



1 under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). In  
2 response, the State has not disputed that it withheld from Mr. [REDACTED] evidence that the  
3 main cooperating witness, [REDACTED] was under investigation for child molestation  
4 and that the prosecutor who participated in the decision not to charge [REDACTED] n was  
5 [REDACTED]'s own lawyer at the time [REDACTED] wanted to cut a deal and testify against [REDACTED]

6 Oral argument took place on [REDACTED] Since oral argument, the COVID-  
7 19 pandemic has caused a state of emergency in Washington State and around the  
8 world. There is a current crisis in Washington's prisons as there is no way that anyone  
9 in the prisons can comply with Governor Jay Inslee's proclamations regarding social  
10 distancing. As a result, on behalf of people in DOC, Columbia Legal Services has  
11 filed an original writ of mandamus in the Washington Supreme Court in an effort to  
12 have the Court order Gov. Inslee to release people from DOC who are high risk of  
13 getting sick due to their age, preexisting health issues and proximity to their release  
14 dates. App. A. This writ sets out in great detail the dangers of COVID-19 in the  
15 Department of Corrections. Unfortunately, even though the Supreme Court has  
16 decided to retain jurisdiction in the case, the briefing will not be complete until April  
17 16, 2020 – more than two weeks from now – and there is no indication when a decision  
18 will come out. App. B.

19 Mr. [REDACTED] is 64 years old and suffers from multiple health issues, making him  
20 particularly at risk for mortality due to COVID-19. A declaration from Mr. [REDACTED] that  
21 was prepared for Columbia Legal Services' lawsuit is attached in App. C. The  
22 undersigned counsel read through this declaration with Mr. [REDACTED] and was given  
23 specific authorization by Mr. [REDACTED] to sign it on his behalf.

24 **4. ARGUMENT**

25 RAP 16.15(b) provides:

26 (b) Release by Appellate Court of Person in Custody. The  
27 appellate court may release a petitioner on bail or personal recognizance  
28 before deciding the petition, if release prevents further unlawful  
confinement and it is unjust to delay the petitioner's release until the  
petition is determined. The appellate court or the superior court in its  
decision on the merits, or by separate order after a decision on the merits,  
may release a petitioner on bail or on personal recognizance. The

1           appellate court may direct the release of petitioner with the conditions of  
2           release to be determined by a trial court.

3           The drafters of this rule intended to restrict its use to a situation after the merits of a  
4           petition are considered, but before an opinion could be prepared and circulated. Orland  
5           and Tegland, 3 *Washington Practice*, at 524 (5th Ed. 1998).

6           The rule codifies a traditional function of a habeas court. As explained years  
7           ago by the United States Supreme Court:

8                     By the common law, upon the return of a writ of habeas corpus  
9                     and the production of the body of the party suing it out, the authority  
10                    under which the original commitment took place is superseded. After  
11                    that time, and until the case is finally disposed of, the safe-keeping of the  
12                    prisoner is entirely under the control and direction of the court to which  
13                    the return is made. The prisoner is detained, not under the original  
14                    commitment, but under the authority of the writ of habeas corpus.  
15                    Pending the hearing he may be bailed *de die in diem*, or be remanded to  
16                    the jail whence he came, or be committed to any other suitable place of  
17                    confinement under the control of the court. He may be brought before  
18                    the court from time to time by its order until it is determined whether he  
19                    shall be discharged or absolutely remanded.

20           *Barth v. Clise*, 79 U.S. 400, 402, 20 L. Ed. 393, 12 Wall. 400 (1870). *See also In re*  
21           *Shuttlesworth*, 369 U.S. 35, 82 S. Ct. 551, 7 L. Ed. 2d 548 (1962) (court district court  
22           has power to set bail pending final disposition in matter).

23           This is not to say that bail in a post-conviction setting is often granted – the  
24           remedy is seen as an extraordinary one and courts are “parsimonious” with their  
25           powers. *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985). Nonetheless, bail  
26           is appropriate during the pendency of a post-conviction writ “when the petitioner has  
27           raised substantial constitutional claims upon which he has a high probability of  
28           success, and also when extraordinary or exceptional circumstances exist which make  
29           the grant of bail necessary to make the habeas remedy effective” *Calley v. Calloway*,  
30           496 F.2d 701, 702 (5th Cir. 1974). Similarly, and more pertinent here, extraordinary  
31           circumstances include: “a serious deterioration of health while incarcerated.” *Salerno v.*  
32           *United States*, 878 F.2d 317, 317 (9th Cir. 1987).

33           In this case, Mr. [REDACTED]’s age and health make him peculiarly more at risk to  
34           contracting COVID-19 in the very close confines of DOC. While there is an original  
35           writ of mandamus pending in the Supreme Court, it is not clear that the matter will be

1 decided before Mr. [REDACTED] is exposed to COVID-19. Given the Court's authority to  
2 release him under RAP 16.15(b), his case qualifies given these extraordinary times.  
3 Mr. [REDACTED] has a place to live, and can be released on personal recognizance or upon  
4 whatever conditions the superior court sets if ordered to do so by this Court.

5 **5. CONCLUSION**

6 For the foregoing reasons, this Court should release Mr. [REDACTED] on personal  
7 recognizance under RAP 16.15(b).

8 Dated this 30th day of March 2020.

9 Respectfully submitted,

10 s/ Neil M. Fox  
11 WSBA No. 15277  
12 Attorney for Petitioner  
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