Filed
Supreme Court of New Mexico
4/23/2020 3:18 PM
Office of the Clerk

Joey D. Moya

IN THE NEW MEXICO SUPREME COURT

NEW MEXICO LAW OFFICES
OF THE PUBLIC DEFENDER;
NEW MEXICO CRIMINAL
DEFENSE LAWYERS ASSOCATION; and
AMERICAN CIVIL LIBERTIES
UNION OF NEW MEXICO,

Petitioners,

v. No. S-1-SC-38252

STATE OF NEW MEXICO; MICHELLE
LUJAN GRISHAM, Governor, State of New Mexico;
ALISHA TAFOYA LUCERO, Secretary, New Mexico
Corrections Department; and MELANIE MARTINEZ,
Director, New Mexico Probation and Parole,

Respondent,

NEW MEXICO DISTRICT ATTONREYS'
ASSOCIATION;
HECTOR BALDERAS,
NEW MEXICO ATTORNEY GENERAL,

Real Parties in Interest.

NEW MEXICO DISTRICT ATTORNEYS' ASSOCIATION RESPONSE TO
EMERGENCY PETITION FOR WRIT OF MANDAMUS
and/or HABEAS RELIEF

April 23, 2020

Submitted by:

John P. Sugg
District Attorney
Twelfth Judicial District Attorney's Office
1000 New York Ave, Rm 101
Alamogordo, New Mexico 88310
(575) 437-3640
jsugg@da.state.nm.us

James Grayson
Deputy District Attorney
Second Judicial District Attorney's Office
520 Lomas Blvd. NW
Albuquerque, NM 87102
(505) 222-1320
james.grayson@da2nd.state.nm.us

Jamshid Askar
Senior Trial Attorney
Twelfth Judicial District Attorney's Office
1000 New York Ave, Rm 101
Alamogordo, New Mexico 88310
(575) 437-3640
jaskar@da.state.nm.us

Counsel for Real Party in Interest
New Mexico District Attorneys' Association (NMDAA)

TABLE OF CONTENTS

Table of Authorities ii

Introduction 1

I. The request for mandamus relief must be denied because the Petition fails to demonstrate that Respondents have failed to perform their ministerial duties, and this Court's mandamus authority does not extend to discretionary acts 2

II. This Court must not exercise its original jurisdiction over Petitioners' request for habeas corpus relief, because Petitioners' filing objectively excludes the necessary components of a bona fide petition for writ of habeas corpus 5

III. Even if this Court exercises its original jurisdiction over habeas corpus proceedings, this Court should deny the Petition because Petitioners have failed to prove that the Respondents have violated any inmate's Eighth Amendment right to be free from cruel and unusual punishment 9

Conclusion 13

TABLE OF AUTHORITIES

New Mexico Cases

State ex rel. Shell W. E & P, Inc. v. Chavez, 2002-NMCA-005, 131 N.M. 445, 38 P.3d 886 2

Brantley Farms v. Carlsbad Irrigation Dist., 1998-NMCA-023, 124 N.M 698, 954 P.2d 763. 2

State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n, 2007-NMSC-023, 141 N.M. 657, 160 P.3d 566....................2

State ex rel. Sugg v. Oliver, 2020-NMSC-002, 456 P.3d 1065....................2

State ex rel. King v. Lyon, 2011-NMSC-004, 149 N.M. 330, 248 P.3d 878.......3

Lovato v. City of Albuquerque, 1987-NMSC-086, 106 N.M. 287, 742 P.2d 499 3

Cook v. Smith, 1992-NMSC-041, 114 N.M. 41, 834 P.2d 418....................3

State v. Archibeque, 1981-NMSC-010, 95 N.M. 411, 622 P.2d 1031 4

Clark v. Tansy, 1994-NMSC-098, 118 N.M. 486 4

State v. Martinez, 1998-NMSC-023, 126 N.M. 39. 4

Cummings v. State, 2007-NMSC-048, 142 N.M. 656, 168 P.3d 1080 ....5, 6

Peyton v. Nord, 1968-NMSC-027, 78 N.M. 717, 437 P.2d 716 ....5, 7

Ex parte Nabors, 1928-NMSC-025, 33 N.M. 324, 267 P. 58....................6

Normand v. Ray, 1988-NMSC-054, 107 N.M. 346 8

State v. Augustus, 1981-NMCA-118, 97 N.M. 100, 637 P.2d 50 9

Ex parte Bustillos, 1920-NMSC-095, 26 N.M. 449, 194 P. 886 .. Appendix A, 4

Federal Cases

Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)....................8, 10, 13

Helling v. McKinney, 509 U.S. 25, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993)..9, 12

Estelle v. Gamble, 429 U.S. 97 (1976) 10

Williams v. Nevada, 2020 U.S. Dist. LEXIS 65821 (D. Nev. April 15, 2020). 11

United States v. Williams, No. PWG-13-544, 2020 U.S. Dist. LEXIS 50185 (D. Md. Mar. 23, 2020) 11

United States v. Adams, Crim. No. 19-257-3, 2020 WL 1457916 (D. Md. Mar. 25, 2020) (unpublished) 11

United States v. Green, 2020 U.S. Dist. LEXIS 67199 (E.D. Cal. April 15, 2020) 11

United States v. Clark, No. 1:09cr336-1, 2020 U.S. Dist. Lexis 66340 (M.D.N.C. April 15, 2020) 12

United States v. Eberhart, No. 13-cr-00313-PJH-1, 2020 U.S. Dist. LEXIS 51909 (N.D. Cal. Mar. 25, 2020) 12

United States v. Smalls, 2020 U.S. Dist. LEXIS 65235 (S.D.N.Y. April 14, 2020) 12

Constitutional Provision

N.M. Const. art. IV, § 1 4

N.M. Const. art. VI, § 3 5

N.M. Const. art. VI, § 13 5

N.M. Const. art. II, § 13 .... 9, 10

U.S. Const. amend. VIII 9, 10, 11, 12, 13

N.M. Const. art. V, § 6 .... Appendix A, 4

New Mexico Rules

Rule 5-802 NMRA 5, 6, 8

Rule 5-802(A) NMRA 6, 7

Rule 5-802(E)(2) NMRA 6

Rule 5-802(B)(1) NMRA 7

Rule 5-802(B)(2) NMRA 7

Rule 5-802(B)(3) NMRA 7
Rule 5-802(B)(4) NMRA 7
Rule 5-802 (C)(2)NMRA 7

New Mexico Statutes

NMSA 1978, § 44-2-4 3
NMSA 1978, § 33-2-29 (1977) 3
NMSA 1978, § 31-21-25.1 (1994) .... 4, Appendix A, 2
NMSA 1978, § 31-21-10 (2009) .... Appendix A, 1
NMSA 1978, § 31-21-15 (2016) .... Appendix A, 1
NMSA 1978, § 31-21-14 (1963) .... Appendix A, 1
NMSA 1978, § 31-21-25.1(B) (1994) .... Appendix A, 2
NMSA 1978, § 31-21-25.1(E) (1994) .... Appendix A, 2
NMSA 1978, §§ 33-9-1 to -10 (2013) .... Appendix A, 3
NMSA 1978, § 33-9-5(B) (2013) .... Appendix A, 3
NMSA 1978, § 33-2A-7 (2002) .... Appendix A, 3
NMSA 1978, § 33-2A-2 (2002) .... Appendix A, 3
NMSA 1978, § 33-2-29 (1978) .... Appendix A, 4

Other Authorities

Ctrs. for Disease Control and Prevention, *Groups at Higher Risk for Severe Illness*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited April 22, 2020) 12

The Emergency Petition for Writ of Mandamus and/or Habeas Relief ("Petition") lacks factual support and legal authority. Petitioners ask this Court to implement criminal justice reforms they have long sought through the Legislature, but have not yet been able to achieve. In an attempt to do an end run around the New Mexico Legislature and Governor, Petitioners ask this Court to use its mandamus and habeas authority to order Respondents to swing open the doors of New Mexico's prisons, allowing an unspecified number of convicted felony inmates to be released into the community.

