Court of Appeals No. 76097-1-I

NO._____

SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES D. MOCK, DANELLE BAME, on behalf of minor child J.B. (DOB 06/09/01) and LINDA and TOM RYAN, a married couple,

Appellants

v.

THE STATE OF WASHINGTON, by and through its DEPARTMENT OF CORRECTIONS, STATE OF WASHINGTON (DOC),

Respondent

Appeal from King County Superior Court
Honorable Jeffrey Ramsdell, Judge
Cause No. 15-2-05471-6 SEA

Appellants' PETITION FOR REVIEW

Philip G. Arnold, WSBA No. 2675
Jeffery M. Campiche, WSBA No. 7592
2025 First Avenue, Suite 830
Seattle, WA 98121
206-281-9000
CAMPICHE ARNOLD PLLC
and
Zachary W. Jarvis, WSBA No. 36941
2025 First Avenue, Suite 830
Seattle, WA 98121
206-735-7474
HART JARVIS MURRAY CHANG PLLC
Attorneys for Petitioners

I. TABLE OF CONTENTS

[1] RCW 9.94A.6332, Appendix at A-20 to A-21, and RCW 9.94A.737, Appendix at A-15 to A-19. These statutes are collective referred to here after as the SRA.

[2] Restatement (Second) of Torts § 319 (AM. LAW INST. 1965) [hereinafter Restatement § 319].

II. TABLE OF AUTHORITIES

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A. IDENTITY OF PETITIONER

The Petitioners—James D. Mock, Danelle Bame, on behalf of the minor child J.B. (date of birth 06/09/01), and Linda and Tom Ryan—ask this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. INTRODUCTION

The Petitioners brought a negligent supervision of a dangerous felon action against the DOC. Petitioners claim that the DOC's community custody supervision of a felon is a Restatement § 319[3] take charge relationship. This relationship imposes upon the DOC a Restatement §319 common law duty to use reasonable care to protect foreseeable victims from the felon's violent propensities. Reasonable care in this case requires the DOC to report to a new sentencing court the felon's dangerous community custody and behavioral violations which was not done. The DOC claims that it met the statutory requirements of the Sentencing Reform Act[4] which did not require the DOC to report to the new sentencing court. Petitioners argue that the Restatement §319 duty is a common law duty and compliance with statutes is not conclusive

[3] Restatement (Second) of Torts § 319 (AM. LAW INST. 1965) [hereinafter Restatement § 319].
[4] RCW 9.94A.6332, Appendix at A-20 to A-21, and RCW 9.94A.737, Appendix at A-15 to A-19.

evidence of due care where a reasonable man would take additional precautions. The Court of Appeals finding no statutory requirement for the DOC to report found no duty to report and upheld the dismissal of this law suit on summary judgment.

C. COURT OF APPEALS DECISION

Petitioners request review of the Court of Appeals decision *Mock v. State*, No.76097-1-I, slip op. (Wash. Ct. App. Oct. 2, 2017) attached in the Appendix at pages A-1 through A-14.

Review is sought of the Court of Appeals' rulings:

1. That no common law duty existed for the Washington State Department of Corrections (DOC) to report its knowledge of the homicidal risk of the felon it supervised on community custody to a new sentencing court; and
2. Upholding the trial court's summary judgment dismissal of Petitioners' negligent DOC supervision lawsuit based on the claim that the DOC's community corrections officer owed a duty to report his concerns about the dangerous propensities of the felon he supervised to a new sentencing court.

D. ISSUES PRESENTED FOR REVIEW

The issues presented for review with this claim and applying to both assignments of error are:

1. Whether the Sentencing Reform Act (SRA)[5] abrogates *Joyce v. Dep't of Correction*'s[6] holding that—when a Restatement § 319 take charge relationship exists—a jury could find the DOC's failure to report an offender's violations to a sentencing court a breach of its Restatement § 319 duty to use reasonable care to protect others from a dangerous felon?[7]

   No.

2. Did the 2009 SRA statutes change the Restatement § 319 duty of the DOC from a common law standard of care, as articulated by *Taggart v. State*,[8] to solely a statutory standard of care?

   No.

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[5] RCW 9.94A.6332, Appendix at A-20 to A-21, and RCW 9.94A.737, Appendix at A-15 to A-19.
[6] 155 Wn.2d 306, 315-16, ¶ 25, 119 P.3d 825, 830 (2005).
[7] RCW 72.09.320 requires gross negligence of a community corrections officer before the DOC is liable.
[8] 118 Wn.2d 195, 218-19, 822 P.2d 243, 244-475 (1992).

3. Whether the Restatement (Second) of Torts § 288 C[9] which provides—"Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take precautions"—is still the law in Washington?

   Yes.

4. Is the DOC's compliance with the SRA statutes conclusive evidence that it fulfilled its Restatement § 319 common law duty to use reasonable care to protect foreseeable victims from a felon's violent propensities?

   No.

5. Whether the DOC can be held liable for failing to report an offender's previous dangerous community custody and behavioral violations to a new sentencing court when not required to do so by statute?

   Yes.

E. STATEMENT OF THE CASE

The Petitioners sued the Washington State Department of Correc-

[9] Restatement (Second) of Torts § 288 C (AM. LAW INST. 1965) [hereinafter Restatement § 288 C].

tions (DOC) for the negligent supervision of domestic violence offender and convicted felon John McKay on DOC community custody.[10] Petitioners are referred to herein as the McKay victims.

1. Procedural History

The trial court dismissed the McKay victims' negligent DOC supervision case on summary judgment finding no DOC duty to the McKay victims.[11] The Court of Appeals affirmed the trial court's dismissal.[12] The McKay victims now request review by the Washington State Supreme Court.

2. Facts

The facts are horrific. McKay a serial domestic violence offender[13] was on DOC community custody[14] when he attempted to murder, shot and

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[10] CP 1-13 (Complaint for Damages); CP 24-40 (First Amended Complaint for Damages); CP 79-82 (Order Granting Leave for Plaintiffs to File Second Amended Complaint for Damages); CP 101-118 (Second Amended Complaint for Damages); CP 174-75 (Order Granting in part and denying in part Defendant's 12(b)(6) Motion to Dismiss Plaintiffs' Second Amended Complaint).

[11] CP 2063-66 (Order Granting Defendant's Motion for Summary Judgment and Order denying Plaintiffs' Motion for Summary Judgment.).

[12] Appendix A at A-13 and A-14.

[13] CP 284-5 ¶ B; CP 762 (12-1-02270-1KNT Judgment and Sentence for Felony Harassment-DV) and at CP 1927-30, ¶¶ 4 and 17 (Declaration of Zachary W. Jarvis); CP 1958-1965 (same as above) and CP 285, ¶ E; CP 552-57 (12-1-02762-1 KNT Malicious Mischief Bail Request and Certification for Determination of Probable Cause); *See also,* CP 1927-30, ¶¶ 7, 17; CP 1983-2014 (Superior Court documents for 12-1-02762-1 KNT, Malicious Mischief).

