NO. 76008-4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CATHY HARPER, et al.,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Petitioner.

PETITION FOR REVIEW

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I. INTRODUCTION

In October 2012, Scottye Miller was released to community custody on two misdemeanor convictions involving domestic violence against Tricia Patricelli. Fifteen days after his release, he murdered Patricelli.

The Department of Corrections (DOC) supervised Miller's conditions for community custody, which prohibited his use of controlled substances and alcohol, and required testing to ensure compliance, regular reporting to his Community Correction Officer (CCO), and payment of court-ordered financial obligations. During Miller's two weeks of community custody, his CCO, Rhonda Freeland, saw him both weeks, each time testing him for drug or alcohol use, with a clean result. She verified that Miller was obtaining treatment and that he was living with his mother. She made numerous collateral contacts to ensure compliance, including calls to Miller's Probation Officer and Patricelli (which went unreturned).

Freeland also twice spoke with Patricelli's DOC Community Victim Liaison, who told Freeland that she was communicating with Patricelli and had helped Patricelli break her lease and move to a new address unknown to Miller, and that Patricelli understood she could contact law enforcement or DOC if Miller violated her no-contact order against him. Unbeknownst to Freeland and Coker, and also hidden from Patricelli's mother and her best friend, Patricelli was secretly consorting with Miller.

For DOC to be liable for the supervision of an offender's conditions for community custody, DOC must be grossly negligent, *i.e.*, DOC must fail to exercise slight care. Finding no evidence of any such failure, the trial court granted DOC summary judgment. The Court of Appeals reversed because Freeland did not investigate whether Miller was violating Patricelli's no-contact order against him. But the no-contact order was not a condition for community custody. Even if it had been, Freeland undertook numerous actions to ensure that Miller was not in contact with Patricelli.

This Court should grant review, because the decision below conflicts with (1) this Court's decisions defining gross negligence and permitting trial courts to assess the sufficiency of the evidence offered to establish gross negligence, (2) Court of Appeals' decisions holding that the failure to discover violations of conditions of community custody does not establish gross negligence, and (3) this Court's decisions holding there is no cause of action for negligent investigation in Washington.

II. IDENTITY OF PETITIONER AND DECISION

DOC petitions for review of the published decision of Division I of the Court of Appeals in *Harper v. State*, No. 76008-4-I (Dec. 4, 2017) (reconsideration denied and opinion reissued with amended language on January 16, 2018). *See* App. at A46-A60 (amended decision).

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in concluding that, because Freeland did not investigate whether Miller might have violated Patricelli's no-contact order against him, DOC failed to exercise slight care in monitoring Miller's conditions for community custody?

2. Did the Court of Appeals err in concluding that DOC could be liable under a negligent investigation theory, when this Court has never recognized a common law cause of action for negligent investigation, and where the Court of Appeals has stated there is no mandatory duty to conduct an ongoing investigation of a domestic violence allegation, even after law enforcement receives actual notice that domestic abuse has occurred?

IV. STATEMENT OF THE CASE

A. The Trial Court Granted Summary Judgment, Finding No Evidence Freeland Failed to Exercise Slight Care

On October 15, 2012, DOC released Miller to community custody on two misdemeanor convictions: King County Cause No. 10-1-03032-4 (misdemeanor domestic violence; court order violation) and King County Cause No. 12-1-00643-8 (assault in the fourth degree-domestic violence).[1] App. at A10-A12, A13-A21. Miller's 2010 conviction required him to "comply with the standard rules and regulations of supervision." *See* RCW 9.94A.703(1)(a)-(d) (2010); App. at A3-A4. Miller's 2012 felony conviction imposed community custody conditions as part of a Drug Offender Sentencing Alternative (DOSA), but the sentencing court revoked

[1] *See* App. at A10-A12, A21-23. DOC supervised Miller for the two misdemeanors pursuant to RCW 9.95.204(1). He was placed on community custody pursuant to RCW 9.94A.501(2) and supervised under the terms of RCW 9.94A.704.

the DOSA and remanded Miller to a term of total confinement followed by no term of community custody. App. at A13-A27.

Thus, Miller's conditions for community custody were limited to those contained within his 2010 Judgment and Sentence and his 2012 misdemeanor Judgment and Sentence, which incorporated by reference the felony "conditions on Count I residential DOSA." App. at A23. Those specific conditions for community custody required that Miller (1) "not use illegal controlled substances" and "submit to urinalysis or other testing to monitor compliance," (2) "not use any alcohol or controlled substances without prescription" and "undergo testing to monitor compliance," (3) "report as directed to his (CCO)," and (4) "pay all court ordered legal financial obligations." App. at A18. The 2012 Judgment and Sentence also referenced Patricelli's "separate (no-contact order)." App. at A18. That no-contact order prohibited Miller from contacting Patricelli for five years, except telephonic contact and contact when Miller was "in custody and in treatment." App. at A27-A28. The court's conditions did not require DOC to investigate whether Miller violated the no-contact order and DOC did not impose a condition regarding the order. App. at A27-A28.

On October 16, the day after DOC released Miller, he reported to Freeland at her Auburn office. CP at 33. Miller was homeless, but said he would stay with his mother, Leola Benson, and relatives in Kent. CP at 33.

As a misdemeanor offender, Miller was not required to have an established residence. CP at 37. Regardless, Freeland required him to report to her weekly and gave him a Shelter Report Form, which required Miller to list where he stayed each night, verified by a resident's signature. CP at 33. Freeland also called the Department of Social and Health Services (DSHS) to see if Miller qualified for benefits, and directed him there. CP at 33.

The following day, Freeland called and left a message with Patricelli, requesting a return phone call. CP at 33. She also called Angella Coker, DOC's Community Victim Liaison, to see if Coker had any concerns about Patricelli's safety. CP at 33, 136-40. Coker told Freeland that she was communicating with Patricelli and had helped her break a lease on a Kent apartment through a statute protecting victims of domestic violence, so Patricelli could move to a new apartment in Auburn. CP at 33, 136-40. Coker told Freeland that Patricelli said Miller did not know where she would be living. CP at 136-140. Coker also said Patricelli was aware she could call DOC or law enforcement, if necessary. CP at 136-140. Freeland also called and left a message for Dave Albers, Miller's 2010-11 King County Probation Officer, seeking a return phone call. CP at 33.

On October 23, Miller again reported to Freeland at her Auburn office. CP at 33. He brought verification of food coupon benefits from DSHS and a completed Shelter Report Form verifying that he had been

staying with Benson. CP at 33. Miller also brought verification that he had scheduled a psychological evaluation for the following day. CP at 34. Freeland told Miller to report again on October 30. CP at 34. On October 29, Benson called Freeland and told her that Miller could live with her. CP at 34. On October 30, Miller murdered Patricelli.

Neither Freeland nor Coker knew that Miller was in contact with Patricelli following his release from prison. CP at 35, 324-25. To the contrary, Patricelli told Coker that she would not resume her relationship with Miller. CP at 138. Despite enlisting Coker to assist her in breaking her apartment lease so that Miller would not know where she was living, Patricelli apparently informed Miller of her new address. CP at 139, 325.

Patricelli also did not tell her mother, Cathy Harper, that she had resumed her relationship with Miller. CP at 208-209. In October 2012, Harper lived near Patricelli, spoke to her daily, and saw her at least three times a week. CP at 208-09. Similarly, Patricelli did not tell her best friend, Breanna Capener, that she had resumed her relationship with Miller. CP 163-165. Capener communicated with Patricelli daily, either in person or by talking or texting on the telephone. CP 164. They saw each other in person three times a week and had dinner together every Sunday. CP at 164. Patricelli told Capener she was no longer seeing Miller. CP at 164.

On these facts, the trial court granted DOC's motion for summary judgment, finding no evidence that Freeland failed to exercise slight care.

B. The Court of Appeals Reversed the Trial Court, Concluding Freeland Failed to Exercise Slight Care Because She Did Not Investigate Miller's Potential Violation of a No-Contact Order

The Court of Appeals concluded a jury could find Freeland failed to exercise slight care because she did not (1) observe that Miller had a history of violating no-contact orders and lying to CCOs, (2) disbelieve the validity of Miller's signed Shelter Report Form, (3) attempt to call Patricelli at a different phone number, and (4) question Benson about whether Miller was actually staying with her. *Harper*, slip op. at 13.[2] The court concluded that despite Freeland's affirmative acts discharging her duty to supervise Miller's conditions for community custody, "with regard to the no-contact order, DOC exercised less than slight care in its supervision of Miller, thereby breaching the applicable duty." *Harper*, slip op. at 12.

V. REASONS WHY REVIEW SHOULD BE GRANTED

This Court should grant review pursuant to RAP 13.4(b)(1) and (2), because the Court of Appeals' decision conflicts with decisions of this Court and the Courts of Appeals. First, this Court should grant review because the Court of Appeals' decision conflicts with cases decided by this

[2] These citations are to the substituted opinion issued on January 16, 2018, and attached to App. at A46-A60.

Court establishing the criteria for distinguishing between negligence and gross negligence, by holding "the drawing of such distinction will almost always require the fact-finding judgment of a jury, as opposed to the legal analysis of a court." *Harper*, slip op. at 12. The Court of Appeals' decision thus removes the historic trust that has been given to trial courts as gatekeepers capable of determining whether there is "substantial evidence of serious negligence" necessary to establish a failure to exercise slight care, or gross negligence. *Nist v. Tudor*, 67 Wn.2d 322, 332, 407 P.2d 798 (1965).

Second, the Court should grant review because the Court of Appeals' decision conflicts with *Kelley v. State*, 104 Wn. App. 328, 17 P.3d 1189 (2000), which holds that a failure to discover unknown violations is not evidence of gross negligence, and *Whitehall v. King County*, 140 Wn. App. 761, 167 P.3d 1184 (2007), which holds there is no duty to undertake affirmative acts beyond the conditions of supervision. Freeland took numerous affirmative steps to supervise Miller's conditions for community custody. Her failure to investigate Miller's potential violation of Patricelli's no-contact order against Miller is not evidence of gross negligence.

Third, the Court should grant review because the Court of Appeals' decision effectively creates a new cause of action for negligent investigation, specifically regarding domestic violence no-contact orders, in direct conflict with long-standing law from this Court and the Court of

Appeals. *See M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003); *Blackwell v. State Dep't of Soc. & Health Servs.*, 131 Wn. App. 372, 378, 127 P.3d 752 (2006) (no common law cause of action for negligent investigation). This new negligent investigation theory threatens to affect DOC and many law enforcement agencies statewide.

A. The Court of Appeals' Decision Conflicts With *Nist v. Tudor*, Which Entrusts to Trial Courts the Ability to Determine Whether There is Substantial Evidence of Serious Negligence

In *Nist*, this Court examined at length the definition of gross negligence and considered what is required to submit the issue of gross negligence to a jury. The Court held that the issue should be submitted to a jury only when there is "substantial evidence of seriously negligent acts or omissions." *Nist*, 67 Wn.2d at 332. In *Nist*, the issue before the trial court was whether the exercise of any care would satisfy the requirement of slight care. *Id.* at 324. After a challenge to the sufficiency of the evidence by the defendant-driver, the trial court dismissed the case, finding the defendant-driver exercised some care by slowing to a near stop before she used her turn signal and made a left turn in front of an oncoming truck. *Id.*

On review, this Court compared the defendant-driver's duty to yield to oncoming traffic before making a left turn with the hazards that breach of duty would present. *Nist*, 67 Wn.2d at 331-32. The Court directed trial courts to consider the hazards confronting the actor based on the relevant

duty of care, and instructed that gross negligence must always be considered in reference to ordinary negligence. *Id.* at 331. The Court stated a clear standard for gross negligence: "there can be no issue of gross negligence unless there is substantial evidence of serious negligence." *Id.*

Here, the Court of Appeals' decision does not fault Freeland for ignoring an impending danger, like the obvious impending danger ignored by the defendant-driver in *Nist.* Rather, the decision faults Freeland for believing Patricelli was honest with Coker when she said that she was not seeing Miller, that Miller did not know her current address, and that she would call DOC or law enforcement if needed, and for failing to investigate whether Miller was actually violating Patricelli's no-contact order despite those representations. This conflicts with *Nist* because it holds that Freeland failed to exercise slight care by failing to discover that which was unknown to her, not by ignoring an obvious impending danger. This warrants review under RAP 13.4(b)(1).

The Court of Appeals' decision also warrants review under RAP 13.4(b)(2) because it conflicts with numerous decisions of the Court of Appeals defining the scope of DOC's duty in supervising offenders on community custody, and regarding the evidence required to prove gross negligence in fulfilling that duty. *See e.g. Husted v. State*, 187 Wn. App. 579, 587, 348 P.3d 776 (2015) (basis for "take charge relationship" is "statutory duty to supervise offender" and to "monitor the offender's compliance with

the conditions of supervision and his . . . progress while on supervision"); *Estate of Davis v. State*, 127 Wn. App. 833, 842, 113 P.3d 487 (2005) ("A corrections officer cannot take charge of an offender without a court order and he can only enforce the order according to its terms and controlling statutes"); *Couch v. Dep't of Corrections*, 113 Wn. App. 556, 54 P .3d 197 (2002), *review denied*, 149 Wn.2d 1012 (2003) (court order creates and defines the "take charge" relationship); *Kelley*, 104 Wn. App. 328 (lapses in supervision insufficient to establish gross negligence and CCO had no duty to investigate and discover violations); *Whitehall*, 140 Wn. App. 761 (probation officer's lack of additional affirmative acts in misdemeanant supervision insufficient to establish gross negligence). In contrast, the Court of Appeals here held that the "analysis necessarily focuses on the sentencing condition most pertinent to Patricelli's safety—the no-contact order." *Harper*, slip op. at 12. The decision concludes: "with regard to the no-contact order, DOC exercised less than slight care in its supervision of Miller." *Id.* The decision thus imposes on DOC a standard of care that is not tied to the enforcement of Miller's conditions for community custody. Rather, it requires DOC to investigate Miller's potential violation of a no-contact order.

The decision also warrants review because DOC's duty is to monitor the offender's compliance with the court's conditions for community custody. *Estate of Davis*, 127 Wn. App. at 842; *Couch*, 113 Wn. App. at 556 (if the

State is not authorized to intervene, it cannot have a duty to do so). That duty is specific and circumscribed:

> [T]he basis of the take charge relationship and the duty created thereby, is the community correction officer's statutory authority to supervise the offender under RCW 9.94A.720. Pursuant to that statute a community corrections officer must monitor the individual's compliance with the conditions of supervision and his or her progress on supervision. And when necessary, the community corrections officer can control the individual's behavior by threat of incarceration, limiting movements to prescribed boundaries, increasing reporting requirements and the like.