As justification for their request, Petitioners seize upon the current COVID-19 health pandemic to make an emotional plea to this Court that ignores controlling law. In a convoluted argument devoid of citation to the applicable legal standards, Petitioners ask this Court to combine its mandamus and habeas authority to issue an order directing the Respondents to exercise their discretionary authority to release inmates and dramatically reduce prison populations. [PET 1]

This Court should reject the Petitioners' invitation to violate the doctrine of separation of powers and deny the Petition without a hearing. Should any inmate suffer from actual conditions of imprisonment in violation of the Eighth Amendment's prohibition against "cruel and unusual punishment," that inmate

should be directed to file a petition for writ of habeas corpus in the appropriate district court in compliance with Rule 5-802 NMRA.

I. The request for mandamus relief must be denied because the Petition fails to demonstrate that Respondents have failed to perform their ministerial duties, and this Court's mandamus authority does not extend to discretionary acts.

"Mandamus is a drastic remedy to be invoked only in extraordinary circumstances…Mandamus lies only to force a clear legal right against one having a clear legal duty to perform an act and where there is no other plain, speedy and adequate remedy in the ordinary course of law." *State ex rel. Shell W. E & P, Inc. v. Chavez*, 2002-NMCA-005, ¶ 8, 131 N.M. 445, 38 P.3d 886, quoting *Brantley Farms v. Carlsbad Irrigation Dist.,* 1998-NMCA-023, ¶¶ 12, 16, 124 N.M 698, 954 P.2d 763; *see also State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n*, 2007-NMSC-023, ¶ 9, 141 N.M. 657, 160 P.3d 566.

In determining whether to exercise original jurisdiction in mandamus, this Court "applies a multi-factor test under which [the Court] will assume jurisdiction 'when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.'" *State ex rel. Sugg v. Oliver*, 2020-

NMSC-002, ¶ 7, 456 P.3d 1065, quoting *State ex rel. King v. Lyon*, 2011-NMSC-004, ¶ 21, 149 N.M. 330, 248 P.3d 878.

Mandamus will compel only the performance of ministerial acts. *See* NMSA 1978, § 44-2-4 (Writs of mandamus "may be issued…to compel the performance of an act which the law specially enjoins as a duty resulting from an office."); *see also Lovato v. City of Albuquerque*, 1987-NMSC-086, ¶ 6, 106 N.M. 287, 742 P.2d 499 ("The act to be compelled must be ministerial, that is, an act or thing which the public official is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case."). "Discretionary acts are beyond the reach of the writ." *Cook v. Smith*, 1992-NMSC-041, ¶ 5, 114 N.M. 41, 834 P.2d 418

There is no New Mexico law that requires Respondents to release inmates from New Mexico Corrections Department facilities when faced with a global health pandemic. That is not to say that the Legislature did not contemplate the possibility that New Mexico prisons would face "pestilence or contagious sickness." *See* NMSA 1978, § 33-2-29 (1977). Since before statehood, corrections officials have had the discretionary authority to remove sick inmates from a correctional facility and move them to a "suitable place of security" where they could receive medical treatment *Id.* Whether to exercise this authority, which balances the health of the

inmates with the safety of the community, rests firmly within the purview of the Respondents and not this Court.

As this Court has recognized, it is the exclusive province of the Legislature to decide the appropriate length of sentence for a crime. *See State v. Archibeque*, 1981-NMSC-010, ¶¶ 4-5, 95 N.M. 411, 622 P.2d 1031; *see also* N.M. Const. art. IV, § 1 ("The legislative power shall be vested in a senate and house of representatives which shall be designated the legislature of the state of New Mexico."). It is also within the province of the Legislature to decide on the circumstances, such as age or health, that justify early release from prison. *See* NMSA 1978, § 31-21-25.1 (1994).

Absent a violation of the Eighth Amendment, which is a matter to be addressed on appeal or through habeas corpus, *see Clark v. Tansy*, 1994-NMSC-098, ¶ 11, 118 N.M. 486 ("Historically the writ of habeas corpus has been used to protect individual rights from erroneous deprivation."), the judiciary cannot "lessen the penalty intended by the Legislature, or otherwise frustrate the Legislature's constitutional function of establishing criminal penalties." *State v. Martinez*, 1998-NMSC-023, ¶ 14, 126 N.M. 39. "This limitation on judicial authority reflects the separation of powers notion that it is solely the province of the Legislature to establish penalties for criminal behavior." *Id.* ¶ 12 (quotation marks and quoted

authority omitted).

While Petitioners cite to some authority that would permit Respondents to exercise limited discretion to release some inmates, none of the statutes or constitutional provisions compel Respondents to act. *See* Appendix A. Accordingly, since Petitioners have failed to establish that Respondents have failed to perform a non-discretionary duty that they are compelled by law to perform, the Court's inquiry into the requested mandamus relief must stop here. To do otherwise would expand the scope of the writ of mandamus and violate the doctrine of separation of powers. To the extent that Petitioners have any claim at all, it does not lie in mandamus and must instead be scrutinized under habeas corpus.

II. This Court must not exercise its original jurisdiction over Petitioners' request for habeas corpus relief, because Petitioners' filing objectively excludes the necessary components of a bona fide petition for writ of habeas corpus.

Petitioners, avoiding the regular procedure prescribed by Rule 5-802 of the Rules of Criminal Procedure for the District Courts that requires them to seek habeas corpus relief in the district court[1] where evidentiary hearings would expose gaping

---

1 NMDAA does not dispute that this Court has "concurrent jurisdiction with district courts to entertain petitions for writs of habeas corpus," *Cummings v. State*, 2007-NMSC-048, ¶ 5, 142 N.M. 656, 168 P.3d 1080; *see also* N.M. Const. art. VI, §§ 3, 13. However, it is generally the Supreme Court's "practice to refuse to take jurisdiction in habeas corpus proceedings which could be brought in the district courts in the first instance." *Peyton v. Nord*, 1968-NMSC-027, ¶ 7, 78 N.M. 717,

holes in their claims, seek to invoke this Court's original jurisdiction without making any meaningful argument why relief in the district court is not possible.[2] By warping the basic tenets of habeas claims in an apparent attempt to evade the established protocols of Rule 5-802, Petitioners ultimately submitted a pleading that is fundamentally defective as a habeas claim for failing to satisfy multiple specific thresholds. Consequently, Petitioners' pleading isn't even a habeas petition at all – regardless of the inclusion of "habeas corpus" in its caption – and therefore this Court shouldn't even *consider* whether to exercise its original jurisdiction over habeas corpus matters.

---

437 P.2d 716; *see also Ex parte Nabors*, 1928-NMSC-025, ¶ 5, 33 N.M. 324, 267 P. 58 ("The jurisdiction being concurrent, we think that, in the first instance, in the absence of a showing of controlling necessity, we properly relegated petitioner to his remedy in the district court of the county where he was restrained.").

For nearly 100 years, this Court has used its original jurisdiction primarily to "give a petitioner the functional equivalent of an appeal from a denial of the writ in district court." *Cummings*, at ¶ 5. This practice makes sense for "fact-finding purposes" since taking evidence in this Court on a habeas corpus petition is "impractical, if not impossible. Thus, historically [this Court has] simply obtained the district court's record by issuing a writ of certiorari so that [the Court] may exercise [its] original jurisdiction by reviewing the ruling of the district court." *Id.* at ¶ 8.

2 Rule 5-802 "governs the procedure for filing a writ of habeas corpus by persons in custody or under restraint for a determination that such custody or restraint is, or will be, in violation of the constitution or laws of the State of New Mexico or of the United States." Rule 5-802(A), NMRA. The proper venue for a petition that "challenges conditions of confinement…shall be…the county where the petitioner is confined or restrained." Rule 5-802(E)(2) NMRA.

In the great State of New Mexico, a bona fide petition for writ of habeas corpus will challenge either a conviction or conditions of confinement. *See* Rule 5-802(B)(1) NMRA. In the instant matter, Petitioners purport to make a "conditions of confinement" claim for habeas relief. A viable petition for writ of habeas corpus challenging conditions of confinement will incorporate the following components:

1) The names of one or more "persons in custody or under restraint." Rule 5-802(A) NMRA.
2) The name of "petitioner's immediate custodian, who shall have the power to produce the body of the petitioner before the court and shall have the power to discharge the petitioner from custody if the petition is granted." Rule 5-802(B)(2).[3]
3) "A brief statement naming the place where the person is confined or restrained." Rule 5-802(B)(3) NMRA.
4) "A brief statement of the steps taken to exhaust all other available remedies." Rule 5-802(B)(4) NMRA.[4]

---

3 When a habeas petitioner names a respondent other than a facility's warden, this Court dismisses that individual as a party. *Peyton*, 1968-NMSC-027, ¶ 2 (dismissing a judge as a habeas respondent).