[14] CP 284-5, ¶ B (Declaration of Philip G. Arnold in Support of Plaintiffs' Motion for Summary Judgment and of Authenticity); CP 762-78 (12-1-02270-1KNT Judgment and Sentence for Felony Harassment-DV); and CP 1927-30, ¶¶ 4 and 17 (Declaration of Zachary W. Jarvis), CP 1958-65 (same as above).

terrorized the McKay victims.[15] McKay was originally placed on community custody supervision after committing a first domestic violence felony against his wife.[16] The DOC knew from its community custody supervision, and the court did not, that McKay:

1. Was ungovernable on community custody;
2. Violated a no-contact order with his estranged wife;
3. Trashed the family home; [17]
4. Was a serious homicidal risk;[18] and
5. The DOC wanted McKay in jail.[19]

McKay then committed a second felony against friends in an attempt to obtain the address of his estranged wife.[20] The sentencing court for the second felony did not request a pre-sentence report from the DOC

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[15] CP 196-201 (Declaration of James D. Mock); CP 202-5 (Declaration of Linda S. Ryan

[16] CP 284-5 at ¶ B (Declaration of Philip G. Arnold in Support of Plaintiffs' Motion for Summary Judgment and of Authenticity); CP 762-78 (12-1-02270-1KNT Judgment and Sentence for Felony Harassment-DV); and at CP 1927-30, ¶¶ 4 and 17 (Declaration of Zachary W. Jarvis); CP 1958-65 .

[17] CP 284-92, ¶¶ E, H, and J; CP 564 (DOC Report of Alleged Violation noting lack of adjustment to supervision to be 'non-existent'); CP 713 ('...he won't make it that far before being arrested...'); CP 724 (DOC Chrono noting trashing of family home); CP 587 at 21:1-16 (CR 30(b)(6) Coker Dep.), CP 604-5 (DOC Chrono noting new violation of no-contact order by McKay); See also CP 360-62 (CR 30(b)(6) Ashlock Dep.); CP 459 (Plaintiff's EX E to CR 30(b)(6) Ashlock Dep.).

[18] CP 284-92 ¶¶ J, L; CP 372 at 80:8-15 and CP 377 at 85:16-21 (CR 30(b)(6) Ashlock Dep.).

[19] CP 287-88 ¶ J; CP 384 at 92: 4-8 (Ashlock Dep.); CP 585-86 at 19:25-20:1-2 (CR 30(b)(6) Coker Dep.); CP 676 at 33:2-15, and CP 689 at 46:18-21 (CR 30(b)(6) Deabler Dep.).

[20] CP 285, ¶ E; CP 552-6 (12-1-02762-1 KNT Malicious Mischief Bail Request and Certification for Determination of Probable Cause); *See also*, CP 1927-30, ¶¶ 7, 17; CP 1983-2014 (Superior Court documents for 12-1-02762-1 KNT, Malicious Mischief).

and instead ordered a defense requested Drug Offender Sentencing Alternative (DOSA) evaluation from the Department.[21] The DOC knew the details of the upcoming sentencing hearing,[22] but did not report McKay's sentence and behavioral violations to the new sentencing court.[23] In fact, the DOC had a process it called a "special" by which it could notify a court for any reason to give the court information.[24]

The unaware sentencing court released this homicidal felon upon the public for approximately a month to wait for a bed for court ordered, in-patient treatment.[25] McKay was given the freedom to attempt to murder, shoot, and terrorize the McKay victims.[26]

The Petitioners presented substantial expert testimony—that had the DOC given the new sentencing judge the benefit of its information on McKay's behavioral and sentence violations—McKay would have been in jail and not on the street at the time he attempted to murder his victims.[27]

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[21] CP 287, ¶¶ I, J; CP 396-8 (Chemical Dependency Examination Report Summary-DOSA).
[22] CP 284-92, ¶ J; CP 603 (DOC Chrono authored by Coker).
[23] CP 360-62 (CR 30(b)(6) (Ashlock Dep.); CP 459 (Plaintiff's EX E to CR 30(b)(6) Ashlock Dep.).
[24] CP 590 at 24:17-23 (CR 30(b)(6) Coker Dep.).
[25] CP 1927-28, ¶ 8; CP 2041 (Order of Release).
[26] CP 196-201 (Declaration of James D. Mock); CP 202-5 (Declaration of Linda S. Ryan).
[27] CP 212-18 (Declaration of Judge Michael J. Fox, Ret'd) , ¶ 14; CP 275-83 (Declaration of Anne Bremner), ¶¶ 15 and 16; CP 219-26 (Declaration of Zachary C. Wagnild), ¶¶ 11 and 12; CP 206-211 (Declaration of Timothy J. Leary Opposing Defendant's Motion for Summary Judgment) , ¶¶ 11 and 12; and CP 1628 – 60 (Declaration of Dan Hall Opposing Defendant's Motion for Summary Judgment), ¶¶ 64-66 submitted in support of

Community custody is a Restatement § 319 take charge relationship creating a § 319 duty of reasonable care to protect the public from dangerous felons. *Joyce*, 155 Wn.2d at 315-16, ¶¶ 22-26. McKay's community custody supervision was sufficient DOC control to impose a Restatement § 319 duty upon the DOC. Thus, the DOC had a duty to report McKay's behavioral and sentence violations.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. This case involves substantial public policy and safety interests that should be determined by the Supreme Court. RAP 13.4(b)(4).

The paramount purpose of the DOC is to ensure the public safety. "The system should ensure the public safety. The system should be designed and managed to provide the maximum feasible safety for the persons and property of the general public, the staff, and the inmates."[28]

The DOC is an essential barrier between the public and the dangerous felons it supervises on community custody.[29] The Court of Appeals made a policy decision to weaken this barrier by limiting the fundamental duty of the DOC in Restatement § 319 take charge cases.

Plaintiffs' Motion for Summary Judgment (CP 227) that had the DOC reported its knowledge to the sentencing court a reasonably prudent judge likely would have jailed McKay or had McKay in an in-patient treatment center on October 27, 2012, the day McKay shot the Plaintiffs. *See also,* CP 250-6 (Declaration of William Prestia), ¶¶ 5-8 and CP 257-63 (Declaration of Robert Jourdan), ¶¶ 5-11 specifically for evidence of Judge Andrus' reasonably prudent judicial practice.

[28] RCW 72.09.010(1) (emphasis added).

[29] RCW 9.94A.6332(7), Appendix at A-20, and RCW 9.94A.737, Appendix at A-15 to A-19.