Husted, 187 Wn. App. at 587. The Legislature and the courts state DOC's duty in supervising offenders as one of gross negligence, which is violated only by evidence of a failure to exercise slight care. RCW 72.09.320; *Kelley*, 104 Wn. App. at 332; *Whitehall*, 140 Wn. App. at 770. On the evidence in this record, even if Freeland had a duty to investigate Miller's potential violation of Patricelli's no-contact order, there is no evidence she failed to exercise slight care in doing so.

DOC classified Miller as a "High Violent" offender under the Washington State Institute for Public Policy's Static Risk Assessment. CP at 36. As a "high violent" offender, Miller was subject to three face-to-face contacts with Freeland per month, two of which were to occur in the field, and one collateral contact. CP at 36. During the 15 days Freeland supervised Miller's conditions for community custody, she twice inquired

of Coker about Patricelli's location and well-being. The information she received affirmed that Miller was not in contact with Patricelli. Freeland twice met with Miller and tested him for compliance with his drug and alcohol conditions. This affirmed that Miller was not using drugs or alcohol, which can trigger behavioral disinhibition. Freeland also monitored where Miller was staying using a Shelter Report Form verified by Benson.

Freeland also called and left unreturned phone messages with Albers and with Patricelli. Those collateral contacts may have yielded confirming information. Since Patricelli never returned Freeland's call, and since she hid her contact with Miller from Coker, Harper, and Capener, there are no facts in the record to prove a return call would have revealed that contact.

B. The Court of Appeals Decision Conflicts With Cases Holding That a Failure to Investigate and Discover Violations of Conditions for Community Custody is Not Gross Negligence

In holding that Freeland failed to exercise slight care because she did not conduct an investigation into whether Miller might be violating Patricelli's no-contact order against him, the Court of Appeals' decision conflicts with established law holding that there is no gross negligence based on a failure to investigate and discover unknown violations. In *Kelley*, Kevin Ingalls was released to community custody following 43 months of confinement for attempted rape. *Kelley*, 104 Wn. App. at 330. A condition of his release was compliance with a court-ordered curfew, requiring that he

remain at home between 11:00 p.m. and 7:00 a.m. Ingalls met with his CCO twice per month at DOC's field office, but his CCO made only 14 out of the 27 field contacts required by DOC policy during eight months of supervision. The CCO was also on notice that Ingalls "may have" violated his curfew on one occasion, when he was detained by police outside a junior high school miles from his home, and the CCO failed to discover that Ingalls violated his curfew on another occasion, when he had been arrested for entering an occupied motel room. Approximately one month after Ingalls' curfew violation, he picked up the plaintiff along a road, demanded sex, and then assaulted her when she refused his advances.

In affirming summary judgment for DOC, the *Kelley* court held as a matter of law that the CCO's conduct, though possibly negligent, did not rise to the level of gross negligence:

> Given Ingalls' background of attempted rape, a jury could easily find that [the community corrections officer] was negligent in failing to discover the actual time of the motel incident, which would have provided grounds for arrest. [The community corrections officer] recognized that the incident was serious and that he would have arrested Ingalls if he could have. But [the community corrections officer's] failure to more thoroughly investigate the motel incident falls short of "negligence substantially and appreciably greater than ordinary negligence." If [the community corrections officer] had made no attempt to learn the critical incident circumstances of the crime, a jury could find gross negligence. Here, he did investigate the critical incident circumstances but failed to verify the time of the arrest.

Kelley, 104 Wn. App. at 335-36 (citations omitted). The *Kelley* court distinguished cases where other courts found an issue of fact regarding gross negligence, such as in *Nist*, noting that "[i]n each, the defendant knew of the impending danger and failed to take appropriate action." *Id.* at 337. In *Kelley*, the CCO merely failed to discover violations. *Kelley* holds that a failure to discover violations of conditions for community custody, as opposed to a failure to act on known violations, does not establish gross negligence.

Likewise, the Court of Appeals' decision conflicts with *Whitehall*, where the plaintiff argued King County was grossly negligent because it did not require additional affirmative acts by the probation officers monitoring the offender. Relying on *Kelley*, the *Whitehall* court held that King County "had no duty to monitor [the offender] more closely than it did." The court noted that even if there was a duty to perform additional, affirmative acts, the failure to do so did not constitute substantial evidence of serious negligence, precluding a finding of gross negligence. *Whitehall*, 140 Wn. App. at 770.

The Court of Appeals' decision here finds a genuine issue of material fact on much thinner evidence than the evidence in *Kelley* and *Whitehall.* The decision holds that Freeland's gross negligence lies in her failure to investigate whether Miller was consorting with Patricelli in violation of her no-contact order, not in her failure to enforce Miller's conditions for community custody or her failure to take appropriate action regarding a violation of those

conditions of which she was aware. The decision conflicts with *Kelley* and *Whitehall* and warrants review under RAP 13.4(b)(2).

C. The Court of Appeals' Decision Conflicts With Settled Law Holding There is No Cause of Action for Negligent Investigation

Washington courts have not recognized a general tort of negligent investigation. *M.W.*, 149 Wn.2d at 601; *Blackwell*, 131 Wn. App. at 378 (no common law cause of action for negligent investigation); *Pettis v. State*, 98 Wn. App. 553, 560, 990 P.2d 453 (1999) (negligent investigation claims cannot be brought by persons not identified in statute). While the courts have recognized a limited negligent investigation theory against DSHS, that "narrow exception is based on, and limited to, the statutory duty and concerns" imposed upon DSHS by statute. *M.W.*, 149 Wn.2d at 601.

Even when law enforcement officers have notice of an actual domestic violence offense, there is no ongoing duty to investigate or apprehend the abuser. In *Donaldson v. City of Seattle*, 65 Wn. App. 661, 831 P.2d 1098 (1992), the plaintiff argued that because the Domestic Violence Protection Act included a mandatory duty to arrest if the abuser is present, it must also state a duty to conduct a follow-up investigation by searching for the absent abuser. The Court of Appeals disagreed, finding that "a mandatory duty to investigate . . . would be completely open-ended as to priority, duration, and intensity." *Id.* at 671. Even where a special

relationship exists between law enforcement and a victim, that relationship ends when law enforcement either makes the victim safe through arrest of the abuser or offers an alternate means to protect the victim. *Id.* at 674. The *Donaldson* Court rejected any attempt to create a negligent investigation cause of action in the context of a report of domestic violence.

The Court of Appeals' decision here would impose on DOC a duty to investigate that is far broader than that rejected by *Donaldson.* The decision faults Freeland for failing to independently verify where Miller was staying and for not trying harder to contact Patricelli. Both of these actions are directed toward determining whether Miller was violating Patricelli's no-contact order. The Court of Appeals' decision imposes this obligation with no principled limit on the reach of a CCOs duty to investigate. The Court of Appeals' decision creates a duty to enforce the no-contact order that is greater than law enforcement's duty to apprehend an abuser mere hours after an actual report of domestic abuse. This warrants review under RAP 13.4(b)(2).

To the extent the Court of Appeals held that Freeland should have imposed additional conditions concerning the no-contact order as part of Miller's conditions for community custody, RCW 9.94A.704(11) provides DOC quasi-judicial immunity. DOC is not liable for a CCO's imposition or failure to impose additional conditions for community custody, and this immunity applies whether the alleged failure was an act or an omission.

Tibbets v. State, 186 Wn. App. 544, 551, 346 P.3d 767 (2015) (if omissions were not also immune there would be no immunity). The Court of Appeals' decision warrants review under RAP 13.4(b)(2) on this basis as well.

VI. CONCLUSION

The Court of Appeals' decision conflicts with decisions from this Court and the Court of Appeals. This Court should accept review, reverse the Court of Appeals and affirm summary judgment.

RESPECTFULLY SUBMITTED this 13th day of February 2018.

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DECLARATION OF SERVICE

I declare in accordance with the laws of the state of Washington that on the undersigned date the foregoing document was electronically filed in the Washington State Court of Appeals, Division 1 according to the Court's protocols for electronic filing.

Further, a copy of the preceding document was sent for electronic service on the parties and their counsel of record as follows:

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

DATED this 13th day of February 2018 at Seattle, Washington.

Valerie Tucker

VALERIE TUCKER – Legal Assistant

APPENDIX

VOLUME 2
Titles 9 through 17

2010
REVISED CODE OF WASHINGTON

Published under the authority of chapter 1.08 RCW.

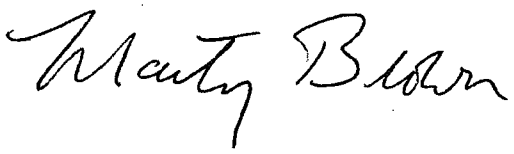
Containing all laws of a general and permanent nature through the 2010 special session which adjourned April 13, 2010.

REVISED CODE OF WASHINGTON

2010 Edition

CERTIFICATE

The 2010 edition of the Revised Code of Washington, published officially by the Statute Law Committee, is, in accordance with RCW 1.08.037, certified to comply with the current specifications of the committee.



MARTY BROWN, Chair
STATUTE LAW COMMITTEE

Effective date—2009 c 28: See note following RCW 2.24.040.

Intent—2008 c 231: "The existing sentencing reform act contains numerous provisions for supervision of different types of offenders. This duplication has caused great confusion for judges, lawyers, offenders, and the department of corrections, and often results in inaccurate sentences. The clarifications in this act are intended to support continued discussions by the sentencing guidelines commission with the courts and the criminal justice community to identify and propose policy changes that will further simplify and improve the sentencing reform act relating to the supervision of offenders. The sentencing guidelines commission shall submit policy change proposals to the legislature on or before December 1, 2008.

Sections 7 through 58 of this act are intended to simplify the supervision provisions of the sentencing reform act and increase the uniformity of its application. These sections are not intended to either increase or decrease the authority of sentencing courts or the department relating to supervision, except for those provisions instructing the court to apply the provisions of the current community custody law to offenders sentenced after July 1, 2009, but who committed their crime prior to August 1, 2009, to the extent that such application is constitutionally permissible.

This will effect a change for offenders who committed their crimes prior to the offender accountability act, chapter 196, Laws of 1999. These offenders will be ordered to a term of community custody rather than community placement or community supervision. To the extent constitutionally permissible, the terms of the offender's supervision will be as provided in current law. With the exception of this change, the legislature does not intend to make, and no provision of sections 7 through 58 of this act may be construed as making, a substantive change to the supervision provisions of the sentencing reform act." [2009 c 375 § 10; 2008 c 231 § 6.]

Application—2008 c 231 §§ 6-58: "(1) Sections 6 through 58 of this act apply to all sentences imposed or reimposed on or after August 1, 2009, for any crime committed on or after August 1, 2009.

(2) Sections 6 through 58 of this act also apply to all sentences imposed or reimposed on or after August 1, 2009, for crimes committed prior to August 1, 2009, to the extent that such application is constitutionally permissible.

(3) To the extent that application of sections 6 through 58 of this act is not constitutionally permissible with respect to any offender, the sentence for such offender shall be governed by the law as it existed before August 1, 2009, or on such prior date as may be constitutionally required, notwithstanding any amendment or repeal of provisions of such law.

(4) If application of sections 6 through 58 of this act is not constitutionally permissible with respect to any offender, the judgment and sentence shall specify the particular sentencing provisions that will not apply to such offender. Whenever practical, the judgment and sentence shall use the terminology set out in this act.

(5) The sentencing guidelines commission shall prepare a summary of the circumstances under which application of sections 6 through 58 of this act is not constitutionally permissible. The summary should include recommendations of conditions that could be included in judgments and sentences in order to prevent unconstitutional application of the act. This summary shall be incorporated into the *Adult Sentencing Guidelines Manual*.

(6) Sections 6 through 58 of this act shall not affect the enforcement of any sentence that was imposed prior to August 1, 2009, unless the offender is resentenced after that date." [2008 c 231 § 55.]

Application of repealers—2008 c 231 § 57: "The repealers in section 57 of this act shall not affect the validity of any sentence that was imposed prior to August 1, 2009, or the authority of the department of corrections to supervise any offender pursuant to such sentence." [2008 c 231 § 58.]

Effective date—2008 c 231 §§ 6-60: "Sections 6 through 60 of this act take effect August 1, 2009." [2008 c 231 § 61.]

Severability—2008 c 231: See note following RCW 9.94A.500.

9.94A.702 Community custody—Offenders sentenced for one year or less. (1) If an offender is sentenced to a term of confinement for one year or less for one of the following offenses, the court may impose up to one year of community custody:

(a) A sex offense;

(b) A violent offense;

(c) A crime against a person under RCW 9.94A.411;

(d) A felony violation of chapter 69.50 or 69.52 RCW, or an attempt, conspiracy, or solicitation to commit such a crime; or

(e) A felony violation of RCW 9A.44.132(1) (failure to register).

(2) If an offender is sentenced to a first-time offender waiver, the court may impose community custody as provided in RCW 9.94A.650. [2010 c 267 § 12; 2008 c 231 § 8.]

Application—2010 c 267: See note following RCW 9A.44.128.

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW 9.94A.701.

Severability—2008 c 231: See note following RCW 9.94A.500.

9.94A.703 Community custody—Conditions. When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

(1) **Mandatory conditions.** As part of any term of community custody, the court shall:

(a) Require the offender to inform the department of court-ordered treatment upon request by the department;

(b) Require the offender to comply with any conditions imposed by the department under RCW 9.94A.704;

(c) If the offender was sentenced under RCW 9.94A.507 for an offense listed in RCW 9.94A.507(1)(a), and the victim of the offense was under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection zone;

(d) If the offender was sentenced under RCW 9A.36.120, prohibit the offender from serving in any paid or volunteer capacity where he or she has control or supervision of minors under the age of thirteen.

(2) **Waivable conditions.** Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

(a) Report to and be available for contact with the assigned community corrections officer as directed;

(b) Work at department-approved education, employment, or community restitution, or any combination thereof;

(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;

(d) Pay supervision fees as determined by the department; and

(e) Obtain prior approval of the department for the offender's residence location and living arrangements.