4 *See also* Rule 5-802(C)(2) NMRA("A NMCD inmate may file a petition challenging any other condition of the inmate's confinement while incarcerated in a NMCD correctional facility, provided…the inmate exhausts the NMCD's internal grievance procedure.").

5) A statement specifying how the petitioner's constitutional right to be free from cruel and unusual punishment is being violated. *See* e.g. *Farmer v. Brennan*, 511 U.S. 825, 835, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)("The inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm").

6) A statement specifying how prison officials have been "deliberately indifferent" to the health or safety of prisoners. *Id*. at 834.

Thus, a reasonable reading of Rule 5-802 reveals that any pleading purporting to seek habeas relief is de facto defective without at least one person named as a petitioner.[5] Similarly, the absence of identifying at least one prison facility warden for fact-based scrutiny acts as a roadblock to habeas viability.[6] By its very nature, a habeas corpus proceeding attacks the basis upon which the 'body' is held by another." *Normand v. Ray*, 1988-NMSC-054, ¶ 4, 107 N.M. 346. Petitioners identify

---

5 NMDAA could not find a single instance in which a New Mexico court has ever granted a writ of habeas corpus that didn't pertain to *at least one named inmate or parolee*.

6 Such an assertion is neither an argument based on standing nor an attempt to dismiss the claims Petitioners seek based on a technicality. Rather, it is indicative of the very nature of Rule 5-802 habeas litigation concerning conditions of confinement: the inmate housed in the predatory behavior program in Santa Fe is experiencing very different conditions of confinement from the non-violent inmate working on the honor farm in Los Lunas or the sex offender in Chaparral.

no "body" and no custodian.

Instead, Petitioners make general claims about the Department of Corrections without making any factual allegations about specific facilities or any conditions of confinement for particular inmates. An inmate's immediate custodian not only has the power to produce the body of the petitioner but, of course, has the most knowledge about a particular inmate's conditions of confinement. Petitioners have attempted to frame this action in a manner that deprives those individuals of an opportunity to rebut the generalized factual claims. The theoretically-based petition thus utterly fails to state an actual claim for habeas relief.

III. Even if this Court exercises its original jurisdiction over habeas corpus proceedings, this Court should deny the Petition because Petitioners have failed to prove that the Respondents have violated any inmate's Eighth Amendment right to be free from cruel and unusual punishment.

NMDAA agrees with Petitioners that the "treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Helling v. McKinney*, 509 U.S. 25, 31, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993).[7] And while "the primary concern of the drafters [of the

---

7 Petitioners also assert their claims under Article II, § 13 of the New Mexico Constitution. New Mexico Courts have declined to hold that Article II, § 13 of the New Mexico Constitution provides greater protection than the protections provided for in the Eighth Amendment to the United State Constitution. *See State v. Augustus*, 1981-NMCA-118, ¶ 1, 97 N.M. 100, 637 P.2d 50 ("We construe both of these

Eighth Amendment] was to proscribe 'torture[s]' and other 'barbar[ous]' methods of punishment…the Amendment proscribes more than physically barbarous punishments…[and includes protections against] deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 102-04 (1976).

Clearly, Respondents have a duty under the Eighth Amendment to take reasonable steps to protect the safety of inmates. However, to establish a violation of the Eighth Amendment, Petitioners must show more than mere negligence by prison officials. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). Instead, Petitioners are required to prove two factors.

The first factor, known as the objective factor, requires Petitioners to prove that the alleged deprivation is sufficiently serious (i.e. "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm"). The second factor, known as the subjective factor, requires Petitioners to prove that prison officials are "deliberately indifferent" to the prisoners' health or safety. *Id.* at 834.

Here, Petitioners have failed to meet their burden to establish the objective factor, and they do not even attempt to address the subjective factor of the Eighth

---

provisions [the Eighth Amendment to the United State Constitution and Article II, § 13 of the New Mexico Constitution] identically.").

Amendment violation analysis.

Petitioners go to great lengths to describe the threat COVID-19 presents to the community as whole while highlighting how older people and those with certain pre-existing conditions are more vulnerable to the virus. [PET 7-9] Petitioners also address how people who in "congregate environments (where people live, eat, and sleep in close proximity) like prisons and jails face increased danger of contracting COVID-19." [PET 9] However, Petitioners make no attempt to show how any specific inmate who is currently incarcerated within a New Mexico Corrections Department facility is being held under conditions posing a substantial risk of serious harm to that individual.[8]

---

8 Instead, Petitioners rely on general, wide-ranging statements about COVID-19 to establish the objective factor. Such arguments have routinely been rejected throughout the country. *See Williams v. Nevada*, 2020 U.S. Dist. LEXIS 65821, *9-12 (D. Nev. April 15, 2020)(Dismissing an Eighth Amendment claim in a civil rights claim from inmate who made "only vague and conclusory allegations that the prison is not equipped to handle an outbreak" and had failed to show that prison authorities "had the authority, ability, and resources to change these conditions without endangering other prisoners at similar risk."); *United States v. Williams*, No. PWG-13-544, 2020 U.S. Dist. LEXIS 50185, at *8 (D. Md. Mar. 23, 2020)("The existence of the present pandemic, without more, is not tantamount to a 'get out of jail free' card. Not even for the older person being detained. While there has been a change in conditions as a result of the pandemic, there has not been enough change to justify the release of [defendant]."); *see also United States v. Adams*, Crim. No. 19-257-3, 2020 WL 1457916, at *1 (D. Md. Mar. 25, 2020) (unpublished); *United States v. Green*, 2020 U.S. Dist. LEXIS 67199, *9 (E.D. Cal. April 15, 2020); *United States*

The objective component of an Eighth Amendment claim requires an inmate to show that the inmate has personally been exposed to an unreasonable risk of harm. *See Helling*, 509 U.S. at 35-36 ("McKinney must show that he himself is being exposed to unreasonably high levels of ETS."). Petitioners fail to allege any conditions of confinement for any specific inmate from which this Court could find personal exposure to a risk of infection. Nor do Petitioners attempt to establish an unreasonable risk of harm by limiting their claim to inmates at the highest risk from COVID-19. *See* Ctrs. for Disease Control and Prevention, *Groups at Higher Risk for Severe Illness*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited April 22, 2020). Moreover, Petitioners have not shown that release would reduce the risk of infection for any individual inmate. *United States v. Clark*, No. 1:09cr336-1, 2020 U.S. Dist. Lexis 66340, at *25 (M.D.N.C. April 15, 2020)(observing that the petitioner's proposed living conditions upon release would have "present[ed] a significant health risk to [the petitioner] during this period of social distancing"). As one part of the objective element of the Eighth Amendment, a petitioner must show exposure to a risk "so grave" that it "is not one that today's society chooses to tolerate." *Helling*, 509 U.S.

---

v. Eberhart, No. 13-cr-00313-PJH-1, 2020 U.S. Dist. LEXIS 51909, at *7 (N.D. Cal. Mar. 25, 2020); *United States v. Smalls*, 2020 U.S. Dist. LEXIS 65235, *6-7 (S.D.N.Y. April 14, 2020).

at 36. Petitioners frame their argument so generally that it prevents this Court from making any informed decision about the objective prong of the Eighth Amendment.

In addition to failing to establish the objective factor of the Eighth Amendment analysis, Petitioners completely ignored the subjective factor of showing that “the official [knew] of and disregard[ed] an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [the official] must also draw the inference.” *Farmer*, 511 U.S. at 837.