This decision, contrary to the Public Policy of Washington, limits the DOC's duty to comply solely with the SRA statutes,[30] disregarding situations where a common law reasonable man would take additional precautions. In other words, compliance with the SRA statutes by law constitutes the exercise of common law reasonable care.[31] This error underpins the Court of Appeals decision which held:

> [D]eabler [community corrections officer][32] was not expected to notify the court when McKay committed violations. No statute required him to do so.[33]
>
> Deabler fulfilled his statutory role by reporting McKay's violation to the department and recommending the maximum 30-day sanction.[34]
>
> There is no evidence that the department, in supervising McKay, failed to comply with statutes or with court directives.[35]
>
> A reporting obligation was not imposed on Deabler [community corrections officer] by the relevant statutes, by McKay's sentence conditions, or by any order of the court.[36]
>
> [T]he trial court properly dismissed plaintiffs' claim the department's community corrections officer owed a duty to report

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[30] RCW 9.94A.6332, Appendix at A-20 to A-21, and RCW 9.94A.737, Appendix at A-15 to A-19.

[31] The Court of Appeals decision found a Restatement § 319 relationship existed between McKay and the DOC but that the (statutory) terms of the relationship did not require the DOC to report McKay's violations to the Court. *Mock v. State*, No.76097-1-I, slip op. (Wash. Ct. App. Oct. 2, 2017), Appendix at 13 (emphasis in original).

[32] CP 287-88, ¶ J authenticates Deabler Dep.: CP 650 at 7:4-12 (CR 30(b)(6) Deabler Dep.).

[33] *Mock* Appendix at 12 (emphasis added) (bracketed material added).

[34] *Id.* Appendix at 12 (emphasis added).

[35] *Id.* Appendix at 12 (emphasis added).

[36] *Id.* Appendix at 13 (emphasis added).

concerns about McKay's dangerous propensities to the sentencing court.[37]

It is for the jury to decide if reasonable care required the community corrections officer to report to the sentencing court.[38] The SRA[39] expresses no intent to negate the general rule of reasonable care.[40] Our Supreme Court observed that:

> Washington State waived sovereign immunity more than 40 years ago. RCW 4.92.090. Implicitly, this waiver functions as a promise that the State and its agents will use reasonable care while performing its duties at the risk of incurring liability. *See, e.g., Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845 (2002).

Joyce, 155 Wn.2d at 309, ¶1 (emphasis added).

Washington adopted the Restatement § 288 C which provides: "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take precautions."[41] This is a fundamental principle of the common law.[42]

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[37] *Id.* Appendix at 14.

[38] *Joyce*, 155 Wn.2d at 316-17, ¶ 25, which held a jury could find the DOC's failure to report an offender's violations to the court a breach of its Restatement § 319 duty.

[39] RCW 9.94A.6332, Appendix at A-20 to A-21, and RCW 9.94A.737, Appendix at A-15 to A-19.

[40] Restatement (Second) of Torts, § 282 (AM. LAW INST. 1965), approved by *Bodin v. City of Stanwood*, 130 Wn.2d 726, 744, 927 P.2d 240, 249-50 (1997) ("The basis of any negligence action is the failure to exercise reasonable care when one has a *duty* to exercise such care.") (emphasis in the original quote).

[41] *Hurley v. Port Blakely Tree Farms L.P.*, 182 Wn. App. 753, 773-75 n.14, 332 P.3d 469, 480 (2014). A similar rule was articulated by *Curtis v. Perry*, 171 Wash. 542, 547, 18 P.2d 840, 843 (1933).

[42] The Restatement § 288C was not cited to the lower courts. New authority supporting arguments is allowed for the first time on appeal. "But RAP 2.5(a), which bars errors raised for the first time on appeal, does not prohibit parties from citing new authorities on

> While violation of a statutory duty may in certain circumstances constitute negligence per se, the inverse proposition, that compliance with a statute precludes a finding of negligence, is not the law; a statutory standard is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions.

57A AM. JUR. 2D *Negligence* § 709 (2004) (emphasis added).

McCluskey v. Handorff-Sherman, 68 Wn. App. 96, 101, 841 P.2d 1300, 1303 (1992), applied this rule to the State in a highway design case. There the State argued that it followed the States' priority array statute setting forth the precedential order of traffic improvement projects and

> [c]ould not be held liable for its failure to make certain improvements to SR 900 since the legislature controlled the

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appeal." *Zonnebloem, LLC v. Blue Bay Holdings, LLC,* 200 Wn. App. 178, 183, ¶13, 401 P.3d 468, 3471 (2017). The principle enunciated by this Restatement rule was made to the lower courts—that although the DOC met its statutory duties and no statute required the DOC to report McKay's behavioral and sentencing violations—the common law standard of care required it to so report. Appellants admit that the DOC committed no statutory violation with respect to McKay's community custody supervision. Appellant's Brief at vi-vii ("On the surface, the DOC's supervision of McKay was appropriate with more in-person contact with McKay than required [by statute]) (bracketed material added). See, Appellant's Brief at 30 ("Defendant argued below to limit DOC's duty to only statutory violations .... DOC then infers that a statute must make reporting mandatory for a duty to report to exist."); *Id.* at 3 ("Implicit in the DOC's logic is the notion that its duty of care is statutory—if a statute does not grant power to sanction—no duty exits. The premise of this argument is false. The duty of care is imposed by the common law and not by statute."); *Id.* at vi ("It is the plaintiff-victims theory of this case that the DOC, even if unasked, was under an independent common law duty to report its material knowledge of McKay's behavioral violations to the court."); *Id.* at 1 (Assignment of Error 4 to the trial court's ruling that "the statutory duty to supervise does not include reporting to sentencing courts ..."); *Id.* at 6 (repeats Assignment of Error 4 and "The DOC claims it had no common law duty to report to the court this knowledge contrary to Supreme Court precedent."), *Id.* at 28 (repeats Assignment of Error 4); *Id.* at 33 (DOC argues "that since not statute requires DOC to report to or share information ... with the court, there is no duty to report ..." is inconsistent with the common law.); *Id.* at 12 ("*Joyce* refused the DOC claim that since its authority to supervise arise from the judgment and sentence, the judgment and sentence must also limit it duty of reasonable care as a matter of law."); and *Id.* at 12-14 for an extended discussion of this argument.

> expenditure of funds for road projects through its adoption of a priority array and the Legislature did not authorize funding for the improvement of this section of road.[43]

The court ruled that:

> The trial court also properly refused to instruct the jury that "it may not find the Department of Transportation liable" if it determined that the State acted in accordance with the priority programming law. RCW 47.05 does not state that compliance with the priority program insulates the State from liability. Although compliance with a statute is generally admissible as evidence of due care to assist the trier of fact, it is not conclusive evidence. *See Estate of Celiz v. PUD 1*, 30 Wn. App. 682, 638 P.2d 588 (1981) (utility's compliance with electrical standards in Washington Administrative Code does not mean a lack of negligence; rather it means compliance with the State's minimal requirements).

McCluskey, 68 Wn. App. at 111 (emphasis added).[44] The Court of Appeals policy decision—incompatible with public policy and fundamental tort law—makes SRA statutory compliance conclusive evidence of due care.

2. The Court of Appeals decision conflicts with decisions of the Supreme Court and other Courts of Appeals. RAP 13.4(b)(1) and (2).