(3) **Discretionary conditions.** As part of any term of community custody, the court may order an offender to:

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

(4) **Special conditions.**

(a) In sentencing an offender convicted of a crime of domestic violence, as defined in RCW 10.99.020, if the offender has a minor child, or if the victim of the offense for which the offender was convicted has a minor child, the court may order the offender to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

(b)(i) In sentencing an offender convicted of an alcohol or drug-related traffic offense, the court shall require the offender to complete a diagnostic evaluation by an alcohol or drug dependency agency approved by the department of social and health services or a qualified probation department, defined under RCW 46.61.516, that has been approved by the department of social and health services. If the offense was pursuant to chapter 46.61 RCW, the report shall be forwarded to the department of licensing. If the offender is found to have an alcohol or drug problem that requires treatment, the offender shall complete treatment in a program approved by the department of social and health services under chapter 70.96A RCW. If the offender is found not to have an alcohol or drug problem that requires treatment, the offender shall complete a course in an information school approved by the department of social and health services under chapter 70.96A RCW. The offender shall pay all costs for any evaluation, education, or treatment required by this section, unless the offender is eligible for an existing program offered or approved by the department of social and health services.

(ii) For purposes of this section, "alcohol or drug-related traffic offense" means the following: Driving while under the influence as defined by RCW 46.61.502, actual physical control while under the influence as defined by RCW 46.61.504, vehicular homicide as defined by RCW 46.61.520(1)(a), vehicular assault as defined by RCW 46.61.522(1)(b), homicide by watercraft as defined by RCW 79A.60.050, or assault by watercraft as defined by RCW 79A.60.060.

(iii) This subsection (4)(b) does not require the department of social and health services to add new treatment or assessment facilities nor affect its use of existing programs and facilities authorized by law. [2009 c 214 § 3; 2009 c 28 § 11; 2008 c 231 § 9.]

Reviser's note: This section was amended by 2009 c 28 § 11 and by 2009 c 214 § 3, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Short title—2009 c 214: "This act shall be known as the Eryk Woodruff public safety act of 2009." [2009 c 214 § 1.]

Effective date—2009 c 214: "This act takes effect August 1, 2009." [2009 c 214 § 4.]

Effective date—2009 c 28: See note following RCW 2.24.040.

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW 9.94A.701.

Severability—2008 c 231: See note following RCW 9.94A.500.

9.94A.704 Community custody—Supervision by the department—Conditions. (1) Every person who is sentenced to a period of community custody shall report to and be placed under the supervision of the department, subject to RCW 9.94A.501.

(2)(a) The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of community custody based upon the risk to community safety.

(b) Within the funds available for community custody, the department shall determine conditions on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection (2)(b).

(3) If the offender is supervised by the department, the department shall at a minimum instruct the offender to:

(a) Report as directed to a community corrections officer;

(b) Remain within prescribed geographical boundaries;

(c) Notify the community corrections officer of any change in the offender's address or employment;

(d) Pay the supervision fee assessment; and

(e) Disclose the fact of supervision to any mental health or chemical dependency treatment provider, as required by RCW 9.94A.722.

(4) The department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(5) If the offender was sentenced pursuant to a conviction for a sex offense, the department may impose electronic monitoring. Within the resources made available by the department for this purpose, the department shall carry out any electronic monitoring using the most appropriate technology given the individual circumstances of the offender. As used in this section, "electronic monitoring" means the monitoring of an offender using an electronic offender tracking system including, but not limited to, a system using radio frequency or active or passive global positioning system technology.

(6) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court-imposed conditions.

(7)(a) The department shall notify the offender in writing of any additional conditions or modifications.

(b) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to the crime of conviction, the offender's risk of reoffending, or the safety of the community.

(8) The department may require offenders to pay for special services rendered including electronic monitoring, day reporting, and telephone reporting, dependent on the offender's ability to pay. The department may pay for these services for offenders who are not able to pay.

(9)(a) When a sex offender has been sentenced pursuant to RCW 9.94A.507, the department shall assess the offender's risk of recidivism and shall recommend to the board any additional or modified conditions based upon the offender's risk to community safety and may recommend affirmative conduct or electronic monitoring consistent with subsections (4) through (6) of this section.

(b) The board may impose conditions in addition to court-ordered conditions. The board must consider and may impose department-recommended conditions.

(c) By the close of the next business day, after receiving notice of a condition imposed by the board or the department, an offender may request an administrative hearing under rules adopted by the board. The condition shall remain in effect unless the hearing examiner finds that it is not reasonably related to any of the following:

(i) The crime of conviction;

(ii) The offender's risk of reoffending;

(iii) The safety of the community.

(d) If the department finds that an emergency exists requiring the immediate imposition of additional conditions in order to prevent the offender from committing a crime, the department may impose such conditions. The department may not impose conditions that are contrary to those set by the board or the court and may not contravene or decrease court-imposed or board-imposed conditions. Conditions imposed under this subsection shall take effect immediately after notice to the offender by personal service, but shall not remain in effect longer than seven working days unless approved by the board.

(10) In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function. [2009 c 375 § 6; 2009 c 28 § 12; 2008 c 231 § 10.]

Application—2009 c 375: See note following RCW 9.94A.501.

Effective date—2009 c 28: See note following RCW 2.24.040.

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW 9.94A.701.

Severability—2008 c 231: See note following RCW 9.94A.500.

9.94A.706 Community custody—Possession of firearms or ammunition prohibited. No offender sentenced to a term of community custody under the supervision of the department may own, use, or possess firearms or ammunition. Offenders who own, use, or are found to be in actual or constructive possession of firearms or ammunition shall be subject to the violation process and sanctions under RCW 9.94A.633, 9.94A.716, and 9.94A.737.

"Constructive possession" as used in this section means the power and intent to control the firearm or ammunition. "Firearm" as used in this section has the same definition as in RCW 9.41.010. [2008 c 231 § 11.]

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW 9.94A.701.

Severability—2008 c 231: See note following RCW 9.94A.500.

9.94A.707 Community custody—Commencement—Conditions. (1) Community custody shall begin: (a) Upon completion of the term of confinement; or (b) at the time of sentencing if no term of confinement is ordered.

(2) When an offender is sentenced to community custody, the offender is subject to the conditions of community custody as of the date of sentencing, unless otherwise ordered by the court. [2009 c 375 § 7; 2008 c 231 § 12.]

Application—2009 c 375: See note following RCW 9.94A.501.

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW 9.94A.701.

Severability—2008 c 231: See note following RCW 9.94A.500.

9.94A.708 Community custody—Mental health information—Access by department. (1) When an offender is under community custody, the community corrections officer may obtain information from the offender's mental health treatment provider on the offender's status with respect to evaluation, application for services, registration for services, and compliance with the supervision plan, without the offender's consent, as described under RCW 71.05.630.

(2) An offender under community custody who is civilly detained under chapter 71.05 RCW, and subsequently discharged or conditionally released to the community, shall be under the supervision of the department for the duration of his or her period of community custody. During any period of inpatient mental health treatment that falls within the period of community custody, the inpatient treatment provider and the supervising community corrections officer shall notify each other about the offender's discharge, release, and legal status, and shall share other relevant information. [2008 c 231 § 13.]

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW 9.94A.701.

Severability—2008 c 231: See note following RCW 9.94A.500.

9.94A.709 Community custody—Sex offenders—Conditions. (1) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions of community custody for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody.

(2) If a violation of a condition extended under this section occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040.

(3) If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition. [2008 c 231 § 14.]

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW 9.94A.701.

Severability—2008 c 231: See note following RCW 9.94A.500.

9.94A.714 Community custody—Violations—Immunity from civil liability for placing offenders on electronic monitoring. (1) If an offender has not completed his or her maximum term of total confinement and is subject to a third violation hearing pursuant to RCW 9.94A.737 for any violation of community custody and is found to have committed the violation, the department shall return the offender to total confinement in a state correctional facility to serve up to the remaining portion of his or her sentence, unless it is determined that returning the offender to a state correctional facility would substantially interfere with the offender's ability to maintain necessary community supports or to participate in necessary treatment or programming and would substantially increase the offender's likelihood of reoffending.

(2) The department may work with the Washington association of sheriffs and police chiefs to establish and operate

VOLUME 2
Titles 9 through 17

2012
REVISED CODE OF WASHINGTON

Published under the authority of chapter 1.08 RCW.

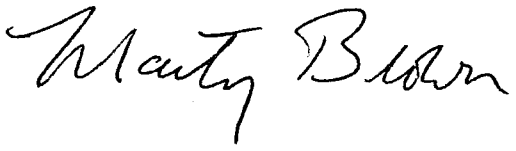
Containing all laws of a general and permanent nature through the 2012 2nd special session which adjourned April 11, 2012.

REVISED CODE OF WASHINGTON

2012 Edition

CERTIFICATE

The 2012 edition of the Revised Code of Washington, published officially by the Statute Law Committee, is, in accordance with RCW 1.08.037, certified to comply with the current specifications of the committee.



MARTY BROWN, Chair
STATUTE LAW COMMITTEE

(d) A felony violation of chapter 69.50 or 69.52 RCW, or an attempt, conspiracy, or solicitation to commit such a crime; or

(e) A felony violation of RCW 9A.44.132(1) (failure to register).

(2) If an offender is sentenced to a first-time offender waiver, the court may impose community custody as provided in RCW 9.94A.650. [2010 c 267 § 12; 2008 c 231 § 8.]

Application—2010 c 267: See note following RCW 9A.44.128.

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW 9.94A.701.

Severability—2008 c 231: See note following RCW 9.94A.500.

9.94A.703 Community custody—Conditions. When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

(1) **Mandatory conditions.** As part of any term of community custody, the court shall:

(a) Require the offender to inform the department of court-ordered treatment upon request by the department;

(b) Require the offender to comply with any conditions imposed by the department under RCW 9.94A.704;

(c) If the offender was sentenced under RCW 9.94A.507 for an offense listed in RCW 9.94A.507(1)(a), and the victim of the offense was under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection zone;

(d) If the offender was sentenced under RCW 9A.36.120, prohibit the offender from serving in any paid or volunteer capacity where he or she has control or supervision of minors under the age of thirteen.

(2) **Waivable conditions.** Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

(a) Report to and be available for contact with the assigned community corrections officer as directed;

(b) Work at department-approved education, employment, or community restitution, or any combination thereof;

(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;

(d) Pay supervision fees as determined by the department; and

(e) Obtain prior approval of the department for the offender's residence location and living arrangements.

(3) **Discretionary conditions.** As part of any term of community custody, the court may order an offender to:

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

(4) **Special conditions.**

(a) In sentencing an offender convicted of a crime of domestic violence, as defined in RCW 10.99.020, if the offender has a minor child, or if the victim of the offense for which the offender was convicted has a minor child, the court may order the offender to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

(b)(i) In sentencing an offender convicted of an alcohol or drug-related traffic offense, the court shall require the offender to complete a diagnostic evaluation by an alcohol or drug dependency agency approved by the department of social and health services or a qualified probation department, defined under RCW 46.61.516, that has been approved by the department of social and health services. If the offense was pursuant to chapter 46.61 RCW, the report shall be forwarded to the department of licensing. If the offender is found to have an alcohol or drug problem that requires treatment, the offender shall complete treatment in a program approved by the department of social and health services under chapter 70.96A RCW. If the offender is found not to have an alcohol or drug problem that requires treatment, the offender shall complete a course in an information school approved by the department of social and health services under chapter 70.96A RCW. The offender shall pay all costs for any evaluation, education, or treatment required by this section, unless the offender is eligible for an existing program offered or approved by the department of social and health services.

(ii) For purposes of this section, "alcohol or drug-related traffic offense" means the following: Driving while under the influence as defined by RCW 46.61.502, actual physical control while under the influence as defined by RCW 46.61.504, vehicular homicide as defined by RCW 46.61.520(1)(a), vehicular assault as defined by RCW 46.61.522(1)(b), homicide by watercraft as defined by RCW 79A.60.050, or assault by watercraft as defined by RCW 79A.60.060.

(iii) This subsection (4)(b) does not require the department of social and health services to add new treatment or assessment facilities nor affect its use of existing programs and facilities authorized by law. [2009 c 214 § 3; 2009 c 28 § 11; 2008 c 231 § 9.]

Reviser's note: This section was amended by 2009 c 28 § 11 and by 2009 c 214 § 3, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Short title—2009 c 214: "This act shall be known as the Eryk Woodruff public safety act of 2009." [2009 c 214 § 1.]

Effective date—2009 c 214: "This act takes effect August 1, 2009." [2009 c 214 § 4.]

Effective date—2009 c 28: See note following RCW 2.24.040.

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW 9.94A.701.

Severability—2008 c 231: See note following RCW 9.94A.500.

9.94A.704 Community custody—Supervision by the department—Conditions. (1) Every person who is sentenced to a period of community custody shall report to and be placed under the supervision of the department, subject to RCW 9.94A.501.

(2)(a) The department shall assess the offender's risk of reoffense and may establish and modify additional conditions

of community custody based upon the risk to community safety.

(b) Within the funds available for community custody, the department shall determine conditions on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection (2)(b).

(3) If the offender is supervised by the department, the department shall at a minimum instruct the offender to:

(a) Report as directed to a community corrections officer;

(b) Remain within prescribed geographical boundaries;

(c) Notify the community corrections officer of any change in the offender's address or employment;

(d) Pay the supervision fee assessment; and

(e) Disclose the fact of supervision to any mental health or chemical dependency treatment provider, as required by RCW 9.94A.722.

(4) The department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(5) If the offender was sentenced pursuant to a conviction for a sex offense, the department may impose electronic monitoring. Within the resources made available by the department for this purpose, the department shall carry out any electronic monitoring using the most appropriate technology given the individual circumstances of the offender. As used in this section, "electronic monitoring" means the monitoring of an offender using an electronic offender tracking system including, but not limited to, a system using radio frequency or active or passive global positioning system technology.

(6) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court-imposed conditions.

(7)(a) The department shall notify the offender in writing of any additional conditions or modifications.

(b) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to the crime of conviction, the offender's risk of reoffending, or the safety of the community.

(8) The department shall notify the offender in writing upon community custody intake of the department's violation process.

(9) The department may require offenders to pay for special services rendered including electronic monitoring, day reporting, and telephone reporting, dependent on the offender's ability to pay. The department may pay for these services for offenders who are not able to pay.

(10)(a) When a sex offender has been sentenced pursuant to RCW 9.94A.507, the department shall assess the offender's risk of recidivism and shall recommend to the board any additional or modified conditions based upon the offender's risk to community safety and may recommend affirmative conduct or electronic monitoring consistent with subsections (4) through (6) of this section.

(b) The board may impose conditions in addition to court-ordered conditions. The board must consider and may impose department-recommended conditions.

(c) By the close of the next business day, after receiving notice of a condition imposed by the board or the department, an offender may request an administrative hearing under rules adopted by the board. The condition shall remain in effect unless the hearing examiner finds that it is not reasonably related to any of the following:

(i) The crime of conviction;

(ii) The offender's risk of reoffending;

(iii) The safety of the community.