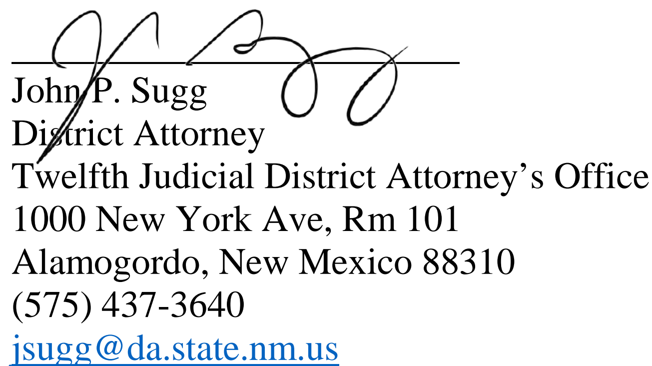
Accordingly, Petitioners have created a Catch-22 that ultimately demands dismissal of their claim for habeas relief: by law the petition will fail without a basis for finding “deliberate indifference,” yet this Court is unable to hold the evidentiary hearing necessary to establish that subjective prong of an Eighth Amendment analysis.

Conclusion

Petitioners fail to support their claims with either a factual basis or legal authority. They have not identified a mandatory duty that would support a claim for mandamus. In addition, they fail to establish any basis for this Court to exercise original jurisdiction in habeas corpus. On its merits, Petitioners’ habeas claim is nothing more than a general reference to a hypothetical risk of infection given the

current pandemic. Petitioners have completely failed to demonstrate the objective and subjective elements necessary to establish a violation of the Eighth Amendment. In short, Petitioners' claim is wholly without merit. By rejecting the claim, this Court would join a growing consensus among courts of last resort across the country – including Colorado, Indiana, Montana, Ohio, and Pennsylvania[9] – in denying similar petitions using COVID-19 as nothing more than an excuse to try to empty the prisons and absolve felons of the penal consequences of their crimes. For the foregoing reasons, NMDAA respectfully request this Court deny the Petition without a hearing

Respectfully submitted,



John P. Sugg
District Attorney
Twelfth Judicial District Attorney's Office
1000 New York Ave, Rm 101
Alamogordo, New Mexico 88310
(575) 437-3640
jsugg@da.state.nm.us

9 Due to many of these orders not being available on Lexis or Westlaw, we have attached these decisions as Exhibit 1.

_/s/ James Grayson__________
James Grayson
Deputy District Attorney
Second Judicial District Attorney's Office
520 Lomas Blvd. NW
Albuquerque, NM 87102
(505) 222-1320
james.grayson@da2nd.state.nm.us

Jamshid Askar
Senior Trial Attorney
Twelfth Judicial District Attorney's Office
1000 New York Ave, Rm 101
Alamogordo, New Mexico 88310
(575) 437-3640
jaskar@da.state.nm.us

Counsel for Real Party in Interest
New Mexico District Attorneys' Association

CERTIFICATE OF SERVICE

I hereby certify that I filed a true and correct copy of the foregoing *Response* was filed via the Odyssey File & Serve electronic filing system, thereby providing service to all counsel of record on April 23, 2020.

John P. Sugg, Twelfth Judicial District Attorney
Counsel for Real Party in Interest – NMDAA

Appendix A – Mandamus Relief Requested by Petitioners

Petitioners ask this Court to grant at least 13 separate forms of Mandamus relief. [PET 23-26.] Many of these requests cite no legal authority, and none of the requests are well-founded in the law. The below table illustrates the abject scarcity of legal authority supporting Petitioners' requested remedies.

Measures pertaining to would-be parolees and probationers
▪ Relax parole plan requirements, and facilitate release of those serving in-house parole for lack of an approved placement. ▪ Hold more and expedited parole hearings. ▪ Temporarily suspend any new incarceration of parolees who commit a technical violation. ▪ Facilitate release of inmates incarcerated for technical parole violations. ▪ Expedite release back to probation/parole of any inmates solely serving sentence for violating probation/parole.
Cited authority? ▪ None.
Laws precluding judicial intervention: ▪ "If an inmate…does not have an approved parole plan, the inmate shall not be released and shall remain in the custody of the institution in which the inmate has served the inmate's sentence." NMSA 1978, § 31-21-10 (2009). ▪ Revocation of probation is a discretionary act of the sentencing judge. *See* NMSA 1978, § 31-21-15 (2016). "If the violation is established, the court *may* continue the original probation or revoke the probation and either order a new probation…or require the probationer to serve the balance of the sentence imposed or any lesser sentence." ▪ Revocation of parole is a discretionary act of the parole board. *See* NMSA 1978, § 31-21-14 (1963). "If violation is established, the [parole] board *may* continue or revoke the parole or enter any other order as it sees fit."

Measures relating to health conditions

- Expedite release of inmates who are at increased risk of serious illness from COVID-19. (E.g., 60+ years old, diabetes, heart disease, asthma, immunocompromised, etc.)
- Facilitate release of individuals eligible for medical or geriatric parole.
- Expedite release of pregnant individuals.

Cited authority?

- NMSA 1978, § 31-21-25.1 (1994)

Laws precluding judicial intervention:

- "The parole board shall…(4) make a determination whether to grant geriatric or medical parole within thirty days of receipt of an application and supporting documentation from the corrections department…[and] (6) authorize the release of geriatric, permanently incapacitated and terminally ill inmates upon terms and conditions as the board may prescribe, if the board determines that an inmate is geriatric, permanently incapacitated or terminally ill, parole is not incompatible with the welfare of society and the inmate is not a first degree murder felon." NMSA 1978, § 31-21-25.1(B) (1994).
- "When determining an inmate's eligibility for geriatric or medical parole, the parole board shall consider the following criteria concerning the inmate's: (1) age; (2) severity of illness, disease or infirmities; (3) comprehensive health evaluation; (4) institutional behavior; (5) level of risk for violence; (6) criminal history; and (7) alternatives to maintaining geriatric or medical inmates in traditional settings." NMSA 1978, § 31-21-25.1(E) (1994).

Measure relating to length of unserved incarceration

- Expedite release of inmates currently serving in-house parole or who have less than a year on their maximum term of imprisonment.

Cited authority?

- NMSA 1978, §§ 33-9-1 to -10 (2013)

Law precluding judicial intervention:

- "The [corrections] department *may* also use the fund to place criminal offenders within twelve months of eligibility for parole in community-based settings; provided that the criminal offender has never been convicted of a felony offense involving the use of a firearm." NMSA 1978, § 33-9-5(B) (2013).

Measure relating to nature of underlying conviction

- Expedite release of individuals incarcerated for a nonviolent offense or offenses.

Cited authority?

- NMSA 1978, § 33-2A-7 (2002)

Laws precluding judicial intervention:

- "The purpose of the Corrections Population Control Act is to establish a [commission] that shall…*prevent the inmate population from exceeding the rated capacity of correctional facilities* and shall take appropriate action when necessary to effect the reduction of the inmate population." NMSA 1978, § 33-2A-2 (2002).
- "The governor *may* order the commission to convene at any time to consider the release of nonviolent offenders who are within one hundred eighty days of their projected release date." NMSA 1978, § 33-2A-7 (2002).

Catch-all "kitchen sink" measure

- Expedite release of "any other individual for whom release is appropriate."

Cited authority?

- NMSA 1978, § 33-2-29 (1978); N.M. Const. art. V, § 6.

Laws precluding judicial intervention:

- "In case of any pestilence or contagious sickness breaking out among the convicts, the department *may* cause the convicts confined therein or any of them to be removed to some suitable place of security where such of them as may be sick shall receive necessary medical attention and such convicts must be returned as soon as may be to the penitentiary to be confined according to their respective sentences, if the same be unexpired." NMSA 1978, § 33-2-29 (1978).
- "The Governor shall have power to grant reprieves and pardons, after conviction for all offenses except treason and in cases of impeachment." N.M. Const. art. V, § 6. "The power granted [is discretionary and] is of such a nature as to require no regulation. It is simply a one-man power, depending for its execution upon nothing more than the stroke of the pen of the Governor." *Ex parte Bustillos*, 1920-NMSC-095, ¶ 29, 26 N.M. 449, 194 P. 886.

Miscellaneous measure
▪ Order the Secretary of Corrections to report daily regarding the number of NMCD staff and inmates who have been tested for COVID-19, presumptive and confirmed positive cases, and number of individuals currently held in quarantine.
Cited authority? ▪ None.
Law precluding judicial intervention: ▪ The Department has many reporting requirements under numerous statutes, but reporting the number of staff and inmates who have been tested for COVID-19 is not among those requirements.