With this one rule of law (statutory compliance), the Court of Appeals decision conflicts with the Supreme Court,[45] other Court of

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[43] *Hurley*, 182 Wn. App, at 101.

[44] Another annunciation of this principle is found in *Graham v. Roderick*, 32 Wn.2d 427, 433, 202 P.2d 253, 257 (1949), an automobile collision case: "The care required of the operator of an automobile, aside from special duties imposed by statute or ordinance, is ordinary or reasonable care under the existing circumstances, and mere compliance with all statutory requirements does not of itself absolve a motorist from negligence."

[45] *Curtis*, 171 Wash. at 547; *Graham*, 32 Wn.2d at 433.

Appeals,[46] the Restatement (Second) of Torts,[47] and American Jurisprudence.[48] This provides a second and third consideration for reviewing the Court of Appeals decision. RAP 13.4(b)(1) and (2).

The Court of Appeals opinion nullifies[49] *Joyce*,155 Wn.2d at 316-17, ¶¶ 25-26, which held a jury could find the DOC's community correction officer's (CCO) failure to report an offender's violations to the court a breach of its Restatement § 319 duty. At the time of *Joyce*, the CCO by statute had the discretion to report violations to the court[50] which sanctioned community custody violations. The CCO failed to report violations to the court.[51] It was a jury question whether due care in the exercise of that discretion required the CCO to report the offender violations to court.

The 2009 SRA divided the sanctioning jurisdiction between the court and the DOC giving the DOC sole jurisdiction to sanction McKay for violations of community custody.[52] On the basis of this statutory change, Court of Appeals held *Joyce*, decided in 2005, was abrogated by

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[46] *Hurley*, 182 Wn. App. at 773-75 n.14; *McCluskey*, 68 Wn. App. at 101.
[47] Restatement § 288 C.
[48] 57A AM. JUR. 2D *Negligence* § 709 (2004).
[49] *Mock*, slip op. at 12.
[50] *Joyce*, 155 Wn.2d at 310-11, ¶ 5: "Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, such offenders are monitored by community corrections officers who are authorized to report violations of the conditions of release to the sentencing judge, if they deem it appropriate to do so. RCW 9.94A.631." (emphasis added).
[51] *Joyce*, 155 Wn.2d at 322, ¶41.
[52] RCW 9.94A.6332, Appendix at A-20 to A-21.

the 2009 SRA.[53] Thereby the Court of Appeals truncated the DOC's tort duty making it solely statutory:[54] "Deabler [CCO] fulfilled his statutory role by reporting McKay's violations to the department and recommending the maximum 30-day sentence."[55]

No language within the SRA suggests repeal of a common law Restatement § 319 duty[56] of reasonable care.

> "It is a well-established principle of statutory construction that '[t]he common law. . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'" *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.,* 464 U.S. 30, 35-36, 104 S. Ct. 304, 78 L. Ed. 2d 29 (1983).

Potter v. Washington State Patrol, 165 Wn.2d 67, 77, ¶11, 196 P.3d 691, 695-96 (2008) (alterations in original). A legion of supreme and appellate court cases affirms the Restatement § 319 take charge duty is a common law duty.[57]

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[53] *Mock*, slip op. at 12.
[54] *Id.* at 13-14.
[55] *Id.* slip op. at 12 (emphasis added).
[56] The Restatement reports the common law of the United States. Negligence, p. ix (AM. LAW INST. 1934).
[57] *Petersen v. State*, 100 Wn.2d 421, 426-28, 671 P.2d 230, 236-37 (1983)—where no statute required, but the common law duty—Restatement (Second) of Torts, § 315 (AM. LAW INST. 1965) special relationship, the sister to the Restatement § 319—required, the state's psychiatrist to petition the court for a 90 day commitment—which was the foundation for *Taggart*, 118 Wn.2d at 218-19, reiterated in *Bishop v. Miche,* 137 Wn.2d 518, 529, 973 P.2d 465, 471 (1999), and reaffirmed in *Joyce*, 155 Wn.2d at 315, ¶19. *See, Husted v. State*, 187 Wn. App. 579, 583, ¶ 11, 348 P.3d 776, 778 (2015).

At issue here is whether a reasonable man would go beyond the SRA and report to the new sentencing court vital information to protect the public to keep McKay in jail, particularly when the DOC's managing agents admitted they wanted the homicidal[58] McKay in jail.[59]

This decision allows the DOC to remain silent and sit on crucial information needed to protect public safety when a pre-sentence report was not requested.[60] This backward step allowed a serious homicidal risk, which the DOC wanted in jail, to walk free, and attempt to murder his victims.

This decision leaves the public unprotected in situations where a felon is on community custody under the sole jurisdiction of the DOC,[61] then commits a new felony, and an unaware sentencing court does not order a pre-sentence report. Each day trial courts routinely make sentencing and release decisions involving many of these same offenders.

3. Cases involving issues of a fundamental tort duty particularly merit Supreme Court review.

The Supreme Court is a court of policy and the ultimate arbiter of

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[58] CP 287-88 at ¶¶ J, L; CP 372 at 80:8-23. (CR 30(b)(6) Ashlock Dep.); CP 747 at 9:16-22. (CR30(b)(6) Aylward Dep.).
[59] CP 287-88 ¶ J; CP 384, 92:4-8 (Ashlock Dep.); CP 585-86, 19:25-20:1-2 (CR 30(b)(6) Coker Dep.); CP 676 at 33:2-15, and CP 689, 46:18-21 (CR 30(b)(6) Deabler Dep.).
[60] RCW 9.94A.500(1) (pre-sentence report order) and *Mock*, slip op., Appendix at pages A-13 and A-14.
[61] RCW 9.94A.6332(7).

the nature and scope of tort duties. In *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wn.2d 131, 691 P.2d 190 (1984), the Supreme Court took direct review from a trial court's denial of a defendant's summary judgment motion to dismiss a loss consortium claim by children of an injured parent, not yet recognized by the common law. *Ueland,* 103 Wn2d. at 131-32. There, the Supreme Court recognized an ongoing responsibility to keep up the common law: "Indeed, we have often discharged our duty to reassess the common law and alter it where justice requires." *Ueland*, 103 Wn2d. at 136. "[S]ince courts have had an existence in America they have never hesitated to take upon themselves the responsibility of saying what *is* the common law. . . Therefore, we have the 'common law' as declared by the highest courts. . . ." *Sayward v. Carlson,* 1 Wash. 29, 40, 23 P. 830, 833 (1890).

The duty of a public entity involves a substantial public interest mandating review. In a negligence tort action, the extent of due care required by a Municipality was considered on direct review by the Supreme Court in *Boeing Co. v. State*, 89 Wn.2d 443, 445-47, 572 P. 2d 8, 10-12 (1978). The Supreme Court granted direct review under RAP 4.2(a)(4) ("A case involving a fundamental and urgent issue of broad

public import . . . .").[62] *Boeing*, 89 Wn.2d at 445. In *Boeing*, the public interest question was whether a city's warning signs of the height of its underpass was sufficient due care to protect over-height trucks given the number of past accidents of truck loads striking the underpass. *Id.* at 445-46. Similarly, the due care required by the State's Restatement § 319 tort duty is an issue of substantial public interest growing from the State's duty to protect the public from violent felons.