(d) If the department finds that an emergency exists requiring the immediate imposition of additional conditions in order to prevent the offender from committing a crime, the department may impose such conditions. The department may not impose conditions that are contrary to those set by the board or the court and may not contravene or decrease court-imposed or board-imposed conditions. Conditions imposed under this subsection shall take effect immediately after notice to the offender by personal service, but shall not remain in effect longer than seven working days unless approved by the board.

(11) In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function. [2012 1st sp.s. c 6 § 3; 2009 c 375 § 6; 2009 c 28 § 12; 2008 c 231 § 10.]

Effective date—2012 1st sp.s. c 6 §§ 1, 3 through 9, and 11 through 14: See note following RCW 9.94A.631.

Implementation--Application—2012 1st sp.s. c 6: See notes following RCW 9.94A.631.

Application—2009 c 375: See note following RCW 9.94A.501.

Effective date—2009 c 28: See note following RCW 2.24.040.

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW 9.94A.701.

Severability—2008 c 231: See note following RCW 9.94A.500.

9.94A.706 Community custody—Possession of firearms, ammunition, or explosives prohibited. (1) No offender sentenced to a term of community custody under the supervision of the department may own, use, or possess firearms, ammunition, or explosives. An offender's actual or constructive possession of firearms, ammunition, or explosives shall be reported to local law enforcement or local prosecution for consideration of new charges and subject to sanctions under RCW 9.94A.633 or 9.94A.737.

(2) For the purposes of this section:

(a) "Constructive possession" means the power and intent to control the firearm, ammunition, or explosives.

(b) "Explosives" has the same definition as in RCW 46.04.170.

(c) "Firearm" has the same definition as in RCW 9.41.010. [2012 1st sp.s. c 6 § 4; 2008 c 231 § 11.]

Effective date—2012 1st sp.s. c 6 §§ 1, 3 through 9, and 11 through 14: See note following RCW 9.94A.631.

Implementation—Application—2012 1st sp.s. c 6: See notes following RCW 9.94A.631.

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW 9.94A.701.

Severability—2008 c 231: See note following RCW 9.94A.500.

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AUG 25 2010

Department of Corrections
Seattle Intake/PSI Unit

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

~~SCOTTY~~ LEON MILLER
Scottye

Defendant.

No. 10-1-03032-4 KNT

JUDGMENT AND SENTENCE,
NON-FELONY – Count(s)
[ ] DEFERRING Imposition of Sentence/Probation
[X] SUSPENDING Sentence

The Prosecuting Attorney, the above-named defendant and counsel ~~GORDON HILL~~ Anna Brusanowski being present in Court, the defendant having been found guilty of the crime(s) charged in the amended information on 8/5/2010 by guilty plea and there being no reason why judgment should not be pronounced;

IT IS ADJUDGED that the defendant is guilty of the crime(s) of: COUNT I- DOMESTIC VIOLENCE MISDEMEANOR VIOLATION OF A COURT ORDER/ RCW 26.50.110(1)

IT IS ORDERED pursuant to RCW 9.95.200 and 9.95.210 that:
[ ] the imposition of sentence against the defendant is hereby **DEFERRED** for a period of _____ months from this date upon the following terms and conditions:

OR

[X] the defendant is sentenced to imprisonment in the King County Jail, Department of Adult Detention, for 12 months on each count, said term(s) to run [ ] concurrently [ ] consecutively with each other, and to run [ ] concurrently [ ] consecutively with [ ] count(s) _____ [ ] Cause No(s). _____ and the sentence (less any days of confinement imposed below) is hereby **SUSPENDED** upon the following terms and conditions:

(1) The defendant shall serve a term of confinement of 180 days [X] in the King County Jail, Department of Adult Detention, [ ] in King County Work/Education Release subject to conditions of conduct ordered this date, [ ] in King County Electronic Home Detention subject to conditions of conduct ordered this date, with credit for [X] 63 days served [ ] days as determined by the King County Jail, solely on this cause, to commence no later than _____. This term shall run [ ]concurrently [ ] consecutively with _____. This term shall run consecutive to any other term not specifically referenced in this order.

[redacted]

(2) The defendant shall be on probation under the supervision of the Washington State Department of Corrections and comply with the standard rules and regulations of supervision. Probation shall commence immediately but is tolled during any period of confinement. The defendant shall report for supervision within 72 hours of this date or release date if in custody. The length of probation shall be 24 months.

(3) Defendant shall pay to the clerk of this Court:

(a) [X] Restitution is not ordered;
[ ] Order of Restitution is attached;
[ ] Restitution to be determined at a restitution hearing on (Date)_____ at_____.m.;
[ ] Date to be set;
[ ] The defendant waives presence at future restitution hearing(s);

(b) $_____, Court costs;

(c) $500, Victim assessment, $500 for gross misdemeanors and $250 for misdemeanors;

(d) $_____, Recoupment for attorney's fees to King County Public Defense Programs;

(e) $_____, Fine; $_____ of this fine is suspended upon the terms and conditions herein;

(f) TOTAL financial obligation: $500;

The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: [ ] Not less than $_____ per month; [X] On a schedule established by the Department of Corrections if it has active supervision of the defendant, or by the county clerk.

(4) [ ] The defendant shall complete _____ community service hours [ ] at a rate of not less than _____ hours per month [ ] to be completed by (Date) _____. If the defendant is not supervised by the Dept. of Corrections, community service will be monitored by the Helping Hands Program.

(5) [ ] The defendant shall not purchase, possess, or use any [ ] alcohol [ ] controlled substance (without a lawful prescription). The defendant shall submit to urinalysis and/or breath testing as required by the Department of Corrections and submit to search of person, vehicle or home by a Community Corrections Officer upon reasonable suspicion of violation;

(6) [ ] The defendant shall obtain a substance abuse evaluation and follow all treatment recommendations;_____

_____

(7) [X] The defendant shall enter into, make reasonable progress and successfully complete a state certified domestic violence treatment program; (within 30 days of release)

_____

(8) [X] The defendant shall have no contact with: Tricia Patricelli (court will reconsider upon substantial compliance with treatment)

(9) [ ] The defendant shall have no unsupervised contact with minors.

(10) [ ] The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in Appendix G (for harassment, stalking, assault in the fourth degree with sexual motivation, communicating with a minor for immoral purposes, failure to register, custodial sexual misconduct in the second degree, patronizing a prostitute, sexual misconduct with a minor in the second degree, violation of a sexual assault protection order, or any other offense requiring registration under RCW 9A.44.130).

(11) [ ] The defendant shall register as a sex offender.

(12) The defendant shall commit no criminal offenses.

(13) [ ] Additional conditions of probation are: _____

_____

_____

_____

(14) Additional conditions are attached to and incorporated as Appendix _____.

Date: August 20, 2010

Judge, King County Superior Court
Print Name: 8/20/10

Presented by:

Deputy Prosecuting Attorney, WSBA # 32800
Print Name: Jennifer L. Worley

Form Approved for Entry:

Attorney for Defendant, WSBA # 24909
Print Name: ANNA BRUSANOWSKA

Defendant's current address:

4412 W. Titus Street
Kent, WA, 98032

DOC

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

Vs.

SCOTTYE LEON MILLER,

Defendant,

No. 12-1-00643-8 KNT

JUDGMENT AND SENTENCE
FELONY (FJS)

I. HEARING

1.1 The defendant, the defendant's lawyer, KRISTEN MURRAY, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Tricia Patricelli

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:
2.1 CURRENT OFFENSE(S): The defendant was found guilty on 05/03/2012 by plea of:

Count No.: I Crime: FELONY HARASSMENT- DOMESTIC VIOLENCE
RCW 9A.46.020(1),(2) Crime Code: 00500
Date of Crime: 12/30/2011 Incident No:

Count No.: II Crime: SEE NON-FELONY J&S
RCW Crime Code:
Date of Crime: Incident No.

Count No.: Crime:
RCW Crime Code:
Date of Crime: Incident No.

Count No.: Crime:
RCW Crime Code:
Date of Crime: Incident No.

[ ] Additional current offenses are attached in Appendix A

SPECIAL VERDICT or FINDING(S):
(a) [ ] While armed with a firearm in count(s) _____ RCW 9.94A.533(3).
(b) [ ] While armed with a deadly weapon other than a firearm in count(s) _____ RCW 9.94A.533(4).
(c) [ ] With a sexual motivation in count(s) _____ RCW 9.94A.835.
(d) [ ] A V.U.C.S.A offense committed in a protected zone in count(s) _____ RCW 69.50.435.
(e) [ ] Vehicular homicide [ ]Violent traffic offense [ ]DUI [ ] Reckless [ ]Disregard.
(f) [ ] Vehicular homicide by DUI with _____ prior conviction(s) for offense(s) defined in RCW 46.61.5055, RCW 9.94A.533(7).
(g) [ ] Non-parental kidnapping or unlawful imprisonment with a minor victim. RCW 9A.44.128, .130.
(h) [X] Domestic violence as defined in RCW 10.99.020 was pled and proved for count(s) I.
(i) [ ] Current offenses encompassing the same criminal conduct in this cause are count(s) _____ RCW 9.94A.589(1)(a).
(j) [ ] Aggravating circumstances as to count(s) _____; _____

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):
[X] Criminal history is attached in Appendix B.
[ ] One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	4	III			12+ TO 16 MONTHS	5 YRS AND/OR $10,000
Count						
Count						
Count						

[ ] Additional current offense sentencing data is attached in Appendix C.

2.5 EXCEPTIONAL SENTENCE
[ ] Findings of Fact and Conclusions of Law as to sentence above the standard range:
Finding of Fact: The jury found or the defendant stipulated to aggravating circumstances as to Count(s) _____.
Conclusion of Law: These aggravating circumstances constitute substantial and compelling reasons that justify a sentence above the standard range for Count(s) _____. [ ] The court would impose the same sentence on the basis of any one of the aggravating circumstances.

[ ] An exceptional sentence above the standard range is imposed pursuant to RCW 9.94A.535(2) (including free crimes or the stipulation of the defendant). Findings of Fact and Conclusions of Law are attached in Appendix D.

[ ] An exceptional sentence below the standard range is imposed. Findings of Fact and Conclusions of Law are attached in Appendix D.

The State [ ] did [ ] did not recommend a similar sentence (RCW 9.94A.480(4)).

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.
[ ] The Court DISMISSES Count(s) _____.

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

[ ] Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.

[ ] Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(5), sets forth those circumstances in attached Appendix E.

[ ] Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.

[ ] Date to be set.

[ ] Defendant waives presence at future restitution hearing(s).

[√] Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of $500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

(a) [ ] $_____, Court costs (RCW 9.94A.030, RCW 10.01.160); [ ] Court costs are waived;

(b) $100 DNA collection fee (RCW 43.43.7541)(mandatory for crimes committed after 7/1/02);

(c) [ ] $_____, Recoupment for attorney's fees to King County Public Defense Programs (RCW 9.94A.030); [ ] Recoupment is waived;

(d) [ ] $_____, Fine; [ ] $1,000, Fine for VUCSA [ ] $2,000, Fine for subsequent VUCSA (RCW 69.50.430); [ ] VUCSA fine waived;

(e) [ ] $_____, King County Interlocal Drug Fund (RCW 9.94A.030); [ ] Drug Fund payment is waived;

(f) [ ] $_____, $100 State Crime Laboratory Fee (RCW 43.43.690); [ ] Laboratory fee waived;

(g) [ ] $_____, Incarceration costs (RCW 9.94A.760(2)); [ ] Incarceration costs waived;

(h) [ ] $_____, Other costs for: _____

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: $ 600. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: [ ] Not less than $_____ per month; [√] On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

[√] Court Clerk's trust fees are waived.

[√] Interest is waived except with respect to restitution.

4.4 (a) **PRISON-BASED** SPECIAL DRUG OFFENDER SENTENCING ALTERNATIVE (DOSA)(for sentences imposed after 10-1-05) : The Court finds the defendant eligible pursuant to RCW 9.94A.660 and, having reviewed an examination report and concluded that a DOSA sentence is appropriate, waives imposition of sentence within the standard range and sentences the defendant as follows:

The defendant is sentenced to the following term(s) of confinement in the custody of the Dept. of Corrections (DOC) to commence [ ] immediately; [ ] by _____ at _____ a.m./p.m.:

_____ months (if crime after 6/6/06, 12 month minimum) on Count No. _____;

_____ months (if crime after 6/6/06, 12 month minimum) on Count No. _____;

_____ months (if crime after 6/6/06, 12 month minimum) on Count No. _____;

The above term(s) of confinement represents one-half of the midpoint of the standard range or, if the crime occurred after 6-6-06, twelve months if that is greater than one-half of the midpoint.

The terms imposed herein shall be served concurrently.
The term(s) imposed herein shall run [ ] CONSECUTIVE. [ ] CONCURRENT to cause No(s) _____

The term(s) imposed herein shall run [ ] CONSECUTIVE [ ] CONCURRENT to any previously imposed commitment not referred to in this judgment.

Credit is given for time served in King County Jail or EHD solely for confinement under this cause number pursuant to RCW 9.94A.505(6): [ ] _____ day(s) or [ ] days determined by the King County Jail.
[ ] Credit is given for days determined by the King County Jail to have been served in the King County Supervised Community Option (Enhanced CCAP) solely under this cause number.
[ ] The court authorizes earned early release credit consistent with the local correctional facility standards for days spent in the King County Supervised Community Option (Enhanced CCAP).
[ ] Jail term is satisfied; defendant shall be released under this cause.

While incarcerated in the Department of Corrections the defendant shall undergo a comprehensive substance abuse assessment and receive, within available resources, appropriate treatment services.

COMMUNITY CUSTODY: The court further imposes _____ months, one-half of the midpoint of the standard range, as a term of community custody during which time the defendant shall comply with the instructions, rules and regulations promulgated by the Department for conduct of the defendant during community custody; shall perform affirmative acts necessary to monitor compliance, shall obey all laws and comply with the following mandatory statutory requirements:

(1) The defendant shall undergo and successfully complete a substance abuse program approved by the Division of Alcohol and Substance Abuse of the Dept. of Social and Health Services;
(2) The defendant shall not use illegal controlled substances and shall submit to urinalysis or other testing to monitor compliance.

NON-COMPLIANCE. RCW 9.94A.660(5): If the defendant fails to complete the Department's special drug offender sentencing alternative program or is administratively terminated from the program, he/she shall be reclassified by the Department to serve the balance of the unexpired term of sentence. If the defendant fails to comply with the conditions of supervision as defined by the Department, he/she shall be sanctioned. Sanctions may include reclassification by the Department to serve the balance of the unexpired term of sentence.