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: April 3, 2020 CASE NUMBER: 2020SA116
Original Proceeding	
In Re: **Petitioners:** Office of the State Public Defender and Office of the Alternate Defense Counsel and the Colorado Criminal Defense Bar, on behalf of their currently incarcerated clients, **v.** **Proposed Respondents:** The County and District Courts for the First Through Twenty-Second Judicial Districts, the Denver County Court, and the Chief Judges Thereof; Honorable Chief Judge Jeffrey Pilkington; Honorable Chief Judge Michael Martinez; Honorable Chief Judge Leslie Gerbracht; Honorable Chief Judge William Bain; Honorable Chief Mark Thompson; Honorable Chief Judge Jeffrey Wilson; Honorable Chief Judge J. Steven Patrick; Honorable Chief Judge Stephen Howard; Honorable Chief Judge James Boyd; Honorable Chief Judge Deborah Eyler; Honorable Chief Judge Patrick Murphy; Honorable Chief Judge Michael Gonzales; Honorable Chief Judge Michael Singer; Honorable Chief Judge Michael O'Hara; Honorable Chief Judge Mike Davidson; Honorable Chief Judge Mark MacDonnell; Honorable Chief Judge Emily Anderson; Honorable Chief Judge Amico Michelle; Honorable Chief Judge James Hartmann; Honorable Chief Judge Ingrid Bakke; Honorable Chief Judge Brian Flynn; Honorable Chief Judge Douglas Walker; and Honorable Chief Judge Theresa Spahn.	Supreme Court Case No: 2020SA116
ORDER OF COURT	

Upon consideration of the petition titled In Re: Office of the State Public Defender, et al v The County and District Court, et al filed in the above cause, and now being sufficiently advised in the premises,

IT IS ORDERED that said petition titled In Re: Office of the State Public Defender, et al v The County and District Court, et al shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 3, 2020.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: THE PETITION OF THE PENNSYLVANIA PRISON SOCIETY, BRIAN MCHALE, JEREMY HUNSICKER, CHRISTOPHER AUBRY, MICHAEL FOUNDOS, AND FREDERICK LEONARD, ON BEHALF OF ALL SIMILARLY SITUATED INDIVIDUALS, Petitioners	:	No. 70 MM 2020

ORDER

PER CURIAM

AND NOW, this 3rd day of April, 2020, the "Application for Extraordinary Relief under the Court's King's Bench Jurisdiction," asking this Court to invoke King's Bench jurisdiction and direct the President Judges of the Commonwealth to order, *inter alia,* the immediate presumptive release of specified categories of incarcerated persons to prevent the spread of COVID-19 in the county correctional institutions, is **DENIED**; nevertheless, pursuant to Rule of Judicial Administration 1952(A) and the Pennsylvania Supreme Court's constitutionally conferred general supervisory and administrative authority over all courts and magisterial district judges, *see* PA. CONST. art V, § 10(a), this Court DIRECTS the President Judges of each judicial district, or their judicial designees, to engage with other county stakeholders to review immediately the current capabilities of the county correctional institutions in their district to address the spread of COVID-19.

The Court further explains and DIRECTS as follows:

The potential outbreak of COVID-19 in the county correctional institutions of this Commonwealth poses an undeniable threat to the health of the inmates, the correctional

staff and their families, and the surrounding communities. Accordingly, action must be taken to mitigate the potential of a public health crisis. We acknowledge that in some of the Commonwealth's judicial districts, judges, district attorneys, the defense bar, corrections officials, and other stakeholders are currently engaged in a concerted, proactive effort to reduce the transmission of the disease in county correctional institutions and surrounding communities through careful reduction of the institutions' populations and other preventative measures.[1] In light of Petitioners' allegations that not all judicial districts containing county correctional institutions have so responded, there remains the potential of unnecessary overcrowding in these facilities which must be addressed for the health and welfare of correctional staffs, inmates, medical professionals, as well as the general public.

We emphasize, however, that the immediate release of specified categories of incarcerated persons in every county correctional institution, as sought by Petitioners, fails to take into account the potential danger of inmates to victims and the general population, as well as the diversity of situations present within individual institutions and communities, which vary dramatically in size and population density. Nevertheless, we recognize that the public health authorities, including the Centers for Disease Control and Prevention and the Pennsylvania Department of Health, continue to issue guidance on best practices for correctional institutions specifically and congregate settings generally to employ preventative measures, including social distancing, to control the spread of the disease.

We DIRECT the President Judges of each judicial district to coordinate with relevant county stakeholders to ensure that the county correctional institutions in their

[1] We further acknowledge the efforts of the Pennsylvania Department of Corrections and others to address similar issues in the State Correctional Institutions.

districts address the threat of COVID-19, applying the recommendations of public health officials, including the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (Mar. 23, 2020).[2] If utilization of public health best practices is not feasible due to the population of the county correctional institutions, President Judges should consult with relevant county stakeholders to identify individuals and/or classes of incarcerated persons for potential release or transfer to reduce the current and future populations of the institutions during this health crisis with careful regard for the safety of victims and their communities in general, with awareness of the statutory rights of victims, and with due consideration given to public health concerns related to inmates who may have contracted COVID-19. Moreover, consistent with these above considerations, President Judges are to undertake efforts to limit the introduction of new inmates into the county prison system.

Additionally, the Application for Leave to Intervene, or in the Alternative, Application for Leave to File *Amicus Curiae* Answer in Opposition to Petitioners' Extraordinary Jurisdiction Application filed by Marsy's Law for Pennsylvania, LLC and Kelly Williams is **DENIED** as to the request to intervene and **GRANTED** as to the application to file an *amicus curiae* answer in opposition.

Chief Justice Saylor files a Concurring Statement in which Justices Todd, Dougherty and Mundy join.

---

[2] The CDC's Guidelines are available at https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html.

In the Indiana Supreme Court

In the Matter of Petition Requesting the Indiana Supreme Court to Engage in Emergency Rulemaking to Address the Issue of Imprisoned Persons and the COVID-19 Crisis

Supreme Court Case No. 20S-MS-234

Published Order

On March 30, 2020, the American Civil Liberties Union of Indiana ("ACLU") filed a petition alleging the 2019 novel coronavirus ("COVID-19") threatens persons detained, jailed, and incarcerated in Indiana, and inviting this Court to engage in emergency rulemaking to facilitate release of such persons. Responses to the petition have been filed. The ACLU has tendered a reply, which this Court directs the Clerk to show filed as of its April 7, 2020 date of tender. The Court has reviewed the filed materials. Each Justice has had the opportunity to voice that Justice's views on this matter in conference with the other Justices, and each has voted on the petition.

This Court has original jurisdiction in, among other things, supervision of the exercise of jurisdiction by the other courts of the State and issuance of writs necessary or appropriate in aid of its jurisdiction. Ind. Const., art. 7, § 4. In accordance with that jurisdiction, this Court "has authority to adopt, amend, and rescind rules of court that govern and control practice and procedure in all the courts of Indiana." Ind. Code § 34-8-1-3. The petition seeks to invoke that original jurisdiction and rule-making authority.

The petition, however, asks this Court to request that the Indiana Department of Correction ("D.O.C.") and county sheriffs take certain actions. A plea for such requests to non-court entities does not invoke this Court's original jurisdiction and rule-making authority. Other parts of the petition ask this Court to order that trial courts take actions. Yet the ACLU accurately acknowledges that Indiana trial courts *already* have tools at their disposal to determine if pretrial detainees and convicted persons should be released from incarceration, Pet., ¶32, and it notes the need to act "consistent with existing law[.]" Reply, p.6. Statutes authorize, for example, suspension of all or part of a sentence or placement on probation for the suspended portion of a sentence as part of a post-conviction forensic diversion program under I.C. § 11-12-3.7-12; review of sentencing when a juvenile offender turns eighteen years of age, I.C. § 31-30-4-5; reduction or suspension of a sentence under I.C. § 35-38-1-17; home detention

under I.C. § 35-38-1-21; and modification of a sentence of a person assigned to a community transition program, in accordance with I.C. § 35-38-1-25.