G. CONCLUSION

The Court of Appeals decision transforms the State's Restatement § 319 common law duty, to protect public safety, into a statutory duty. This construct excludes the common law reasonable man from the duty calculus. It irrationally allows the DOC, who wants to jail and remove a homicidal felon's threat to the public, to remain mute to a sentencing court who has the power to jail the felon. The decision makes compliance with the SRA statutes conclusive proof of due care and ignores the common law's requirement of reasonableness—the foundation of all tort law. Public safety is weakened; the decision conflicts with Supreme Court and Appellate Court precedent; and the decision marches backwards from the common law. Supreme Court review is necessary to preserve public safety

[62] The rule's language is similar to RAP 13.4(b)(4).

from a decision renouncing the State's implicit promise to act reasonably towards its citizens when it waived sovereign immunity.

RESPECTFULLY SUBMITTED this 26th day of October, 2017.

CAMPICHE ARNOLD, PLLC

Philip G. Arnold, WSBA # 2675

HART JARVIS MURRAY CHANG, PLLC

Zachary W. Jarvis, WSBA # 36941

DECLARATION OF SERVICE

I hereby declare that on October 26, 2017, I filed the attached **Petition for Review** and Appendix via Electronic Filing to ac.courts.wa.gov and delivered via ABC Legal Messenger and E-mail the same to:

Tad Robinson O'Neill
Paul J. Triesch
Assistant Attorneys General
Attorney General of Washington-Torts Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
PaulT@atg.wa.gov;TadR@atg.wa.gov;
JenniferO@atg.wa.gov;TamarS@atg.wa.gov;
MonicaT@atg.wa.gov

I hereby declare that on October 26, 2017, I further delivered via ABC Legal Messenger Service a copy of the **Petition for Review** and Appendix to:

The Washington State Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA. 98101-1176

I hereby declare that I have paid the **$200 Petition for Review filing** fee to the Clerk of the Court of Appeals, Division I.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated at Seattle, Washington, this 26th day of October, 2017.

By _____
Susan Macías
Paralegal

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES D. MOCK, a single person, DANELLE BAME on behalf of minor child J.B. (DOB 06/09/01), a single person, and LINDA and TOM RYAN, a married couple,	)	No. 76097-1-I
	)	DIVISION ONE
Appellants,	)	
v.	)	
THE STATE OF WASHINGTON, by and through its DEPARTMENT OF CORRECTIONS, STATE OF WASHINGTON (DOC),	)	PUBLISHED OPINION
	)	FILED: October 2, 2017
Respondent.	)	

BECKER, J. — Plaintiffs were injured in an armed attack by an offender who was serving a term of community custody under supervision by the Department of Corrections. The issue is whether the department can be held liable for failing to report the offender's previous community custody violations to the court. Summary judgment was properly granted to the department. Under applicable statutes, sanctions for community custody violations are imposed by the department in an administrative process, not by the court.

This case was dismissed on summary judgment. Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). We make the same inquiry as the trial court. Hertog, 138 Wn.2d at 275. The facts and reasonable inferences are considered in the light most favorable to the nonmoving party. Hertog, 138 Wn.2d at 275. Questions of law are reviewed de novo. Hertog, 138 Wn.2d at 275.

FACTS

John McKay was in his forties when he was convicted of felony harassment for threatening to kill his wife. It was his first criminal conviction. After serving several months in jail, he was released in June 2012 to begin serving a 12-month term of community custody under the supervision of the Department of Corrections. Community corrections officer Mark Deabler was assigned to supervise McKay.

McKay was ordered to have no contact with his wife. On June 27, 2012, the first day of supervision, Deabler and other officers contacted McKay's wife to make sure McKay was not violating the no-contact order. The chronological entries in McKay's case file include a note from that day documenting "lots of red flags" disclosed by McKay's wife. She reported they were ending a 20-year marriage, McKay was a long-time alcohol user, he was on disability and not working, he had "burned all his bridges" with family, he was asking third parties about her and making threats to kill her and to commit suicide, he talked about "'shooting cops,'" he was trained in martial arts, and he had access to firearms

through family. He had been to treatment twice, but it "sounds like he drinks all day."

On July 9, 2012, McKay committed a new offense. Intoxicated, he drove to the home of family friends and demanded to know where his wife was. When they did not tell him, he repeatedly rammed his van through their garage doors, causing extensive damage to the cars inside. Police arrested McKay for investigation of malicious mischief and booked him into jail.

The garage-ramming incident was not only a criminal offense, it was also a violation of the terms of McKay's community custody sentence. In 2009, the legislature made the administrative process outlined in RCW 9.94A.737 the exclusive enforcement mechanism for violations in cases like McKay's, with exceptions not relevant here. RCW 9.94A.6332(7) ("if the offender is being supervised by the department, any sanctions shall be imposed by the department pursuant to RCW 9.94A.737"). Reporting violations to the court is not part of the administrative process that is currently in effect.

If an offender is accused of committing a high level violation of a condition or requirement of community custody, the department may sanction the offender to not more than 30 days in total confinement after an administrative hearing. RCW 9.94A.737(4). Deabler considered the garage-ramming incident to be a high level violation. He described McKay's adjustment to supervision as "nonexistent." At Deabler's request, a hearing officer imposed the maximum 30 days of confinement.

While McKay was in jail for the 30-day sanction, his wife tried to serve him with divorce papers. McKay reportedly tried to call his wife, in violation of the no contact order. Deabler wrote in an internal e-mail that he hoped the prosecutor would file charges against McKay "and not let him out."

On July 12, 2012, the King County prosecutor filed a felony charge of malicious mischief against McKay for the garage-ramming incident. A high bail was set. McKay was unable to pay it, and he remained incarcerated.

The standard sentence range for the malicious mischief charge was three to nine months. McKay negotiated a plea bargain that allowed him to request a drug offender sentencing alternative. The sentencing court accepted the guilty plea on September 18, 2012. By order of the court pursuant to RCW 9.94A.660, the department provided the summary of a chemical dependency examination report on McKay. McKay was assessed as alcohol and drug dependent and likely to continue committing crimes while under the influence. He admitted he had hit "rock bottom" and needed treatment. According to the report, a certified residential treatment provider in Chehalis could make a bed available for McKay beginning on November 5, 2012. McKay's parents agreed to provide a clean and sober living environment for him until that date.

On September 28, 2012, the court sentenced McKay to a treatment-based residential sentence of three to six months. See RCW 9.94A.660 (drug offender sentencing alternative). As a condition of sentence, McKay was to reside with his parents and report for supervision by the department until he entered treatment.

Deabler was not informed of the guilty plea and did not know that McKay was requesting a treatment sentence. After the judgment and sentence was entered, Deabler received an e-mail advising him that McKay had been released from jail and was expected to report to the department for supervision.