The court further imposes an additional term of Community Custody of 12 months upon failure to complete or administrative termination from DOSA program if any of these offenses is a crime against a person (RCW 9.94A.411) or a felony violation of RCW 69.50/52. The defendant in this event shall comply with the conditions of Community Custody set forth in section 4.7 herein.

4.4 (b) **RESIDENTIAL TREATMENT-BASED** SPECIAL DRUG OFFENDER SENTENCING ALTERNATIVE (DOSA)(for sentences imposed after 10-1-05) (available if the midpoint of the standard range is 24 months or less): The Court finds the defendant eligible pursuant to RCW 9.94A.660 and, having reviewed an examination report and concluded that a DOSA sentence is appropriate, waives imposition of sentence within the standard range and sentences the defendant on Count(s) I as follows:

The defendant shall serve 24 months in community custody under the supervision of the DOC, on the condition that the defendant enters and remains in residential chemical dependency treatment certified under RCW Ch. 70.96 for 3 to 6 (between 3 and 6) months. The DOC shall make chemical dependency assessment and treatment services available during the term of community custody, within available resources.

Pending DOC placement in residential chemical dependency treatment, the defendant is ordered to attend a DOC day reporting center and follow all applicable rules. The defendant shall report to DOC to begin the DOC day reporting program within 24 hours of release.

The defendant shall comply with the treatment and other conditions proposed in the examination report, as mandated by RCW 9.94A.665(2)(a). Frequency and length of treatment and monitoring plan are specified in the EXAMINATION REPORT ATTACHED AS APPENDIX 1.

A progress hearing is set in this court during the residential treatment, for 8/24/2012 (90 days from sentencing date). Additional progress hearings may be set.

A treatment termination hearing is set in this court three months before the expiration of the community custody term, for Feb. 21, 2014 (date).

Before the progress hearing and the treatment termination hearing, the treatment provider and the DOC shall submit written reports to the court and parties regarding the defendant's compliance with treatment and monitoring requirements, including recommendations regarding termination from treatment.

NON-COMPLIANCE. RCW 9.94A.665(4): At the progress hearing or treatment termination hearing, the court may modify the conditions of community custody, authorize termination of community custody status on expiration of the community custody term, or impose a term of total confinement equal to one-half the midpoint of the standard range, along with a term of community custody.

4.5 ADDITIONAL COMMUNITY CUSTODY CONDITIONS OF DOSA SENTENCE: The court further imposes the following non-mandatory conditions of Community Custody (if checked):

[X] The defendant shall not use illegal controlled substances and shall submit to urinalysis or other testing to monitor compliance.
[X] The defendant shall not use any alcohol or controlled substances without prescription and shall undergo testing to monitor compliance.
[ ] Devote time to a specific employment or training.
[ ] Remain within prescribed geographical boundaries and notify the court or the community corrections officer of any change in the offender's address or employment.
[X] Report as directed to a community corrections officer.
[X] Pay all court ordered legal financial obligations.
[ ] Perform _____ community restitution hours on a schedule set by DOC.
[ ] Stay out of designated areas as follows: _____

[ ] Other conditions as set forth in APPENDIX F.

4.6 ADDITIONAL CONFINEMENT: The court may order the defendant to serve a term of total confinement within the standard range at any time during the period of community custody if the defendant violates the conditions of sentence or if the defendant is failing to make satisfactory progress in treatment.

4.7 CONDITIONS OF COMMUNITY CUSTODY IMPOSED AFTER TERMINATION OF DOSA:

[X] The defendant shall not use illegal controlled substances and shall submit to urinalysis or other testing to monitor compliance.

[X] The defendant shall not use any alcohol or controlled substances without prescription and shall undergo testing to monitor compliance.

[ ] Remain within prescribed geographical boundaries and notify the court or the community corrections officer of any change in the offender's address or employment.

[X] Report as directed to a community corrections officer.

[X] Pay all court ordered legal financial obligations.

[ ] Stay out of designated areas as follows: _____

_____

[ ] Other conditions: _____

_____

_____

_____

4.8 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G.

[ ] HIV TESTING: For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in APPENDIX G.

4.9 [ ] OFF-LIMITS ORDER: The defendant, having been found to be a known drug trafficker, shall neither enter nor remain in the protected against drug trafficking area(s) as described in APPENDIX I during the term of community supervision. APPENDIX I is attached and incorporated by reference into this Judgment and Sentence.

5.0 [X] NO CONTACT: For the maximum term of 5 years, defendant shall have no contact with Tesca Patricelli per the separate NCO.

Date: May 18, 2012

JUDGE
Print Name: CAYCE

Presented by:

Deputy Prosecuting Attorney, WSBA# 41498
Print Name: David Baker

Approved as to form:

Attorney for Defendant, WSBA # 36008
Print Name: Kristen Murray

FINGERPRINTS

RIGHT HAND FINGERPRINTS OF:

SCOTTYE LEON MILLER

DEFENDANT'S SIGNATURE: X Scottye L. Miller

DEFENDANT'S ADDRESS: ABHS Chehalis, WA

DATED: 5/18/82

ATTESTED BY: BARBARA MINER, SUPERIOR COURT CLERK

BY: _____ DEPUTY CLERK

JUDGE, KING COUNTY SUPERIOR COURT

CERTIFICATE

I, _____, CLERK OF THIS COURT, CERTIFY THAT THE ABOVE IS A TRUE COPY OF THE JUDGEMENT AND SENTENCE IN THIS ACTION ON RECORD IN MY OFFICE.

DATED: _____

_____ CLERK

BY: _____ DEPUTY CLERK

OFFENDER IDENTIFICATION

S.I.D. NO. WA20182175

DOB: MAY 24, 1962

SEX: M

RACE: B

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. SCOTTYE LEON MILLER, Defendant.	No. 12-1-00643-8 KNT JUDGMENT AND SENTENCE APPENDIX H COMMUNITY CUSTODY

The Defendant shall comply with the following conditions of community custody, effective as of the date of sentencing unless otherwise ordered by the court.

1) Report to and be available for contact with the assigned community corrections officer as directed;
2) Work at Department of Corrections-approved education, employment, and/or community restitution;
3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
4) Pay supervision fees as determined by the Department of Corrections;
5) Receive prior approval for living arrangements and residence location; and
6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.706)
7) Notify community corrections officer of any change in address or employment;
8) Upon request of the Department of Corrections, notify the Department of court-ordered treatment;
9) ~~Remain within geographic boundaries, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.~~

[✓] The defendant shall not consume any alcohol.
[ ] Defendant shall have no contact with: _____

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: _____

[ ] The defendant shall participate in the following crime-related treatment or counseling services: _____

[ ] The defendant shall comply with the following crime-related prohibitions: _____

[ ] _____

[ ] _____

Other conditions may be imposed by the court or Department during community custody.

Community Custody shall begin upon completion of the term(s) of confinement imposed herein, or at the time of sentencing if no term of confinement is ordered. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions and may issue warrants and/or detain defendants who violate a condition.

Date: 5/18/12

JUDGE

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. SCOTTYE LEON MILLER, Defendant.	No. 12-1-00643-8 KNT JUDGMENT AND SENTENCE, NON-FELONY – Count(s) II [ ] DEFERRING Imposition of Sentence/Probation [✓] SUSPENDING Sentence SEE FELONY J&S-COUNT I

The Prosecuting Attorney, the above-named defendant and counsel KRISTEN MURRAY being present in Court, the defendant having been found guilty of the crime(s) charged in the information on 05/03/2012 by guilty plea and there being no reason why judgment should not be pronounced;

IT IS ADJUDGED that the defendant is guilty of the crime(s) of: COUNT II: ASSAULT IN THE FOURTH DEGREE-DOMESTIC VIOLENCE/ RCW 9A.36.041

[X] For the crimes charged in Counts II, domestic violence (as defined in RCW 10.99.020) was pled and proved.

IT IS ORDERED pursuant to RCW 9.95.200 and 9.95.210 that:

[ ] the imposition of sentence against the defendant is hereby **DEFERRED** for a period of _____ months from this date upon the following terms and conditions:

OR

[✓] the defendant is sentenced to imprisonment in the King County Jail, Department of Adult Detention, for 364 days on each count (maximum 364 days for gross misdemeanor), said term(s) to run [ ] concurrently [ ] consecutively with each other, and to run [✓] concurrently [ ] consecutively with [✓] count(s) I [ ] Cause No(s). _____ and the sentence (less any days of confinement imposed below) is hereby **SUSPENDED** upon the following terms and conditions: sufficient days to hold the defendant in custody

(1) The defendant shall serve a term of confinement of _____ with 5/23/12 at [✓] in the King County Jail, Department of Adult Detention, [ ] in King County Work/Education Release subject to conditions of conduct ordered this date, [ ] in King County Electronic Home Detention subject to conditions of conduct ordered this date, with credit for [ ] _____ days served [✓] days as determined by the King County Jail, solely on this cause, to commence no later than _____. This term shall run [ ] concurrently [ ] consecutively with _____. This term shall run consecutive to any other term not specifically referenced in this order.

(2) [✓] The defendant shall serve 24 months of probation under the supervision of the Washington State Department of Corrections (DOC) and comply with the standard rules and regulations of supervision. Probation

The defendant is to be released by 9:00am on 5/23/12.

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shall commence immediately but is tolled during any period of confinement. The defendant shall report for supervision within 72 hours of this date or release date if in custody. If DOC declines to supervise, the defendant shall be on unsupervised probation.

[ ] The defendant shall be on unsupervised probation for _____ months, subject to the conditions of this sentence. [ ] A review hearing is set for _____ at _____ a.m./p.m. in this courtroom.

For the following crimes (committed on or after 8/1/2009), probation is mandatory (but DOC will not supervise convictions after 8/1/2011): assault in the fourth degree or violation of a domestic violence court order pursuant to RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.50.110, 26.52.070, or 74.34.145, if the defendant has a prior conviction for one or more of the following: (a) a violent offense; (b) a sex offense; (c) a crime against a person as defined in RCW 9.94A.411; (d) assault in the fourth degree; or (e) violation of a domestic violence court order. Ch. 40, Laws of 2011 Special Session, §3.

For the following crimes, probation may be ordered and if probation is ordered, DOC supervision is mandatory: (a) sexual misconduct with a minor in the second degree, custodial sexual misconduct in the second degree, communication with a minor for immoral purposes, or failure to register pursuant to RCW 9A.44.130; (b) a repetitive domestic violence offense where domestic violence was pled and proven after 8/1/2011, if the defendant has a prior conviction for either a felony domestic violence offense or a repetitive domestic violence offense, where domestic violence was pled and proven after 8/1/2011. Ch. 40, Laws of 2011 Special Session, §2(1).

DOC will not supervise any other nonfelony probation. Ch. 40, Laws of 2011 Special Session, §2(5).

(3) Defendant shall pay to the clerk of this Court:

(a) [ ] Restitution is not ordered;
[ ] Order of Restitution is attached;
[ ] Restitution to be determined at a restitution hearing on (Date)_____ at _____ a.m.;
[ ] Date to be set;
[ ] The defendant waives presence at future restitution hearing(s);

(b) $_____, Court costs;

(c) $_____, Victim assessment, $500 for gross misdemeanors and $250 for misdemeanors (mandatory);

(d) [ ] $100 DNA collection fee (RCW 43.43.7541)(mandatory for crimes listed in paragraph 12);

(e) $_____, Recoupment for attorney's fees to King County Public Defense Programs;

(f) $_____, Fine; $_____ of this fine is suspended upon the terms and conditions herein;

(g) **TOTAL financial obligation:** See felony J+S;

The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: [ ] Not less than $_____ per month; [ ] On a schedule established by DOC if it has active supervision of the defendant, or by the county clerk. Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

(4) [ ] The defendant shall complete _____ community service hours [ ] at a rate of not less than _____ hours per month [ ] to be completed by (Date) _____. If DOC supervision is not ordered, this will be monitored by [ ] the Helping Hands Program [ ] this court.
[ ] A review hearing is set on _____, 20____, at _____ a.m./ p.m. in this courtroom.

(5) [ ] The defendant shall complete _____ days of Community Work Program (Work Crew).

(6) [ ] The defendant shall attend the King County Supervised Community Option (Enhanced CCAP) subject to

conditions of conduct ordered this date:

[ ] For a period of _____ days.

[ ] While in Work/ Education Release.

(7) [ ] The defendant shall not purchase, possess, or use any [ ] alcohol [ ] controlled substance (without lawful prescription). The defendant shall submit to urinalysis and breath testing as required by DOC and submit to search of person, vehicle or home by a Community Corrections Officer upon reasonable suspicion of violation;

(8) [ ] The defendant shall obtain a substance abuse evaluation and follow all treatment recommendations;_____

(9) [ ] The defendant shall enter into, make reasonable progress and successfully complete a state certified domestic violence treatment program;_____

(10) [X] The defendant shall have no contact with: Tricia Paticelli per the NCO

(11) [ ] The defendant shall have no unsupervised contact with minors.

(12) [ ] The defendant shall have a biological sample collected for DNA identification analysis and shall fully cooperate in the testing, as ordered in Appendix G (for harassment, stalking, assault in the fourth degree with sexual motivation, communicating with a minor for immoral purposes, failure to register, custodial sexual misconduct in the second degree, patronizing a prostitute, sexual misconduct with a minor in the second degree, violation of a sexual assault protection order, or any other offense requiring registration under RCW 9A.44.130).

(13) [ ] The defendant shall register as a sex offender.

(14) The defendant shall commit no criminal offenses.

(15) [X] Additional conditions of probation are: abide by conditions on Count I (Residential DOSA)

(16) Additional conditions are attached to and incorporated as Appendix _____

Date: May 18, 2012

Judge, King County Superior Court
Print Name: CAYCE

Presented by:

Deputy Prosecuting Attorney, WSBA # 41997
Print Name: David Sobel

Defendant's current address:
ABHS - Chehalis WA

Form Approved for Entry:

Attorney for Defendant, WSBA # 31000
Print Name: Kirsten Murray

Non-Felony
Revised 9/2011

90040144

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	No. 12-1-00643-8 KNT
vs.	ORDER REVOKING RESIDENTIAL DOSA
SCOTTYE LEON MILLER, Defendant,	Clerks Action Required

On July 27, 2012, the Court presided over a Review Hearing. Present were the following:

[x] The Defendant (in person/by phone)
[x] The Defendant's lawyer: Jamie Kvistad
[x] The Deputy Prosecuting Attorney: Bradley Bowen
[ ] The Community Corrections Officer (in person/by phone)_____
[ ] Other _____

The Court considered:

[ ] Dept. of Corrections report dated:
[ ] Oral statements from the Defendant
[ ] Argument of Counsel
[ ] Other: _____

FINDINGS

[ ] The court continues this hearing to _____. All issues are reserved.