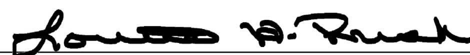
This Court has taken steps to address generally concerns expressed in the petition. The Chief Justice met with the Governor and the Leadership of the General Assembly. This resulted in issuance of a joint letter on April 3, 2020. The letter refers to proactive measures taken by the State's correctional facilities, which are also listed in the D.O.C.'s response to the petition. From the very beginning of the COVID-19 epidemic, many judges, sheriffs, prosecutors, local health officials, county representatives, public defenders, and other local justice partners took the initiative and worked together with each other to release low-risk, nonviolent juveniles and inmates to supervision within their communities. The letter encourages counties and communities, including courts, to review the population of local detention facilities and jails to identify which low-risk, nonviolent juveniles and inmates, if any, may be released safely into their communities under pretrial, probation, or community corrections supervision.

Further, the Court has issued emergency orders under Indiana Administrative Rule 17, one of which authorizes courts to review county-jail and direct placement community correction sentences of non-violent inmates and juveniles and, after consultation with a team comprising local prosecutors, a public defender, community corrections, the county sheriff, and local health authorities, to modify sentences to probation and take other action. *In re the Matter of Administrative Rule 17 Emergency Relief in the Indiana Trial Courts Related to the 2019 Novel Coronavirus (COVID-19)*, No. 20S-CB-123, p.2 (Ind. April 3, 2020). That order also helps regulate the number of those in jail by (1) limiting the circumstances in which courts may issue writs of attachment, civil bench warrants, or body attachments under Trial Rule 64 until the expiration of the public health emergency, and (2) stays service of those writs of attachment, civil bench warrants, or body attachments issued but not yet served prior to April 3, 2020, until expiration of the public health emergency. *Id.*

Finally, the ACLU states its understanding that many counties have already taken steps to reduce their jail populations, Pet., ¶27, and it recognizes the extraordinary steps being taken to protect Hoosiers, some of which have been highlighted by the responses. Reply, p.3. We applaud the efforts of all, including the D.O.C. and county criminal justice and health partners, who have collaboratively taken measures in response to the COVID-19 emergency and are examining or reexamining the status of those jailed or incarcerated in Indiana.

For all the reasons set out above, the Court DENIES the petition for emergency rulemaking.

Done at Indianapolis, Indiana, on 4/8/2020.



Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

FILED
04/14/2020
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: OP 20-0189

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 20-0189

DISABILITY RIGHTS MONTANA,

Petitioner,

v.

MONTANA JUDICIAL DISTRICTS 1-22, MONTANA COURTS OF LIMITED JURISDICTION, MONTANA DEPARTMENT OF CORRECTIONS, and THE MONTANA BOARD OF PARDONS AND PAROLE,

Respondents.

FILED
APR 14 2020
Bowen Greenwood
Clerk of Supreme Court
State of Montana

ORDER

Petitioner Disability Rights Montana (DRM) has petitioned this Court to exercise its powers of original jurisdiction and supervisory control under Article VII, Section 2, of the Montana Constitution and pursuant to M. R. App. P. 14, and the Court's power to issue writs of mandamus under Title 27, chapter 26, MCA. DRM asks this Court to invoke these powers to immediately reduce the population of Montana jails, prisons, and houses of correction because Montana is under a state of emergency due to the COVID-19 pandemic.

The Petition is denied. DRM has failed to establish that corrections and jail officials have violated a clear legal duty to reduce prisoner populations as requested. DRM also fails to establish that the courts of Montana are proceeding under a mistake of law or causing a gross injustice. Further, DRM has either completely ignored or misrepresented the facts that clearly demonstrate the Executive and Judicial Branches have implemented appropriate and detailed measures for correctional facilities and jails to address the current state of emergency surrounding the critical health and safety issues that must be addressed in light of the emergence of the COVID-19 virus in this State.

DRM alleges it has associational standing to bring this petition on behalf of all disabled prisoners because it is authorized by law to pursue legal remedies to ensure that

disabled individuals in state institutions are protected from abuse and neglect. It argues that subjecting non-dangerous, disabled prisoners to a potential outbreak of COVID-19 violates their right to be free from cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution and Article II, Section 22, of the Montana Constitution, and their right to due process under the Fourteenth Amendment to the U.S. Constitution and Article II, Section 17, of the Montana Constitution. DRM sets forth a request for relief that includes specific actions it wants Respondents to take to limit the number of individuals currently in custody—both pretrial detainees and sentenced prisoners—and the number of individuals being taken into custody. It suggests this Court appoint a special master to achieve these actions.

We gave the named Respondents the opportunity to respond to DRM's petition. We received responses from several.[1] We also granted leave to file an amicus curiae brief to Public Health and Human Rights Experts.[2] Upon DRM's motion, we granted it leave to file a reply brief. The Court has considered all filings it received in this matter.

As a threshold issue, we must first determine if this Court may take original jurisdiction. Article VII, Section 2, of the Montana Constitution grants this Court original jurisdiction to issue, hear, and determine writs of habeas corpus and such other writs as

[1] Montana Department of Corrections and Montana Board of Pardons and Parole (DOC); District Court Judge Hon. Elizabeth A. Best, Eighth Judicial District; Hon. Kelly E. Mantooth, Fergus County Justice of the Peace and Lewistown City Court Judge; District Court Judges Hon. Amy Eddy, Hon. Robert Allison, Hon. Heidi Ulbricht, Hon. Dan Wilson, and Justices of the Peace Hon. Eric Hummel and Hon. Paul Sullivan, Eleventh Judicial District; District Court Judges Hon. Leslie Halligan, Hon. Robert L. Deschamps, III, Hon. John W. Larson, Hon. Jason Marks, and Hon. Shane A. Vannatta, Fourth Judicial District; District Court Judges Hon. Howard F. Recht and Hon. Jennifer B. Lint, Twenty-First Judicial District; Bridger City Court Judge Hon. Bert Kraft, Twenty-Second Judicial District; District Court Judges Hon. Jessica Fehr, Hon. Donald L. Harris, Hon. Michael Moses, Hon. Gregory R. Todd, Hon. Rod Souza, Hon. Mary Jane Knisely, Hon. Colette B. Davies, Hon. Ashley Harada, Standing Masters Molly Rose Fehringer and Laurie Grygiel, and Justices of the Peace Hon. David Carter and Hon. Jeanne Walker, and Billings Municipal Court Judge Hon. Sheila Kolar, Thirteenth Judicial District; District Court Judge Hon. Matthew J. Wald, Twenty-Second Judicial District; District Court Judge Hon. David Cybulski, Fifteenth Judicial District; and Hon. Jessie Connolly, President, Montana Magistrates Association.

[2] Joseph Bick, M.D., Robert L. Cohen, M.D., Kathryn Hampton, MSt, Ranit Mishori, M.D., and Brie Williams, M.D.

may be provided by law, and it grants this Court general supervisory control over all other courts. The procedure for applying for such writs is governed by M. R. App. P. 14.

DRM first argues this Court should exercise supervisory control over the State's Judicial Districts to require a uniform response to the COVID-19 pandemic in all detention and correctional facilities. Under M. R. App. P. 14(3)(a), we will exercise supervisory control over another court in limited circumstances: when urgency or emergency factors exist, making the normal appeal process inadequate; when the case involves purely legal questions; and when "the other court is proceeding under a mistake of law and is causing a gross injustice[.]" As we recently stated, "Our procedure for writ of supervisory control is unique to Montana, and we are loathe to suspend or refashion its criteria." *Barrus v. Mont. First Judicial Dist. Court*, 2020 MT 14, ¶ 20, 398 Mont. 353, 456 P.3d 577. In *Barrus*, we refused to expand the writ to situations in which facts are in dispute. *Barrus*, ¶¶ 17-20. Judge Wald, among other Respondents, argues DRM's petition for writ of supervisory control must fail because there are numerous disputed facts and DRM has not developed a factual record to support its allegations of inaction. We agree this matter is not appropriate for supervisory control because it does not involve purely legal questions.