Deabler knew McKay posed a significant danger to his estranged wife and the people around her. To Deabler, the similarity between McKay's two convictions showed he had an "offense cycle" involving consumption of alcohol followed by threats. Deabler told a colleague that he would require McKay to report frequently until November 5 and "my guess is he won't make it that far before being arrested but we will see."

McKay was seen by community corrections officers 21 times in the month of October—much more frequently than the department's standard policy required. During these contacts, the officers periodically administered breath and urine tests. They inspected logs to verify that McKay was attending Alcoholics Anonymous meetings 3 times a week as they directed. They made an unscheduled home visit to verify that McKay was living with his parents. During these weeks, Deabler had no reason to believe McKay was drinking or violating other conditions of supervision.

At some point in October, McKay's estranged wife, accompanied by her boyfriend, James Mock, had what seemed to be a chance encounter with McKay in a hardware store. She had not seen McKay for months. McKay asked her if she was going to divorce him, and she answered "probably." McKay's wife was frightened, but she did not report the contact to police.

When Deabler saw McKay on Friday, October 26, McKay was still in compliance with all conditions of community custody. That evening, while out having dinner with his sister, McKay saw his wife across the street dressed up as if for a date. Over his sister's objections, McKay followed his wife and became convinced she was dating someone else.

On the morning of October 27, 2012, McKay stole his nephew's guns and drove to his wife's home. He shot at his wife and missed her. He shot Mock and kidnapped Mock's 11-year-old son. He drove to the home of his mother-in-law, Linda Ryan, and shot her too. Police found McKay some hours later, slumped over his steering wheel and holding a gun. He had committed suicide.

The plaintiffs—Mock and his son J.B., and Ryan and her husband—brought this lawsuit against the department. They alleged Deabler was negligent for failing to make a report to the court that sentenced McKay on September 28. Plaintiffs concede that during the month of October, before the attacks, McKay did not commit any violation for which the department could have sanctioned him. In their view, Deabler should have known when McKay was going to be sentenced on the new charge and should have informed the sentencing court of the reasons why he regarded McKay as at risk to commit more acts of domestic violence. Plaintiffs submitted the opinion of an expert witness that if the sentencing court had received such information, the court would not have released McKay from jail until he entered the treatment facility. In that event, McKay would not have been free to attack the plaintiffs on October 27.

Both parties moved for summary judgment. The court granted the department's motion. The plaintiffs appeal.

IMMUNITY

We first consider the department's claim to absolute immunity. Immunity is a question of law we review de novo. Hertog, 138 Wn.2d at 275.

An immunity "frees one who enjoys it from a lawsuit whether or not he acted wrongly." Richardson v. McKnight, 521 U.S. 399, 403, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997). Absolute immunity, where it exists, protects the State as well as its agents. Gilliam v. Dep't of Soc. & Health Servs., 89 Wn. App. 569, 576-77, 950 P.2d 20, review denied, 135 Wn.2d 1015 (1998). "Absolute immunity necessarily leaves wronged claimants without a remedy. This runs contrary to the most fundamental precepts of our legal system. Therefore, in determining whether a particular act entitles the actor to absolute immunity, we must start from the proposition that there is no such immunity." Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 105, 829 P.2d 746 (1992), cert. denied, 506 U.S. 1079 (1993).

Judges are absolutely immune from civil damages suits for acts performed within their judicial capacity. Taggart v. State, 118 Wn.2d 195, 203, 822 P.2d 243 (1992). Therefore, the judge who sentenced McKay on September 28, 2012, is immune from liability for the decision to release McKay pending treatment. Judicial immunity extends to witnesses, prosecutors, and other participants at judicial hearings. Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc., 113 Wn.2d 123, 125, 776 P.2d 666 (1989); Gilliam, 89 Wn. App. at 580.

Therefore, the prosecutor and the McKay family members who spoke at the sentencing hearing are immune from liability for failing to argue that McKay should not be released. If Deabler had submitted a presentence report or testified at the sentencing hearing as a witness, he too would be immune under Bruce. But Deabler did not attend the hearing. No one asked him to attend, and his job did not require it.

Judicial immunity also extends to actors of governmental agencies who perform quasi-judicial functions, for example, the parole board. Taggart, 118 Wn.2d at 204. Some of the functions of the department are identified by statute as quasi-judicial: "In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function." RCW 9.94A.704(11). The immune functions of setting, modifying, and enforcing conditions of community custody are carried out administratively within the department. See RCW 9.94A.737. Deabler's alleged negligence—failure to report to the court—did not occur in the exercise of the quasi-judicial functions identified by RCW 9.94A.704(11). Therefore, the department is not immune under the statute.

The department argues that because Deabler would have immunity from suit if he *had* made a report to the court, he must also have immunity from suit for failing to do so. The only case the department cites in support of this proposition is Tibbits v. Department of Corrections, 186 Wn. App. 544, 346 P.3d 767 (2015).

In Tibbits, an employee of the department modified the offender's community custody conditions by allowing him to travel unescorted to a treatment

facility outside the county. Tibbits, 186 Wn. App. at 549. Instead of reporting to treatment, the offender committed a crime. Tibbits, 186 Wn. App. at 546. The victim sued the department. The department was held to be immune under RCW 9.94A.704(11) because the department's alleged negligence—allowing unescorted travel—was committed in the exercise of a quasi-judicial function, i.e., modifying the conditions of community custody. Only the most tortuous reading of Tibbits would interpret it as holding that immunity for performing a quasi-judicial function applies equally when the actor is not performing a quasi-judicial function.

We reject the department's claims to witness immunity and immunity under RCW 9.94A.704(11).

DUTY

The plaintiffs state their theory of the case as follows: The department, "even if unasked, was under an independent common law duty to report its material knowledge of McKay's behavioral violations to the court."[1] Plaintiffs say this common law reporting duty "provides the sentencing or releasing court material information and the opportunity to protect the public by not releasing, as in this case, a homicidal felon upon the public."[2]

The common law duty owed by community custody officers is not an obligation to take a specific action such as reporting an offender's violations to a

[1] Brief of Appellant at vi.
[2] Brief of Appellant at 22.

sentencing court.[3] The duty, as recognized and adopted by our Supreme Court in Taggart, is the duty stated in general terms by the *Restatement (Second) of Torts* § 319 (1965): "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Taggart, 118 Wn.2d at 219.[4]

Existence of a duty is a question of law. Hertog, 138 Wn.2d at 275. Generally an actor owes no duty to control the conduct of a third party so as to prevent him from causing harm to another. Bishop v. Miche, 137 Wn.2d 518, 524, 973 P.2d 465 (1999); Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 199, 943 P.2d 286 (1997). Such a duty may, however, arise if a special relationship exists between the actor and the third party. RESTATEMENT § 315(a). "Once the relationship is created, it is the *relationship* itself which ultimately imposes the duty upon the government." Joyce v. Dep't of Corr., 155 Wn.2d 306, 318-19, 119 P.3d 825 (2005). The section 319 duty—also referred to as the "take charge" duty—is imposed only when there is a "'definite, established and continuing relationship between the defendant and the third party.'" Taggart, 118 Wn.2d at

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[3] Cf. Nivens v. 7-11 Hoagy's Corner, 133 Wn.2d 192, 205-06, 943 P.2d 286 (1997). In Nivens, the court recognized the common law duty of protection arising from the special relationship between a business and its invitee. The court rejected the plaintiff's proposal that a business owes a free-floating general duty to provide security personnel to prevent criminal behavior on the business premises.