Daniel Satterberg, Prosecuting Atty.
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

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[ ] The defendant volunteers revocation of his/her DOSA sentence.

[X] The court finds that the defendant has violated the requirements or conditions of the DOSA sentence as follows:

[ ] Failing to report to DOC as ordered.
[ ] Failing to report to treatment as ordered.
[ ] Failing to comply with or complete treatment as ordered.
[ ] Failing to submit to urinalysis or other testing to monitor compliance.
[ ] Using alcohol or controlled substance without prescription.
[ ] Failing to appear at a hearing on _____
[X] Other Defendant was discharged from ABHS

[ ] The court finds that the following allegations have not been proven:

[ ] _____
[ ] _____
[ ] _____

COMMITMENT ORDER

The DOSA sentence is hereby revoked.

[ ] Pursuant to RCW 9.94A.664 (4)(c), the court imposes a term of total confinement equal to one-half the midpoint of the standard range followed by a term of community custody under RCW 9.94A.701.

Count 1 standard range ____ to ____ months
Count 2 standard range ____ to ____ months
Count 3 standard range ____ to ____ months

The defendant shall serve ____ months of total confinement on count 1, ____ months of total confinement on count 2, and ____ months of total confinement on count 3. Confinement on counts ____ and ____ are to be served concurrently unless otherwise specified.

The defendant shall serve a term of community custody of:

____ 12 months (for "crimes against person" (RCW 9.94A.411)) under RCW 9.94A.701(3)(a)
____ 12 months (for violations of RCW chapter 69.50 or chapter 69.52) under RCW 9.94A.701(3)(c)

Daniel Satterberg, Prosecuting Atty.
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

[X] Pursuant to RCW 9.94A.660(7)(c), the court orders the defendant to serve a term of total confinement within the standard range of the defendant's current offense.

Count 1 standard range 12 months and a day to 16 months

The defendant shall serve 12 MONTHS AND ONE DAY months of total confinement on count 1.

[ ] The defendant shall serve a term of community custody of:

____ 12 months (for "crimes against person" (RCW 9.94A.411)) under RCW 9.94A.701(3)(a)
____ 12 months (for violations of RCW chapter 69.50 or chapter 69.52) under RCW 9.94A.701(3)(c)

[X] There is no community custody following the term of total confinement.

OTHER

The defendant is to receive credit for this booking and any time previously served in custody under this/these cause number(s), as determined by the Department of Corrections. RCW 9.94A.660(7)(d). The defendant is to also receive credit for days spent in inpatient treatment.

DONE IN OPEN COURT this 27 day of July, 2012.

JUDGE

Deputy Prosecuting Attorney, WSBA #41765

Attorney for Defendant, WSBA #

Defendant

Daniel Satterberg, Prosecuting Atty.
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

21698121

ISSUED

FILED
KING COUNTY, WASHINGTON
MAY 18 2012
SUPERIOR COURT CLERK
BY STEPHANIE WALTON
DEPUTY

Superior Court of Washington
for the County of King

No. 12-1-00643-8 KNT

State of Washington
Plaintiff

vs. Scottie Leon Miller
Defendant (First, Middle, Last Name)

☐ Pre-Trial ☑ Post Conviction
☑ Replacement Order (paragraph 10)

Domestic Violence No-Contact Order

(clj=NOCON, Superior cts =ORNC)
Clerk's action required: Para 9

No-Contact Order

1. Protected Person's Identifiers:

Tricia Patricelli
Name (First, Middle, Last)

9-4-1979 F W
DOB Gender Race

If a minor, use initials instead of name, and complete a Law Enforcement Information Sheet (LEIS).

Defendant's Identifiers:

Date of Birth	
5-24-1982	
Gender	Race
M	B

2. Defendant:
A. shall not cause, attempt, or threaten to cause bodily injury to, assault, sexually assault, harass, stalk, or keep under surveillance the protected person.
B. shall not contact the protected person, directly, indirectly, in person or through others, by phone, mail, or electronic means, except for mailing or service of process of court documents through a third party, or contact by the defendant's lawyers.
C. shall not knowingly enter, remain, or come within 1000 feet (1,000 feet if no distance entered) of the protected person's residence, school, workplace, other: Person of
D. other: Except the defendant may have telephonic Contact with the the protected person and may be visited by the protected person while in Custody and in treatment after the Black out Period. MC

3. Firearms and Weapons, Defendant:
☐ shall not obtain or possess a firearm, other dangerous weapon or concealed pistol license. (Pre-Trial, RCW 9.41.800. See findings in paragraph 7, below.)
☐ shall not obtain, own, possess or control a firearm. (Post Conviction or Pre-Trial, RCW 9.41.040.)
☐ shall immediately surrender all firearms and other dangerous weapons within the defendant's possession or control and any concealed pistol license to the following law enforcement agency: _____ (Pre-Trial Order, RCW 9.41.800.)

4. This no-contact order expires on: May 18, 2017. Five years from today if no date is entered.

Warning: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 26.50 RCW AND WILL SUBJECT A VIOLATOR TO ARREST; ANY ASSAULT, DRIVE-BY SHOOTING, OR RECKLESS ENDANGERMENT THAT IS A VIOLATION OF THIS ORDER IS A FELONY. You can be arrested even if the person protected by this order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid violating the order's provisions. Only the court can change the order. (Additional warnings on page 2 of this order.)

21698121

Findings of Fact

5. Based upon the record both written and oral, the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense, and the court issues this Domestic Violence No-Contact Order under chapter 10.99 RCW to prevent possible recurrence of violence.

6. The court further finds that the defendant's relationship to a person protected by this order is an ☑ intimate partner (former/current spouse; parent of common child; former/current dating; or former/current cohabitants) or ☐ Other family member as defined by Ch. 10.99 RCW: _____.

7. ☐ (Pretrial Order) For crimes not defined as a serious offense, the court makes the following mandatory findings pursuant to RCW 9.41.800: ☐ The defendant used, displayed, or threatened to use a firearm or other dangerous weapon in a felony. ☐ The defendant is ineligible to possess a firearm due to a prior conviction pursuant to RCW 9.41.040; or ☐ Possession of a firearm or other dangerous weapon by the defendant presents a serious and imminent threat to public health or safety, or to the health or safety of any individual.

Additional Warnings to Defendant. This order does not modify or terminate any order entered in any other case. The defendant is still required to comply with other orders.

Willful violation of this order is punishable under RCW 26.50.110. State and federal firearm restrictions apply. 18 U.S.C. § 922(g)(8)(9); RCW 9.41.040.

Pursuant to 18 U.S.C. § 2265, a court in any of the 50 states, the District of Columbia, Puerto Rico, any United States territory, and any tribal land within the United States shall accord full faith and credit to the order.

Additional Orders

8. ☐ Civil standby: The appropriate law enforcement agency shall, at a reasonable time and for a reasonable duration, assist the defendant in obtaining personal belongings located at: _____

9. The clerk of the court shall forward a copy of this order on or before the next judicial day to: Kent (11-16041) ☐ County Sheriff's Office ☑ Police Department where the case is filed, which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

10. ☐ This order replaces all prior no-contact orders protecting the same person issued under this cause number.

Dated: May 18, 2012 ☑ In open court with the defendant present.

_____
Judge/ Pro Tem/Court Commissioner

Presented by: _____
Deputy Prosecuting Attorney, WSBA# 41998

I acknowledge receipt of this order: _____ DATE: 5/18/12
(Signature of Defendant)

I am a certified or registered interpreter or found by the court to be qualified to interpret in the _____ language, which the defendant understands. I translated this order for the defendant from English into that language.

Signed at (city) _____, (state) _____, on (date) _____
Interpreter: _____ print name: _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CATHY HARPER, individually, as Personal Representative of the ESTATE OF TRICIA PATRICELLI, as Guardian ad Litem for KHALANI MICHAEL, a minor child, and as Guardian ad Litem for NIYERRAH MICHAEL, a minor child, Appellant, v. STATE OF WASHINGTON; WASHINGTON DEPARTMENT OF CORRECTIONS, a governmental entity, Respondents, RHONDA FREELAND and JOHN DOE FREELAND, and their marital community Defendants.	DIVISION ONE No. 76008-4-I PUBLISHED OPINION FILED: December 4, 2017

DWYER, J. — Cathy Harper, personal representative of the estate of Tricia Patricelli, appeals from the trial court's order granting summary judgment to the Department of Corrections (DOC) and dismissing her lawsuit. On appeal, Harper contends that the trial court erred because genuine issues of material fact exist

as to whether DOC breached its take charge duty owed toward Patricelli in its supervision of Scottye Miller.

We conclude that genuine issues of material fact remain for trial as to whether DOC exercised less than slight care in its supervision of Miller. Accordingly, we reverse.

I

DOC was assigned to supervise Miller during his term of community placement to begin on October 15, 2012. Prior to this term of community placement, Miller had a lengthy criminal record, much of it involving crimes of domestic violence against Patricelli, Harper's daughter. Specifically, Miller had been convicted of 4 domestic violence felonies, 2 of which were against Patricelli, and 18 domestic violence misdemeanors, 4 of which were against Patricelli.

In addition, multiple no-contact orders had been issued against Miller, barring him from interacting with Patricelli. In the past, Miller had repeatedly violated these no-contact orders and lied to his community corrections officers when asked whether he was residing with Patricelli.

Upon his release from incarceration on October 15, Miller was placed under the supervision of DOC community corrections officer Rhonda Freeland. At the time of his release, Miller was to be supervised by DOC as a misdemeanor domestic violence offender.[1] A no-contact order in place at the time of Miller's

[1] Miller's misdemeanant supervision was in part due to a prior conviction for violation of a no-contact order prohibiting him from contacting Patricelli.

release effectively prohibited him from having physical contact with Patricelli but permitted him to have telephone contact with her.[2]

On October 16, Miller reported to Freeland at her Auburn office. While there, Miller was subjected to a urinalysis test to monitor his drug and alcohol use. The test results were negative, indicating that Miller had not used drugs or alcohol since his release from incarceration the day before.

Pursuant to DOC policy, Freeland asked Miller where he would be residing. Miller indicated that he was homeless but that he would be staying with his mother, Leola Benson, as well as with nearby relatives. Freeland required that Miller report to her office weekly and complete a housing report log, a form document listing where he resided each night to be verified by the signature of the person with whom he had resided. Because Miller was subject to community placement pursuant to a misdemeanor conviction—rather than a felony conviction—DOC's policy did not require that Miller establish an approved address upon his release from incarceration.

Over the next two days, Freeland made several telephone calls. First, she contacted Miller's previous mental health counselor, who told her that Miller would be required to sign up for mental health services and to schedule an intake appointment.[3] Freeland then contacted Dave Albers, a King County probation officer who had supervised Miller in 2010 and 2011, to inform him of the community custody conditions that were imposed on Miller and of her

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[2] The no-contact order permitted Miller to have personal contact with Patricelli in the event that he was incarcerated or in residential chemical dependency treatment.

[3] Freeland received verification the next day that Miller had scheduled an intake appointment to begin receiving mental health services.

assignment as supervisor of Miller's community placement. Freeland telephoned Patricelli and left a message for her, requesting a return call. Freeland did not again attempt to contact Patricelli.

Freeland also contacted Angela Coker, who was currently assigned to Patricelli as a DOC community victim liaison due to Miller's prior crimes of domestic violence against Patricelli. In the time leading up to Freeland's supervision of Miller, Coker had successfully contacted Patricelli using a different telephone number than the number dialed by Freeland. Coker told Freeland that she had spoken with Patricelli and that Patricelli said that she had changed residences, believed that Miller did not know where she would be living, and was aware that she could contact DOC or the police if she saw Miller.

On October 23, seven days after his initial visit, Miller again reported to Freeland's office. He was subjected to another urinalysis test, the result of which was negative for drug or alcohol use. He gave Freeland a completed housing report log with Benson's signature placed thereon, suggesting that he had been residing with Benson for the past week. Miller also brought Freeland verification of food assistance benefits and acknowledged that he had a psychological examination scheduled for October 24. Freeland directed Miller to report to her again on October 30.

On October 29, Benson contacted Freeland and indicated that she would be willing to let Miller live with her at her residence going forward. Freeland did not inquire of Benson as to whether Miller had been staying at her residence for the past two weeks. Freeland thereafter sent an e-mail to Coker inquiring into

whether the area surrounding Benson's address was associated with any of Miller's past domestic violence victims. Coker responded that there were no known security concerns regarding Benson's address.

On October 30, Harper visited Patricelli's apartment. Inside the apartment, she found Patricelli near death, the victim of multiple stab wounds. Patricelli died shortly thereafter. Miller was later convicted of Patricelli's murder.

Harper sued DOC alleging gross negligence and negligent infliction of emotional distress. DOC moved for summary judgment as to both claims. The trial court granted summary judgment of dismissal.

II

Harper contends that the trial court erred by granting summary judgment as to her gross negligence claim. The trial court erred, Harper asserts, because genuine questions of material fact remain for trial as to whether DOC breached its take charge duty in its supervision of Miller upon his release from incarceration. We agree.

A

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 engage in the same inquiry as the trial court and consider the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Hertog, 138 Wn.2d at 275.

B

DOC's community corrections officers have a "take charge" duty over the offenders they supervise. Taggart v. State, 118 Wn.2d 195, 219, 822 P.2d 243 (1992). Our Supreme Court announced the existence of this duty with reference to the special relationship provision in the Restatement (Second) of Torts, § 319 (1965), which reads: "'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.

Applying this duty to parole officers, our Supreme Court in Taggart held that, "parole officers have a duty to protect others from reasonably foreseeable dangers engendered by parolees' dangerous propensities." 118 Wn.2d at 224. "When a parolee's criminal history and progress during parole show that the parolee is likely to cause bodily harm to others if not controlled," the court continued, "the parole officer is under a duty to exercise reasonable care to control the parolee and to prevent him or her from doing such harm." Taggart, 118 Wn.2d at 220. Thus, DOC's duty when supervising offenders is the "take charge" duty set forth in Taggart.

Statutory provisions and an offender's sentencing conditions are not the origin of the duty. Mock v. Dep't of Corr., ___ Wn. App ___, 403 P.3d 102, 108 (2017). Rather, the conditions of the sentence and the statutory authority

granted to DOC inform the contours of the special relationship duty discussed in Taggart. Mock, 403 P.3d at 108.[4]

> "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 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 [v. Miche], 137 Wn.2d [518,] 528-29, 531[, 973 P.2d 465 (1999)].
>
> . . . .
>
> Whether the department owed plaintiffs a section 319 duty actionable in the circumstances of this case depends on the terms defining [the community corrections officer's] relationship with [the offender]. 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, 69 P.3d 874 (2003); Joyce, 155 Wn.2d at 320 n.3.