DRM further argues the Court should accept jurisdiction and issue a writ of mandamus to effectuate the remedies DRM seeks. A writ of mandamus is available if the party who applies for it is entitled to the performance of a clear legal duty by the party against whom the writ is sought. If a clear legal duty exists, a court must grant the writ if there is no speedy and adequate remedy available in the ordinary course of law. The clear legal duty must involve a ministerial, not a discretionary, act. *Smith v. Cty. of Missoula*, 1999 MT 330, ¶ 28, 297 Mont. 368, 992 P.2d 834 (citing § 27-26-102, MCA). A clear legal duty exists only when the law defines the duty with such precision and certainty as to leave nothing to the exercise of discretion and judgment. *City of Deer Lodge v. Chilcott*, 2012 MT 165, ¶ 16, 365 Mont. 497, 285 P.3d 418 (citation and quotation omitted). DRM alleges that Respondents have a clear legal duty to reduce the population of incarcerated individuals to protect disabled prisoners. However, this is not a specific duty contained in statute and it clearly requires the exercise of discretion and judgment. While DRM may

have a "policy disagreement" with Respondents, as DOC describes it, DRM has not proven the existence of a clear legal duty to reduce the prison population. Without the existence of a clear legal duty, no writ of mandamus may issue.

DRM further offers that this Court has broad authority to take jurisdiction of original proceedings seeking extraordinary writs. DRM offers nothing further than this general statement. However, even if this Court were to assume original jurisdiction under Article VII, Section 2, of the Montana Constitution and pursuant to M. R. App. P. 14, DRM's substantive arguments would not persuade the Court to insert itself further into this matter.

DRM argues that the constitutional rights of non-dangerous, disabled prisoners are being violated by subjecting them to an "inevitable" outbreak of COVID-19 while incarcerated. Several Respondents, including the Fourth Judicial District, contend DRM has not established that an outbreak is "inevitable." However, it is undisputed that an outbreak is at least as likely, if not more likely, to occur within the confines of a detention center or correctional facility. Prison officials may not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Helling v. McKinney*, 509 U.S. 25, 33, 113 S. Ct. 2475, 2480 (1993).

The government custodian responsible for the custody and care of incarcerated persons has a constitutional duty to provide for the "general well being" and "basic human needs" of incarcerated persons, including but not necessarily limited to food, clothing, shelter, medical care, mental health care, and reasonable safety. *See Wilson v. State*, 2010 MT 278, ¶ 28, 358 Mont. 438, 249 P.3d 28. In order to show an alleged violation of the Eighth Amendment based on an alleged deprivation of adequate health care, an inmate must make an evidentiary showing (1) that the level of health care at issue is constitutionally inadequate from an objective standpoint based either on a pattern of negligent conduct or systematic deficiencies or a serious deprivation resulting in the denial of even a minimal civilized measure of a necessity of life and (2) that the correctional institution acted with deliberate indifference to the inmate's health and safety through a conscious disregard of a substantial risk of serious harm to the inmate's health or safety. *Wilson*, ¶¶ 27-30; *Walker v. State*, 2003 MT 134, ¶ 56, 316 Mont. 103, 68 P.3d 872;

Farmer v. Brennan, 511 U.S. 825, 840-41, 114 S. Ct. 1970, 1980-81 (1994). "Deliberate indifference" requires that prison officials consciously disregarded a substantial risk of serious harm to an inmate's health or safety. *Walker*, ¶ 55.

Article II, Section 4, of Montana Constitution further guarantees Montanans a fundamental right to human dignity. When the allegations at issue implicate both the Eighth Amendment protection against cruel and unusual punishment and the Montana right to human dignity, we read both together to provide Montanans "greater protection[] from cruel and unusual punishment" than the Eighth Amendment. *Wilson*, ¶ 31 (citing *Walker*, ¶¶ 73, 75). Accordingly, in order to show an alleged violation of the Montana right to human dignity based on an alleged deprivation of adequate health care to inmates in a correctional institutional or detention center, an inmate must make an evidentiary showing (1) that prison officials or conditions subjected the inmate to a substantial risk of serious harm to the inmate's health or safety and (2) that prison officials "acted with deliberate indifference to the inmate's health and safety" through a conscious disregard of that risk. *Wilson*, ¶¶ 30-32; *Walker*, ¶ 73-76.

Both of these tests require the satisfaction of both prongs. Regardless of whether DRM could meet the first prong of either test, we conclude it has not met the second as it has failed to demonstrate that prison officials have acted with deliberate indifference to the health and safety of disabled inmates. DRM contends that "[f]ailure to take action is 'conscious' disregard," but it has not demonstrated that Respondents have failed to take action.

Judge Wald points out in his response that DRM has the burden of persuasion. *See Miller v. 11th Judicial Dist. Court*, 2007 MT 58, ¶ 14, 336 Mont. 207, 154 P.3d 1186 (burden is upon petitioner to convince court to issue writ). He argues that DRM has improperly attempted to shift this burden to Respondents, requiring them "to present facts justifying our actions in response to the crisis, in order to prove Petitioner's relief need not be granted." However, Respondents have provided this Court with ample evidence that they have not failed to take action. For example, the Fourth Judicial District informs us that, among other measures taken to reduce the inmate population, the Missoula County

Detention Facility is not accepting individuals who have been charged, but not convicted, of non-violent misdemeanor offenses under state law or city ordinances, or individuals who have been arrested based on a warrant for failure to appear for court dates related to the same. The Twenty-First Judicial District notes that Judge Recht, the Managing Attorney for the local Office of the Public Defender, the Ravalli County Attorney, and the Ravalli County Sheriff met to formulate a plan to review the status of inmates and assess which could potentially be released without bond under appropriate terms of supervision. As a result, 12 inmates held in felony cases were released on supervision, and five inmates with misdemeanor matters were also released. The Thirteenth Judicial District advises us that the population at the Yellowstone County Detention Facility has been reduced by 25% in three weeks, from 503 inmates on March 16, 2020, to 374 inmates on April 6, 2020, and the Justice Court has released all inmates under its jurisdiction except for three who were identified as violent or posed a danger of harm to an identified victim.

Moreover, this Court has provided the Judicial Branch with guidance on an ongoing basis. On March 17, 2020, the Chief Justice "strongly suggest[ed]" that all District Courts and the Courts of Limited Jurisdiction work with local authorities to evaluate every pretrial defendant and every youth in detention. Montana Supreme Court (Mar. 17, 2020), https://perma.cc/P9J3-T758. On March 20, 2020, the Chief Justice asked the Courts of Limited Jurisdiction to "review your jail rosters and release, without bond, as many prisoners as you are able, especially those being held for non-violent offenses." Letter from Chief Justice Mike McGrath to Montana Courts of Limited Jurisdiction Judges (Mar. 20, 2020), https://perma.cc/H4NN-Q6YJ. On March 27, 2020, the Chief Justice issued an Order for this Court that ordered, in part, that courts shall hear motions for pretrial release on an expedited basis, and:

> The Court finds that for those identified as part of a vulnerable or at-risk population by the Centers for Disease Control, COVID-19 is presumed to be a material change in circumstances, and the parties do not need to supply additional briefing on COVID-19 to the court. For all other cases, the COVID-19 crisis may constitute a material change in circumstances and new information allowing amendment of a previous bail order or providing different conditions of release, but a finding of changed circumstances in any

> given case is left to the sound discretion of the trial court. Under such circumstances in juvenile matters, the court may make revisions to detention provisions without a new detention hearing.

In the Matter of the Statewide Response by Montana State Courts to the COVID-19 Public Health Emergency, Order (Mar. 27, 2020), https://perma.cc/BK24-4869.

As to DOC's role, on April 1, 2020, the Governor issued a Directive related to the implementation of Montana's current State of Emergency due to the COVID-19 pandemic.[3] In that Directive, Governor Bullock set forth protocols to protect the state inmate population and facilities staff, which included screening all persons arriving at a correctional facility, restricting in-person visitations and off-site appointments and, directly on point with the relief DRM seeks here:

> Providing support to the Board of Pardons and Parole to consider early release for all of the following, but only so long as they do not pose a public safety risk and can have their medical and supervision needs adequately met in the community:
>
> - Inmates aged 65 or older;
> - Inmates with medical conditions that place them at high risk during this pandemic or who are otherwise medically frail;
> - Pregnant inmates; or
> - Inmates nearing their release date.

In the Directive, Governor Bullock referred to interim guidance for correctional facilities from the Centers for Disease Control and Prevention (CDC).[4] He listed some of the CDC recommendations, such as modifying programming to accommodate social distancing and limit crowding, while further noting that the CDC recognized that its guidance "may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions."