[4] A statute provides that the department will be liable only for gross negligence by community corrections officers. RCW 72.09.320. The distinction between gross negligence and ordinary negligence is not important here because the standard of care is not at issue.

219, quoting Honcoop v. State, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988). It has been imposed on community corrections officers as well as parole officers and probation officers. Joyce, 155 Wn.2d at 320; Taggart, 118 Wn.2d at 224; Bishop, 137 Wn.2d at 528-29, 531.

Appellate opinions occasionally refer to a "duty to report" to a court. See, e.g., Bishop, 137 Wn.2d at 528 ("duty to supervise [the probationer] and report to the court if he failed to comply"); Hertog, 138 Wn.2d at 279 (city probation officer "has a duty to report violations to the court"). The plaintiffs interpret these references as signifying that community corrections officers owe a free-floating, ever-present common law "duty to report to the court" the dangerous propensities of the offenders they are supervising. That interpretation is incorrect. When a phrase like "duty to report" is used, it serves as shorthand for a determination that (1) a special relationship existed giving rise to a section 319 duty to prevent harm and (2) the terms defining the relationship in the particular case required the "take charge" official to report to the court. For example, in Bishop, the probation manual required probation officers to report violations of probation conditions to the court. Bishop, 137 Wn.2d at 522, 531. In Hertog, the city probation officers did not have the power to revoke probation; they had to seek revocation by the court. Hertog, 138 Wn.2d at 279.

Whether the department owed plaintiffs a section 319 duty actionable in the circumstances of this case depends on the terms defining Deabler's relationship with McKay. See Bishop, 137 Wn.2d at 528 ("The relevant inquiry is the relationship of the officer with the parolee.") Statutes and conditions of

sentence are relevant to this inquiry. Taggart, 118 Wn.2d at 219; Bishop, 137 Wn.2d at 528-29, 531; Joyce, 155 Wn.2d at 317, 319-20. The tort of negligent supervision is not unlimited. If the department "is not authorized to intervene, it cannot have a duty to do so." Couch v. Dep't of Corr., 113 Wn. App. 556, 569, 54 P.3d 197 (2002), review denied, 149 Wn.2d 1012 (2003); Joyce, 155 Wn.2d at 320 n.3.

Joyce was decided in 2005 before the 2009 statutory change discussed above. In the previous statutory scheme described in Joyce, the department "maintained a definite, established, and continuing relationship by assigning a community corrections officer to monitor and to *notify the judge* if [the offender] failed to substantially comply with the court's conditions of release." Joyce, 155 Wn.2d at 320 (emphasis added). That statutory scheme is no longer in effect. The department's administrative process is now the exclusive process for dealing with violations by offenders like McKay. RCW 9.94A.737.

Unlike his counterparts in Bishop, Hertog, and Joyce, Deabler was not expected to notify the court when McKay committed violations. No statute required him to do so. Only if McKay was *not* being supervised by the department would a court have the authority to impose sanctions for a violation. RCW 9.94A.6331(1); State v. Bigsby, ___ Wn.2d ___, 399 P.3d 540 (2017). Deabler fulfilled his statutory role by reporting McKay's violation to the department and recommending the maximum 30-day sanction.

There is no evidence that the department, in supervising McKay, failed to comply with statutes or with court directives. When McKay requested a

treatment sentence on the new charge of malicious mischief, the department provided the court with a chemical dependency screening report. RCW 9.94A.500(1). The court had the discretion to ask the department for a risk assessment or presentence report concerning McKay, RCW 9.94A.500(1), but because the court did not ask, the department did not breach a duty by failing to provide one. And this was not a situation in which the department was required to provide the court with a presentencing risk assessment under RCW 9.94A.501(7).

We will assume that Deabler could have discovered the terms of the plea bargain, could have put the sentencing date on his calendar, and could have reported his concerns about McKay to the sentencing judge either in writing or by appearing at the sentencing hearing as an uninvited witness. We will further assume Deabler would have told the court that McKay had dangerous propensities toward domestic violence and was likely to act on them unless kept in jail pending his entry into treatment. But Deabler's *duty* to prevent McKay from harming others existed only to the extent of his special relationship with McKay. The terms of that relationship did not require him to give the court or the prosecutor unasked-for advice about how to sentence McKay. A reporting obligation was not imposed on Deabler by the relevant statutes, by McKay's sentence conditions, or by any order of the court. In hindsight, Deabler was one of many people who theoretically could have recommended against releasing

McKay or taken other steps that might have prevented McKay's criminal attack on the plaintiffs. But having the opportunity to prevent another's criminal conduct does not by itself impose a duty to do so.

In summary, the department is not immune from this suit. Nevertheless, the trial court properly dismissed plaintiffs' claim that the department's community corrections officer owed a duty to report concerns about McKay's dangerous propensities to the sentencing court.

Affirmed.

Becker, J.

WE CONCUR:

West's RCWA 9.94A.737

9.94A.737. Community custody--Violations--Disciplinary proceedings--Structured violation process--Sanctions

Effective: June 1, 2012

Currentness

(1) If an offender is accused of violating any condition or requirement of community custody, the department shall address the violation behavior. The department may hold offender disciplinary proceedings not subject to chapter 34.05 RCW. The department shall notify the offender in writing of the violation process.

(2)(a) The offender's violation behavior shall determine the sanction the department imposes. The department shall adopt rules creating a structured violation process that includes presumptive sanctions, aggravating and mitigating factors, and definitions for low level violations and high level violations.

(b) After an offender has committed and been sanctioned for five low level violations, all subsequent violations committed by that offender shall automatically be considered high level violations.

(c)(i) The department must define aggravating factors that indicate the offender may present a current and ongoing foreseeable risk and which therefore, elevate an offender's behavior to a high level violation process.

(ii) The state and its officers, agents, and employees may not be held criminally or civilly liable for a decision to elevate or not to elevate an offender's behavior to a high level violation process under this subsection unless the state or its officers, agents, and employees acted with reckless disregard.

(3) The department may intervene when an offender commits a low level violation as follows:

(a) For a first low level violation, the department may sanction the offender to one or more nonconfinement sanctions.

(b) For a second or subsequent low level violation, the department may sanction the offender to not more than three days in total confinement.

(i) The department shall develop rules to ensure that each offender subject to a short-term confinement sanction is provided the opportunity to respond to the alleged violation prior to imposition of total confinement.