Mock, 403 P.3d at 108.

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[4] A claim that DOC made during oral argument with regard to instructing the jury on its take charge duty bears mentioning. Specifically, DOC claimed that it is unnecessary to instruct the jury as to the take charge duty so long as the jury is instructed as to the gross negligence standard.

This is incorrect. We have never held that instructing the jury as to a party's duty in a special relationship case is unnecessary. Indeed, we have expressly rejected that proposition, reversing trial court decisions when the jury was not instructed as to the applicable common law special relationship duty. See, e.g., Hendrickson v. Moses Lake Sch. Dist., 199 Wn. App. 244, 247-49, 398 P.3d 1199 (2017); Quynn v. Bellevue Sch. Dist., 195 Wn. App. 627, 641, 383 P.3d 1053 (2016); Hopkins v. Seattle Pub. Sch. Dist. No. 1, 195 Wn. App. 96, 103, 107-08, 380 P.3d 584, review denied, 186 Wn.2d 1029 (2016).

C

Harper contends that genuine issues of material fact remain for trial as to whether DOC breached its take charge duty toward Patricelli while supervising Miller.

The statutory provision guiding whether DOC and its community corrections officers breached their take charge duty while rendering community placement activities is set forth in RCW 72.09.320. The statute provides:

> **Community placement—Liability.** The state of Washington, the department and its employees, community corrections officers, their staff, and volunteers who assist community corrections officers in the community placement program *are not liable for civil damages resulting from any act or omission in the rendering of community placement activities unless the act or omission constitutes gross negligence.*

RCW 72.09.320 (emphasis added).

Thus, DOC and its correctional officers breach their take charge duty when they are grossly negligent in rendering community placement activities. A weathered but still vital Supreme Court opinion explicates upon the quantum of care that constitutes gross negligence.

1

More than half a century ago, our Supreme Court decided Nist v. Tudor, 67 Wn.2d 322, 407 P.2d 798 (1965), a vehicular collision case that impelled the court to undertake a "study of gross negligence." Nist, 67 Wn.2d at 323. The court's opinion, authored by Justice Hale, acknowledged at the outset that

> [a] review of the commentaries, scholarly treaties and case law on gross negligence shows the term to have universally escaped definition, and despite the most assiduous efforts to give it precision it retains its amorphous quality. Every qualifying word

> added to sharpen the phrase seems to obscure in about the same degree as it clarifies it and inevitably invites further definition. Or, standing alone in its self-contained significance, great negligence, the idea remains extremely difficult for the trial courts to apply in specific situations. The problem ever remains: Was there sufficient proof of great negligence to submit the issue to the jury?

Nist, 67 Wn.2d at 325 (footnote omitted). The court then reviewed its decades-old decisions, noting that, "[a]lthough retaining slight care as a standard, this court has in recent years, where there is substantial evidence of acts or omissions seriously negligent in character, inclined toward leaving the question of gross negligence to the jury." Nist, 67 Wn.2d at 326.

Thereafter, the court set out to clarify the gross negligence standard:

> We have many times said that failure to exercise slight care is gross negligence within the meaning of the motor vehicle statutes. Since this statement seems as appropriate in describing the concept as the other definitions offered, we should amplify the definition so that it may be more readily applied by the trial courts in given situations.
>
> Gross negligence may be more readily understood if anchored to or guided by other more understandable concepts, and ought to be directly related to the hazards of the occasion in which it is invoked. Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928). A gentle push of one window washer by another may be merely a playful gesture and of only the slightest negligence when both are standing in a basement window well, but put the same two men on the window ledge of a skyscraper, 30 stories above the ground, and the same playful gesture becomes an act of the grossest negligence, if not one of wanton depravity.
>
> The term *gross negligence*, then, to have practical validity in the trial of a cause, should be related to and connected with the law's polestar on the subject, ordinary negligence. . . . Gross negligence, being a form of negligence on a larger scale, must also, like ordinary negligence, derive from foreseeability of the hazards out of which the injury arises.
>
> It means, therefore, gross or great negligence, that is, negligence substantially and appreciably greater than ordinary negligence. Its correlative, failure to exercise slight care, means not the total absence of care but care substantially or appreciably

> less than the quantum of care inhering in ordinary negligence. In determining the degree of negligence, the law must necessarily look to the hazards of the situation confronting the actor.

Nist, 67 Wn.2d at 330-31.

As one pertinent application of the gross negligence standard, the Nist court discussed its decision in Emery v. Milk, 62 Wn.2d 617, 384 P.2d 133 (1963), in which the court observed that although

> the host driver demonstrated a number of the elements of care by driving in her proper lane with her lights on, keeping her car under control, we said that failure to stop at a stop sign and yield the right of way in driving through an obstructed intersection provided evidence of gross negligence, creating an issue of fact for the jury.

67 Wn.2d at 328. The court emphasized that, in Emery, "[t]he elements of care shown in controlling and operating the car did not cancel the elements of gross negligence implicit in driving across an obstructed arterial street at 30 miles per hour without stopping." Nist, 67 Wn.2d at 328.

With this framework, the Nist court proceeded to address the merits of the case before it.

> Although Mrs. Tudor, the driver, had slowed her car to a near stop, had her left-turn blinker signal on to warn following cars and waited for them to go by, her negligence, if any, should therefore, be measured in the case not by dangers from following cars but from the hazards whereof plaintiff received her injuries—the oncoming truck. Any care or prudence exerted by the defendant driver here had reference to following cars and little or no relationship to the hazards generated by the approaching truck, for the truck had the right of way, and the duty to yield rested upon the Tudor car before making its left turn.
>
> Neither slowing down, nor signaling, nor looking toward a truck coming toward her on a clear, dry day on a straight, level road reduced the hazards from so imminent and perceptible a danger unless her actions suited the needs of the occasion. Her acts and omissions in turning suddenly into so obvious a danger supplied evidence from which a jury could well infer that she acted in the exercise of so small a degree of care under the circumstances as to

> be substantially and appreciably more negligent than ordinary, and hence could be held guilty of gross or great negligence.

Nist, 67 Wn.2d at 331-32.

Given that, the court instructed:

> If there is substantial evidence of seriously negligent acts or omissions on the part of the host driver, then the issue of gross negligence should be resolved by the jury under proper instructions.
>
> . . . .
>
> Because gross negligence is a species of aggravated negligence, the jury should have an understanding of what the law means by ordinary negligence so that it may have a basis of comparison; consequently, the jury should be given the benefit of the law's classic definition of negligence coupled with the definition of and the rule concerning proximate cause. . . .
>
> Finally, we believe the jury—having received the classic definition of ordinary negligence—will better understand the idea of gross negligence if it is informed that gross negligence means what the term implies—great negligence, negligence substantially or appreciably greater than ordinary negligence.

Nist, 67 Wn.2d at 332-33.

In the present case, if the question of whether DOC was grossly negligent in its community placement actions was put to a jury, the law summarized in the Washington Pattern Jury Instructions regarding ordinary negligence, ordinary care, and gross negligence would be pertinent. These instructions read:

> WPI 10.01
> NEGLIGENCE—ADULT—DEFINITION
>
> Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.
>
> WPI 10.02
> ORDINARY CARE—ADULT—DEFINITION
>
> Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

WPI 10.07
GROSS NEGLIGENCE—DEFINITION

Gross negligence is the failure to exercise slight care. It is negligence that is substantially greater than ordinary negligence. Failure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care.

6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 10.01, .02, .07, at 124, 126, 132 (6th ed. 2012) (boldface omitted).

In summary, as Justice Hale well-illustrated with his example of the window washers, the sufficiency of evidence of gross negligence is not merely a function of the quantity of evidence presented, it is also a function of the significance the jury could give to that evidence in light of the foreseeable danger. It is in this latter respect that the distinction between ordinary negligence and gross negligence will often be manifest. But the drawing of such distinction will almost always require the fact-finding judgment of a jury, as opposed to the legal analysis of a court.

2

We must next determine whether genuine issues of material fact exist as to whether DOC breached its take charge duty owed to Patricelli.

Our analysis necessarily focuses on the sentencing condition most pertinent to Patricelli's safety—the no-contact order. Just as with the driver in Nist, that DOC may have exercised the appropriate care with regard to other factors does not, as a matter of law, "cancel," Nist, 67 Wn.2d at 328, the evidence of gross negligence regarding the enforcement of the no-contact order.

First, Freeland attested during her deposition that she possessed a physical copy of Miller's field file and had access to DOC's electronic offender management system. This is significant because these records detailed that Miller had a long history of violating no-contact orders prohibiting him from contacting Patricelli and of lying to community corrections officers when asked if he was contacting or residing with Patricelli.

Next, Freeland attested in her deposition that, in determining whether Miller had truthfully filled out his housing report log, "I can't assume that he's always lying to me, but I can't always assume that he's telling me the truth." Accordingly, viewed in the light most favorable to Harper, Freeland reviewed Miller's housing report logs in the same manner as she would have with any other offender, notwithstanding Miller's clear record of violating no-contact orders so that he could reside with Patricelli and lying to DOC officers about whether he had been residing with her.

Furthermore, the parties do not dispute that Freeland made only one attempt to contact Patricelli by telephone in the two weeks of her supervision of Miller—an attempt that was unsuccessful. This is significant because available to Freeland in DOC's electronic records system was another telephone number for Patricelli at which she had been successfully contacted in the weeks leading up to her murder. However, Freeland did not make any attempt to contact Patricelli using the alternative telephone number.

Lastly, when Benton called Freeland to indicate that Miller could reside with her going forward, Freeland did not ask Benton whether Miller had, in

actuality, been residing with her during his community placement, as Miller's housing report logs suggested. If Freeland had the requisite level of familiarity with Miller's record of lying about where he had been residing, she would have been more likely to inquire into whether he had actually been staying with Benton during his term of community placement. This is significant because it would have given Freeland a basis on which to inquire into whether Miller had violated the no-contact order.

Taking all reasonable inferences in favor of Harper, a jury could find that, notwithstanding the steps that were taken in discharge of the take charge duty, Nist, 67 Wn.2d at 328, these facts support a conclusion that, with regard to the no-contact order, DOC exercised less than slight care in its supervision of Miller, thereby breaching its applicable duty.

Accordingly, the trial court erred by granting summary judgment of dismissal.[5]

III

Harper also contends that she may prevail on her negligent infliction of emotional distress claim by establishing ordinary negligence, rather than gross negligence, on the part of DOC in its rendering of community placement activities. Harper is wrong.

Again, RCW 72.09.320 provides:

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[5] We do not consider DOC's claim that Harper failed to establish proximate cause because DOC did not present this argument to the trial court in its opening summary judgment materials. King v. Rice, 146 Wn. App. 662, 668, 191 P.3d 946 (2008) (citing White v. Kent Med. Ctr., Inc., P.S., 61 Wn. App. 163, 169, 810 P.2d 4 (1991)).

We further emphasize that our determination is restricted to the circumstances of this case. No record was made of the abilities or authorization to intervene applicable to probation officers in limited jurisdiction courts. Cf. Couch, 113 Wn. App. at 569.

> **Community placement—Liability.** The state of Washington, the department and its employees, community corrections officers, their staff, and volunteers who assist community corrections officers in the community placement program *are not liable for civil damages resulting from any act or omission in the rendering of community placement activities unless the act or omission constitutes gross negligence.*

(Emphasis added.) Accordingly, in a civil action against DOC regarding its rendering of community placement activities, no liability attaches to DOC for any act or omission unless the act or omission constitutes gross negligence.

Harper's negligent infliction of emotional distress claim is a civil action against DOC regarding its rendering of community placement activities. Thus, as a predicate to establishing her negligent infliction of emotional distress claim against DOC, Harper must establish that DOC acted with gross negligence, rather than ordinary negligence. Harper's contrary contention fails.

However, given our resolution of the first issue presented, it follows that the trial court also erred by dismissing Harper's negligent infliction of emotional distress claim.

Reversed.

We concur:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CATHY HARPER, individually, as Personal Representative of the ESTATE OF TRICIA PATRICELLI, as Guardian ad Litem for KHALANI MICHAEL, a minor child, and as Guardian ad Litem for NIYERRAH MICHAEL, a minor child, Appellant, v. STATE OF WASHINGTON; WASHINGTON DEPARTMENT OF CORRECTIONS, a governmental entity, Respondents, RHONDA FREELAND and JOHN DOE FREELAND, and their marital community Defendants.	DIVISION ONE No. 76008-4-I ORDER DENYING MOTION FOR RECONSIDERATION AND ORDER WITHDRAWING OPINION AND SUBSTITUTING OPINION

The respondent, State of Washington Department of Corrections, having filed a motion for reconsideration of the court's opinion filed December 4, 2017, and a majority of the panel having determined that the motion should be denied, now, therefore it is hereby

ORDERED that the respondent's motion for reconsideration is denied; and it is further

ORDERED that the opinion filed on December 4, 2017 is withdrawn; and it is further

ORDERED that a substitute opinion shall be filed to correct a factual conclusion, and the substituted opinion shall be published in the Washington Appellate Reports.

Duggan, J.

Appelwick, J.

Becker, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CATHY HARPER, individually, as Personal Representative of the ESTATE OF TRICIA PATRICELLI, as Guardian ad Litem for KHALANI MICHAEL, a minor child, and as Guardian ad Litem for NIYERRAH MICHAEL, a minor child, Appellant, v. STATE OF WASHINGTON; WASHINGTON DEPARTMENT OF CORRECTIONS, a governmental entity, Respondents, RHONDA FREELAND and JOHN DOE FREELAND, and their marital community Defendants.	DIVISION ONE No. 76008-4-I PUBLISHED OPINION FILED: January 16, 2018

DWYER, J. — Cathy Harper, personal representative of the estate of Tricia Patricelli, appeals from the trial court's order granting summary judgment to the Department of Corrections (DOC) and dismissing her lawsuit. On appeal, Harper contends that the trial court erred because genuine issues of material fact exist

as to whether DOC breached its take charge duty owed toward Patricelli in its supervision of Scottye Miller.

We conclude that genuine issues of material fact remain for trial as to whether DOC exercised less than slight care in its supervision of Miller. Accordingly, we reverse.

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On October 29, Benson contacted Freeland and indicated that she would be willing to let Miller live with her at her residence going forward. Freeland did not inquire of Benson as to whether Miller had been staying at her residence for the past two weeks. Freeland thereafter sent an e-mail to Coker inquiring into

whether the area surrounding Benson's address was associated with any of Miller's past domestic violence victims. Coker responded that there were no known security concerns regarding Benson's address.