---

[3] *Directive implementing Executive Orders 2-2020 and 3-2020 related to state correctional and state-contracted correctional facilities* (Apr. 1, 2020), https://perma.cc/R5SV-T8YZ.

[4] Centers for Disease Control, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (Mar. 27, 2020), https://perma.cc/XJP8-ZJ62.

In its petition, DRM provides nothing more than speculation that some judicial districts might not be taking action and a false assertion that Cascade County "has refused to release any individuals because of the COVID-19 pandemic." DRM relies on a news report with a superficially misleading headline in making this assertion. In an article entitled, "Sheriff: no release of inmates from Cascade County jail due to COVID-19," Matt Holzapfel, a reporter/anchor for KRTV, reported on the March 20, 2020 letter from the Chief Justice to the Montana Courts of Limited Jurisdiction Judges.[5] Holzapfel interviewed Cascade County Sheriff Jesse Slaughter, who expressed concern about releasing inmates that were already risk-assessed and determined not to be safe in the community. Sheriff Slaughter informed Holzapfel that as County Sheriff he was one, but not the only, official who could request the release of an inmate. Holzapfel acknowledged in his report that other officials, such as judges, could request the release of inmates. Misleading headline aside, the substance of the news account makes it clear that while the Cascade County Sheriff had chosen not to request that any inmates be released, this Court had directed Cascade County's judges to "release, without bond, as many prisoners as you are able . . . ."

Judge Best's response to DRM's petition also asserts that judges, not sheriffs, bear the responsibility of releasing inmates. She advises that she has been proactively releasing inmates at the time of initial appearance, reducing bail as much as possible for inmates being held, and attempting to find creative pretrial supervision solutions to alleviate the problem. She notes that while Cascade County Detention Center remains overcrowded, "the jail population is at its lowest in years." In reply, DRM comments that Judge Best is but one Judge in the Eighth Judicial District and makes no attempt to correct the false assertion in its petition concerning the release of Cascade County inmates.

DRM further argues that Respondents' failure to act under the current circumstances would violate the due process clauses of the Fourteenth Amendment of the U.S. Constitution and Article II, Section 17, of the Montana Constitution. While DRM

[5] Matt Holzapfel, *Sheriff: no release of inmates from Cascade County jail due to COVID-19* (KRTV Mar. 24, 2020), https://perma.cc/P9KL-GCHG.

complains that the responses taken to the danger of a COVID-19 outbreak have not been "uniform" and alleges that some responses have not been adequate, it provides no evidence of deliberate indifference and no specific evidence of failure to act. Therefore, its substantive arguments also must fail.

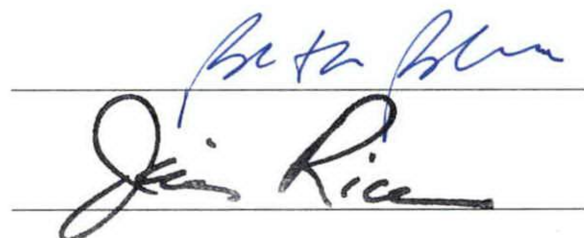
Finally, we note that individuals who are detained or incarcerated have other remedies available to them, such as a motion for bond reduction under § 46-9-311, MCA. This Court has already ordered the lower courts to hear such motions on an expedited basis. As to the remedies sought by DRM, we believe the Governor's Directive, and its reliance on the CDC interim guidance, best addresses the current crisis. In particular, the CDC's guidance sets forth best practices while recognizing the need for flexibility to accommodate variability in detention centers and correctional facilities.

IT IS THEREFORE ORDERED that DRM's Emergency Petition for Extraordinary Writ, Mandamus Relief, and Writ of Supervisory Control is DENIED.

The Clerk is directed to provide a copy of this Order to counsel for Petitioner Disability Rights Montana, the Attorney General, counsel for the Department of Corrections, the Montana Board of Pardons and Parole, and to the Office of Court Administrator for electronic service on the judges and justices of the Respondent courts.

DATED this 14th day of April, 2020.

Chief Justice



Justices

No *Shepard's* Signal™
As of: April 16, 2020 10:11 PM Z

State ex rel. Lichtenwalter v. Dewine

Supreme Court of Ohio

April 16, 2020, Decided

2020-0401.

Reporter
2020-Ohio-1465 *; 2020 Ohio LEXIS 951 **

State ex rel. Lichtenwalter v. DeWine.

Notice: DECISION WITHOUT PUBLISHED OPINION

Core Terms

mandamus, habeas corpus, prison population, amicus, tens of thousands, executive branch, steps to prevent, prison employee, catastrophe, decisions, curiae, powers, spread

Judges: **[**1]** Donnelly, J., concurs, with an opinion.

Opinion

MISCELLANEOUS DISMISSALS

In Mandamus. On motion for leave to file amicus brief on behalf of relator filed by amicus curiae, American Civil Liberties Union of Ohio Foundation, Inc. Motion granted. Respondents' motion to dismiss granted. Cause dismissed for failure to state a claim in habeas corpus or mandamus.

Donnelly, J., concurs, with an opinion.

Concur by: DONNELLY

Concur

DONNELLY, J., concurring.

[*P1] I agree with the court's decisions to grant the motion filed by the ACLU of Ohio Foundation, Inc., for leave to file an amicus curiae brief; to dismiss petitioner Derek Lichtenwalter's petition for a writ of mandamus or, in the alternative, a writ of habeas corpus; and to dismiss as moot the motion to strike filed by respondents Governor Mike DeWine, Ohio Department of Rehabilitation and Correction Director Annette Chambers-Smith, and Belmont Correctional Institution Warden David Gray.

[*P2] Because Lichtenwalter does not seek immediate release from state custody but instead seeks a temporary reprieve from the environment of prison, habeas corpus is not the appropriate remedy. *See* *Waites v. Gansheimer, 110 Ohio St.3d 250, 2006-Ohio-4358, 852 N.E.2d 1204, ¶ 6* (a civil-rights action under *42 U.S.C. 1983*, rather than habeas corpus, is the appropriate avenue for prisoners **[**2]** to challenge the conditions of their confinement). And although the executive branch does have power to grant clemency and to liberally execute remedial statutes, such as *R.C. 2967.18* (reduction of prison populations in the face of overcrowding emergencies) and 2967.05 (conditional release of prisoners who are severely ill or at risk of imminent death), this court does not have the authority to control the executive branch's discretion to exercise these powers through mandamus. *See* *State ex rel. Sheppard v. Koblentz, 174 Ohio St. 120, 122-123, 187 N.E.2d 40 (1962)* (mandamus will not issue to control discretionary decisions).

[*P3] I hope that petitioner and others in Ohio do not see today's decision as the judiciary's throwing up its hands and claiming that there is nothing that it can do. The whole of Ohio's government needs to take serious,

unprecedented steps to prevent the catastrophe of unmitigated spread of COVID-19 to the tens of thousands of prisoners in Ohio as well as to the tens of thousands of people who are prison employees along with those living in the households of prison employees. Ohio's executive branch, including the governor, the Department of Rehabilitation and Correction, the Adult Parole Authority, and the Correctional Institution Inspection Committee collectively **[**3]** have broad authority to take an assortment of steps to prevent such a catastrophe. Ohio's trial courts have the power to liberally and expeditiously grant appropriate requests for judicial release. And with the stroke of a pen, the General Assembly could remove various arbitrary statutory restrictions[1] on judicial release that currently fetter the judiciary's discretion.

[*P4] Many of the foregoing powers have already been exercised to some extent, but the danger of the virus spreading has not yet been fully solved. It would take broad action to release an adequate number of prisoners to make a difference in the overall prison population and protect those who are medically fragile. It would also require painstaking, individualized action to ensure that proper consideration is given to each inmate's detention history, health status, and risk of recidivism, as well as to victims' rights and general concerns for public safety and welfare, before releases or furloughs can occur. If each branch of our state government does its part, we have an opportunity, collectively, to be proactive and to protect Ohio's vulnerable prison population from COVID-19.

End of Document

---

[1] For example, the General Assembly could allow prisoners like petitioner who are serving nonmandatory prison terms of two to five years to file a motion for judicial release prior to the expiration of the 180-day period set forth in *R.C. 2929.20(C)(2)*.