action could potentially sustain an Eighth Amendment claim for failure to protect. *See, e.g., Harrison v. Culliver*, 746 F.3d 1288 (11th Cir. 2014) (petitioner must show that prison supervisor had actual or constructive notice of flagrant and persistent pattern of policy violations by guards); *Jason v. Tanner*, 938 F.3d 191 (5th Cir. 2019) (same). But, the record before this court does not contain any evidence or allegations that Department supervisors have received reports of individual violations and failed to take action. While Mr. Gorski's declarations make accusations against unnamed individual jailers for violating protocols during his medical transport and at other times, he does not allege that he voiced his concerns to prison supervisors. The DOC cannot knowingly disregard a risk posed by individual staff members that it has no knowledge of.

The court dismisses Mr. Gorski's Eighth Amendment claim for failure present an arguable basis for relief in law or in fact, as required by *Khan*.

Article I, Section 14

In *Colvin* and *Pauley*, the Supreme Court and Court of Appeals refused to separately analyze the petitioners' claims under Art. I, § 14, due to inadequate briefing. *Colvin*, 195 Wn.2d at 900; *Pauley*, 13 Wn. App. 2d at 310. In *Williams*, the Court of Appeals developed an independent test for claims under Art. I, § 14, after concurring in the petitioner's *Gunwall*⁷ analysis. *Williams*, slip op. at 8-16. This court notes that Mr. Gorski shares counsel with Mr. Williams and that counsel's Art. I, § 14, briefing mirrors counsel's briefing from *Williams*.

This court has not adopted the *Williams* framework. Even if this court were to adopt that framework, Mr. Gorski's Art. I, § 14, claim would fail on the merits for the same reasons that Williams's claim failed. Moreover, Mr. Gorski's Art. I, § 14, claim is even less meritorious than Mr. Williams's claim. Mr. Gorski is serving a sentence for a completed murder, as opposed to Williams's attempted murder conviction. Unlike Williams, Mr. Gorski does not satisfy the medical criteria for an extraordinary medical placement. Williams is also 8 years older than Mr. Gorski and has an earlier release date.

Requested Remedy

Even if this court were to find a violation of the Eighth Amendment or Art. I, § 14, Mr. Gorski offers no authority that release from prison is the appropriate remedy. He cites a single federal district court opinion where a judge speculated that release could be

an available option under the Constitution. He also cites a district court case where a federal inmate was granted home confinement pursuant to 18 U.S.C. § 3624, not the Constitution. Moreover, district court opinions are not precedential or persuasive. The decision of a district court “is not ‘controlling authority’ in any jurisdiction, much less in the entire United States,” and “falls far short of . . . a robust ‘consensus of cases of persuasive authority.’” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (quoting *Wilson*, 526 U.S. at 617).

The weight of persuasive federal precedent holds that release is not an available remedy for Eighth Amendment claims challenging conditions of confinement. *Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir.2005) (“If an inmate established that his medical treatment amounts to cruel and unusual punishment, the appropriate remedy would be to call for appropriate treatment, or to award him damages; release from custody is not an option.”); *see also Gomez v. United States*, 899 F.2d 1124, 1126 (11th Cir. 1990); *Crawford v. Bell*, 599 F.2d 890, 891–92 (9th Cir. 1979); *Cook v. Hanberry*, 596 F.2d 658, 660 (5th Cir. 1979). Counsel fails to cite, let alone distinguish, this contrary authority.

Mr. Gorski’s Diet and Cardiac Treatment

Interlaced within the petition are complaints about Mr. Gorski’s diet and cardiac treatment. This court does not address those issues because Mr. Gorski does not request any relief specific to his diet and cardiac treatment and does not explicitly allege

⁷ *State v. Gunwall*, 106 Wn.2d 54, 61, 720 P.2d 808 (1986).

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deliberate indifference as to his diet and cardiac treatment. He only alleges deliberate indifference to the risk of COVID-19 infection. This court will not provide a remedy for an issue where none has been requested as to that issue. *In re Det. of Reyes*, 184 Wn.2d 340, 348, 358 P.3d 394 (2015). If Mr. Gorski wants redress concerning these issues, he can file a separate personal restraint petition developing those arguments more thoroughly and requesting such relief. *In re Pers. Restraint of Snively*, 180 Wn.2d 28, 32 fn. 2, 320 P.3d 1107 (2014) (petitioner required to file separate personal restraint petition requesting correct remedy, despite presence of error in judgment and sentence).

Mr. Gorski's petition fails to present an arguable basis for relief in law or in fact, as required by *Khan*. He thus fails his burden under RAP 16.4 and *Cashaw*. The petition is dismissed as frivolous pursuant to RAP 16.11(b). The motion for accelerated review is denied. The motion for release pending review is denied. The motion for appointment of and reimbursement of pro bono counsel at public expense is denied. *See In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999); RCW 10.73.150(4).


KEVIN M. KORSMO
ACTING CHIEF JUDGE