(ii) The offender may appeal the short-term confinement sanction to a panel of three reviewing officers designated by the secretary or by the secretary's designee. The offender's appeal must be in writing and hand-delivered to department staff, or postmarked, within seven days after the sanction is imposed.

(4) If an offender is accused of committing a high level violation, the department may sanction the offender to not more than thirty days in total confinement per hearing.

(a) The offender is entitled to a hearing prior to the imposition of sanctions; and

(b) The offender may be held in total confinement pending a sanction hearing. Prehearing time served must be credited to the offender's sanction time.

(5) If the offender's underlying offense is one of the following felonies and the violation behavior constitutes a new misdemeanor, gross misdemeanor or felony, the offender shall be held in total confinement pending a sanction hearing, and until the sanction expires or until if a prosecuting attorney files new charges against the offender, whichever occurs first:

(a) Assault in the first degree, as defined in RCW 9A.36.011;

(b) Assault of a child in the first degree, as defined in RCW 9A.36.120;

(c) Assault of a child in the second degree, as defined in RCW 9A.36.130;

(d) Burglary in the first degree, as defined in RCW 9A.52.020;

(e) Child molestation in the first degree, as defined in RCW 9A.44.083;

(f) Commercial sexual abuse of a minor, as defined in RCW 9.68A.100;

(g) Dealing in depictions of a minor engaged in sexually explicit conduct, as defined in RCW 9.68A.050;

(h) Homicide by abuse, as defined in RCW 9A.32.055;

(i) Indecent liberties with forcible compulsion, as defined in RCW 9A.44.100(1)(a);

(j) Indecent liberties with a person capable of consent, as defined in RCW 9A.44.100(1)(b);

(k) Kidnapping in the first degree, as defined in RCW 9A.40.020;

(l) Murder in the first degree, as defined in RCW 9A.32.030;

(m) Murder in the second degree, as defined in RCW 9A.32.050;

(n) Promoting commercial sexual abuse of a minor, as defined in RCW 9.68A.101;

(o) Rape in the first degree, as defined in RCW 9A.44.040;

(p) Rape in the second degree, as defined in RCW 9A.44.050;

(q) Rape of a child in the first degree, as defined in RCW 9A.44.073;

(r) Rape of a child in the second degree, as defined in RCW 9A.44.076;

(s) Robbery in the first degree, as defined in RCW 9A.56.200;

(t) Sexual exploitation of a minor, as defined in RCW 9.68A.040; or

(u) Vehicular homicide while under the influence of intoxicating liquor or any drug, as defined in RCW 46.61.520(1)(a).

(6) The department shall adopt rules creating hearing procedures for high level violations. The hearings are offender disciplinary proceedings and are not subject to chapter 34.05 RCW. The procedures shall include the following:

(a) The department shall provide the offender with written notice of the alleged violation and the evidence supporting it. The notice must include a statement of the rights specified in this subsection, and the offender's right to file a personal restraint petition under court rules after the final decision;

(b) Unless the offender waives the right to a hearing, the department shall hold a hearing, and shall record it electronically. For offenders not in total confinement, the department shall hold a hearing within fifteen business days, but not less than twenty-four hours, after written notice of the alleged violation. For offenders in total confinement, the department shall hold a hearing within five business days, but not less than twenty-four hours, after written notice of the alleged violation;

(c) The offender shall have the right to: (i) Be present at the hearing; (ii) have the assistance of a person qualified to assist the offender in the hearing, appointed by the hearing officer if the offender has a language or communications barrier; (iii) testify or remain silent; (iv) call witnesses and present documentary evidence; (v) question witnesses who appear and testify; and (vi) receive a written summary of the reasons for the hearing officer's decision; and

(d) The sanction shall take effect if affirmed by the hearing officer. The offender may appeal the sanction to a panel of three reviewing officers designated by the secretary or by the secretary's designee. The offender's appeal must be in writing and hand-delivered to department staff, or postmarked, within seven days after the sanction was imposed. The appeals panel shall affirm, reverse, modify, vacate, or remand based on its findings. If a majority of the panel finds that the sanction was not reasonably related to any of the following: (i) The crime of conviction; (ii) the violation committed; (iii) the offender's risk of reoffending; or (iv) the safety of the community, then the panel will reverse, vacate, remand, or modify the sanction.

(7) For purposes of this section, the hearings officer may not rely on unconfirmed or unconfirmable allegations to find that the offender violated a condition.

(8) Hearing officers shall report through a chain of command separate from that of community corrections officers.

Credits

[2012 1st sp.s. c 6 § 7, eff. June 1, 2012; 2008 c 231 § 20, eff. Aug. 1, 2009; (2009 c 375 § 13 expired August 1, 2009); 2007

c 483 § 305, eff. July 22, 2007; 2005 c 435 § 3, eff. July 24, 2005; 2002 c 175 § 15; 1999 c 196 § 8; 1996 c 275 § 3; 1988 c 153 § 4. Formerly RCW 9.94A.205.]

Notes of Decisions (16)

West's RCWA 9.94A.737, WA ST 9.94A.737
Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

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West's RCWA 9.94A.6332

9.94A.6332. Sanctions--Which entity imposes

Effective: June 1, 2014

Currentness

The procedure for imposing sanctions for violations of sentence conditions or requirements is as follows:

(1) If the offender was sentenced under the drug offender sentencing alternative, any sanctions shall be imposed by the department or the court pursuant to RCW 9.94A.660.

(2) If the offender was sentenced under the special sex offender sentencing alternative, any sanctions shall be imposed by the department or the court pursuant to RCW 9.94A.670.

(3) If the offender was sentenced under the parenting sentencing alternative, any sanctions shall be imposed by the department or by the court pursuant to RCW 9.94A.655.

(4) If a sex offender was sentenced pursuant to RCW 9.94A.507, any sanctions shall be imposed by the board pursuant to RCW 9.95.435.

(5) If the offender was released pursuant to RCW 9.94A.730, any sanctions shall be imposed by the board pursuant to RCW 9.95.435.

(6) If the offender was sentenced pursuant to RCW 10.95.030(3) or 10.95.035, any sanctions shall be imposed by the board pursuant to RCW 9.95.435.

(7) In any other case, if the offender is being supervised by the department, any sanctions shall be imposed by the department pursuant to RCW 9.94A.737. If a probationer is being supervised by the department pursuant to RCW 9.92.060, 9.95.204, or 9.95.210, upon receipt of a violation hearing report from the department, the court retains any authority that those statutes provide to respond to a probationer's violation of conditions.

(8) If the offender is not being supervised by the department, any sanctions shall be imposed by the court pursuant to RCW 9.94A.6333.

Credits

[2014 c 130 § 3, eff. June 1, 2014; 2010 c 224 § 11, eff. June 10, 2010; 2009 c 375 § 14, eff. July 26, 2009; 2009 c 28 § 8, eff. Aug. 1, 2009; 2008 c 231 § 18, eff. Aug. 1, 2009.]

West's RCWA 9.94A.6332, WA ST 9.94A.6332
Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

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