On October 30, Harper visited Patricelli's apartment. Inside the apartment, she found Patricelli's body, the victim of multiple stab wounds. Harper believed Patricelli to be dead, and she was later pronounced as such by medical personnel. Miller was later convicted of Patricelli's murder.

Harper sued DOC alleging gross negligence and negligent infliction of emotional distress. DOC moved for summary judgment as to both claims. The trial court granted summary judgment of dismissal.

II

Harper contends that the trial court erred by granting summary judgment as to her gross negligence claim. The trial court erred, Harper asserts, because genuine questions of material fact remain for trial as to whether DOC breached its take charge duty in its supervision of Miller upon his release from incarceration. We agree.

A

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 engage in the same inquiry as the trial court and consider the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Hertog, 138 Wn.2d at 275.

B

DOC's community corrections officers have a "take charge" duty over the offenders they supervise. Taggart v. State, 118 Wn.2d 195, 219, 822 P.2d 243 (1992). Our Supreme Court announced the existence of this duty with reference to the special relationship provision in the Restatement (Second) of Torts, § 319 (1965), which reads: "'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.

Applying this duty to parole officers, our Supreme Court in Taggart held that, "parole officers have a duty to protect others from reasonably foreseeable dangers engendered by parolees' dangerous propensities." 118 Wn.2d at 224. "When a parolee's criminal history and progress during parole show that the parolee is likely to cause bodily harm to others if not controlled," the court continued, "the parole officer is under a duty to exercise reasonable care to control the parolee and to prevent him or her from doing such harm." Taggart, 118 Wn.2d at 220. Thus, DOC's duty when supervising offenders is the "take charge" duty set forth in Taggart.

Statutory provisions and an offender's sentencing conditions are not the origin of the duty. Mock v. Dep't of Corr., ___ Wn. App ___, 403 P.3d 102, 108 (2017). Rather, the conditions of the sentence and the statutory authority

granted to DOC inform the contours of the special relationship duty discussed in Taggart. Mock, 403 P.3d at 108.[4]

> "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 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 [v. Miche], 137 Wn.2d [518,] 528-29, 531[, 973 P.2d 465 (1999)].
>
> . . . .
>
> Whether the department owed plaintiffs a section 319 duty actionable in the circumstances of this case depends on the terms defining [the community corrections officer's] relationship with [the offender]. 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, 69 P.3d 874 (2003); Joyce, 155 Wn.2d at 320 n.3.

Mock, 403 P.3d at 108.

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[4] A claim that DOC made during oral argument with regard to instructing the jury on its take charge duty bears mentioning. Specifically, DOC claimed that it is unnecessary to instruct the jury as to the take charge duty so long as the jury is instructed as to the gross negligence standard.

This is incorrect. We have never held that instructing the jury as to a party's duty in a special relationship case is unnecessary. Indeed, we have expressly rejected that proposition, reversing trial court decisions when the jury was not instructed as to the applicable common law special relationship duty. See, e.g., Hendrickson v. Moses Lake Sch. Dist., 199 Wn. App. 244, 247-49, 398 P.3d 1199 (2017); Quynn v. Bellevue Sch. Dist., 195 Wn. App. 627, 641, 383 P.3d 1053 (2016); Hopkins v. Seattle Pub. Sch. Dist. No. 1, 195 Wn. App. 96, 103, 107-08, 380 P.3d 584, review denied, 186 Wn.2d 1029 (2016).

C

Harper contends that genuine issues of material fact remain for trial as to whether DOC breached its take charge duty toward Patricelli while supervising Miller.

The statutory provision guiding whether DOC and its community corrections officers breached their take charge duty while rendering community placement activities is set forth in RCW 72.09.320. The statute provides:

> **Community placement—Liability.** The state of Washington, the department and its employees, community corrections officers, their staff, and volunteers who assist community corrections officers in the community placement program *are not liable for civil damages resulting from any act or omission in the rendering of community placement activities unless the act or omission constitutes gross negligence.*

RCW 72.09.320 (emphasis added).

Thus, DOC and its correctional officers breach their take charge duty when they are grossly negligent in rendering community placement activities. A weathered but still vital Supreme Court opinion explicates upon the quantum of care that constitutes gross negligence.

1

More than half a century ago, our Supreme Court decided Nist v. Tudor, 67 Wn.2d 322, 407 P.2d 798 (1965), a vehicular collision case that impelled the court to undertake a "study of gross negligence." Nist, 67 Wn.2d at 323. The court's opinion, authored by Justice Hale, acknowledged at the outset that

> [a] review of the commentaries, scholarly treaties and case law on gross negligence shows the term to have universally escaped definition, and despite the most assiduous efforts to give it precision it retains its amorphous quality. Every qualifying word

> added to sharpen the phrase seems to obscure in about the same degree as it clarifies it and inevitably invites further definition. Or, standing alone in its self-contained significance, great negligence, the idea remains extremely difficult for the trial courts to apply in specific situations. The problem ever remains: Was there sufficient proof of great negligence to submit the issue to the jury?

Nist, 67 Wn.2d at 325 (footnote omitted). The court then reviewed its decades-old decisions, noting that, "[a]lthough retaining slight care as a standard, this court has in recent years, where there is substantial evidence of acts or omissions seriously negligent in character, inclined toward leaving the question of gross negligence to the jury." Nist, 67 Wn.2d at 326.

Thereafter, the court set out to clarify the gross negligence standard:

> We have many times said that failure to exercise slight care is gross negligence within the meaning of the motor vehicle statutes. Since this statement seems as appropriate in describing the concept as the other definitions offered, we should amplify the definition so that it may be more readily applied by the trial courts in given situations.
>
> Gross negligence may be more readily understood if anchored to or guided by other more understandable concepts, and ought to be directly related to the hazards of the occasion in which it is invoked. Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928). A gentle push of one window washer by another may be merely a playful gesture and of only the slightest negligence when both are standing in a basement window well, but put the same two men on the window ledge of a skyscraper, 30 stories above the ground, and the same playful gesture becomes an act of the grossest negligence, if not one of wanton depravity.
>
> The term *gross negligence*, then, to have practical validity in the trial of a cause, should be related to and connected with the law's polestar on the subject, ordinary negligence. . . . Gross negligence, being a form of negligence on a larger scale, must also, like ordinary negligence, derive from foreseeability of the hazards out of which the injury arises.
>
> It means, therefore, gross or great negligence, that is, negligence substantially and appreciably greater than ordinary negligence. Its correlative, failure to exercise slight care, means not the total absence of care but care substantially or appreciably

> less than the quantum of care inhering in ordinary negligence. In determining the degree of negligence, the law must necessarily look to the hazards of the situation confronting the actor.

Nist, 67 Wn.2d at 330-31.

As one pertinent application of the gross negligence standard, the Nist court discussed its decision in Emery v. Milk, 62 Wn.2d 617, 384 P.2d 133 (1963), in which the court observed that although

> the host driver demonstrated a number of the elements of care by driving in her proper lane with her lights on, keeping her car under control, we said that failure to stop at a stop sign and yield the right of way in driving through an obstructed intersection provided evidence of gross negligence, creating an issue of fact for the jury.

67 Wn.2d at 328. The court emphasized that, in Emery, "[t]he elements of care shown in controlling and operating the car did not cancel the elements of gross negligence implicit in driving across an obstructed arterial street at 30 miles per hour without stopping." Nist, 67 Wn.2d at 328.

With this framework, the Nist court proceeded to address the merits of the case before it.

> Although Mrs. Tudor, the driver, had slowed her car to a near stop, had her left-turn blinker signal on to warn following cars and waited for them to go by, her negligence, if any, should therefore, be measured in the case not by dangers from following cars but from the hazards whereof plaintiff received her injuries—the oncoming truck. Any care or prudence exerted by the defendant driver here had reference to following cars and little or no relationship to the hazards generated by the approaching truck, for the truck had the right of way, and the duty to yield rested upon the Tudor car before making its left turn.
>
> Neither slowing down, nor signaling, nor looking toward a truck coming toward her on a clear, dry day on a straight, level road reduced the hazards from so imminent and perceptible a danger unless her actions suited the needs of the occasion. Her acts and omissions in turning suddenly into so obvious a danger supplied evidence from which a jury could well infer that she acted in the exercise of so small a degree of care under the circumstances as to

> be substantially and appreciably more negligent than ordinary, and hence could be held guilty of gross or great negligence.

Nist, 67 Wn.2d at 331-32.

Given that, the court instructed:

> If there is substantial evidence of seriously negligent acts or omissions on the part of the host driver, then the issue of gross negligence should be resolved by the jury under proper instructions.
>
> . . . .
>
> Because gross negligence is a species of aggravated negligence, the jury should have an understanding of what the law means by ordinary negligence so that it may have a basis of comparison; consequently, the jury should be given the benefit of the law's classic definition of negligence coupled with the definition of and the rule concerning proximate cause. . . .
>
> Finally, we believe the jury—having received the classic definition of ordinary negligence—will better understand the idea of gross negligence if it is informed that gross negligence means what the term implies—great negligence, negligence substantially or appreciably greater than ordinary negligence.

Nist, 67 Wn.2d at 332-33.

In the present case, if the question of whether DOC was grossly negligent in its community placement actions was put to a jury, the law summarized in the Washington Pattern Jury Instructions regarding ordinary negligence, ordinary care, and gross negligence would be pertinent. These instructions read:

> WPI 10.01
> NEGLIGENCE—ADULT—DEFINITION
>
> Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.
>
> WPI 10.02
> ORDINARY CARE—ADULT—DEFINITION
>
> Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

WPI 10.07
GROSS NEGLIGENCE—DEFINITION

Gross negligence is the failure to exercise slight care. It is negligence that is substantially greater than ordinary negligence. Failure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care.

6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 10.01, .02, .07, at 124, 126, 132 (6th ed. 2012) (boldface omitted).

In summary, as Justice Hale well-illustrated with his example of the window washers, the sufficiency of evidence of gross negligence is not merely a function of the quantity of evidence presented, it is also a function of the significance the jury could give to that evidence in light of the foreseeable danger. It is in this latter respect that the distinction between ordinary negligence and gross negligence will often be manifest. But the drawing of such distinction will almost always require the fact-finding judgment of a jury, as opposed to the legal analysis of a court.

2

We must next determine whether genuine issues of material fact exist as to whether DOC breached its take charge duty owed to Patricelli.

Our analysis necessarily focuses on the sentencing condition most pertinent to Patricelli's safety—the no-contact order. Just as with the driver in Nist, that DOC may have exercised the appropriate care with regard to other factors does not, as a matter of law, "cancel," Nist, 67 Wn.2d at 328, the evidence of gross negligence regarding the enforcement of the no-contact order.

First, Freeland attested during her deposition that she possessed a physical copy of Miller's field file and had access to DOC's electronic offender management system. This is significant because these records detailed that Miller had a long history of violating no-contact orders prohibiting him from contacting Patricelli and of lying to community corrections officers when asked if he was contacting or residing with Patricelli.

Next, Freeland attested in her deposition that, in determining whether Miller had truthfully filled out his housing report log, "I can't assume that he's always lying to me, but I can't always assume that he's telling me the truth." Accordingly, viewed in the light most favorable to Harper, Freeland reviewed Miller's housing report logs in the same manner as she would have with any other offender, notwithstanding Miller's clear record of violating no-contact orders so that he could reside with Patricelli and lying to DOC officers about whether he had been residing with her.

Furthermore, the parties do not dispute that Freeland made only one attempt to contact Patricelli by telephone in the two weeks of her supervision of Miller—an attempt that was unsuccessful. This is significant because available to Freeland in DOC's electronic records system was another telephone number for Patricelli at which she had been successfully contacted in the weeks leading up to her murder. However, Freeland did not make any attempt to contact Patricelli using the alternative telephone number.

Lastly, when Benton called Freeland to indicate that Miller could reside with her going forward, Freeland did not ask Benton whether Miller had, in

actuality, been residing with her during his community placement, as Miller's housing report logs suggested. If Freeland had the requisite level of familiarity with Miller's record of lying about where he had been residing, she would have been more likely to inquire into whether he had actually been staying with Benton during his term of community placement. This is significant because it would have given Freeland a basis on which to inquire into whether Miller had violated the no-contact order.

Taking all reasonable inferences in favor of Harper, a jury could find that, notwithstanding the steps that were taken in discharge of the take charge duty, Nist, 67 Wn.2d at 328, these facts support a conclusion that, with regard to the no-contact order, DOC exercised less than slight care in its supervision of Miller, thereby breaching its applicable duty.

Accordingly, the trial court erred by granting summary judgment of dismissal.[5]

III

Harper also contends that she may prevail on her negligent infliction of emotional distress claim by establishing ordinary negligence, rather than gross negligence, on the part of DOC in its rendering of community placement activities. Harper is wrong.

Again, RCW 72.09.320 provides:

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[5] We do not consider DOC's claim that Harper failed to establish proximate cause because DOC did not present this argument to the trial court in its opening summary judgment materials. King v. Rice, 146 Wn. App. 662, 668, 191 P.3d 946 (2008) (citing White v. Kent Med. Ctr., Inc., P.S., 61 Wn. App. 163, 169, 810 P.2d 4 (1991)).

We further emphasize that our determination is restricted to the circumstances of this case. No record was made of the abilities or authorization to intervene applicable to probation officers in limited jurisdiction courts. Cf. Couch, 113 Wn. App. at 569.

> **Community placement—Liability.** The state of Washington, the department and its employees, community corrections officers, their staff, and volunteers who assist community corrections officers in the community placement program *are not liable for civil damages resulting from any act or omission in the rendering of community placement activities unless the act or omission constitutes gross negligence.*

(Emphasis added.) Accordingly, in a civil action against DOC regarding its rendering of community placement activities, no liability attaches to DOC for any act or omission unless the act or omission constitutes gross negligence.

Harper's negligent infliction of emotional distress claim is a civil action against DOC regarding its rendering of community placement activities. Thus, as a predicate to establishing her negligent infliction of emotional distress claim against DOC, Harper must establish that DOC acted with gross negligence, rather than ordinary negligence. Harper's contrary contention fails.

However, given our resolution of the first issue presented, it follows that the trial court also erred by dismissing Harper's negligent infliction of emotional distress claim.

Reversed.

We concur:

Dwyer, J.

Becker, J.

AGO TORTS SEATTLE

February 13, 2018 - 2:52 PM

Transmittal Information

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Appellate Court Case Title:	Cathy Harper, et al., Apps vs. Washington State Department of Corrections, Resp
Superior Court Case Number:	14-2-32600-9

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