70403-6

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No. 70403-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RICHARD BLICK, Appellant;

v.

STATE OF WASHINGTON, ELDON VAIL,
BERNIE WARNER, and DOES 1-20, Respondents.

APPEAL FROM THE SUPERIOR COURT FOR
KING COUNTY

The Honorable Beth Andrus
No. 12-2-35870-2 SEA

OPENING BRIEF OF APPELLANT BLICK

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ORIGINAL

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A. ASSIGNMENTS OF ERROR.

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1. Does the statutory language contained in RCW 9.92.151 and RCW 9.94A.729 create two separate but equal statutory schemes by which the agency having jurisdiction over an inmate has sole authority to promulgate policies for granting or taking away good-time for the time the inmate spent under that's agency's jurisdiction?

2. Do the prior decisions in *In re Pers. Restraint of Williams*, 121 Wn.2d 655, 853 P.2d 444 (1993) and progeny establish that the Department of Corrections may not take away good-time from a inmate under their jurisdiction if the good-time was earned while under the jurisdiction of a county jail?

3. Does the prior decision in *In re Pers. Restraint of Mattson,* 166 Wn.2d 730, 214 P.3d 141 (2009) provide statutory authority pursuant to RCW 9.94A.729 for the Department of Corrections to take away good-time from Mr. Blick that he earned in the county jail because he could not obtain an approved address for release?

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5. Did the Respondents falsely imprison Mr. Blick by establishing policies permitting it to take away 52 days of Mr. Blick's jail good-time?

II. STATEMENT OF THE CASE

A. STATEMENT OF FACTS.

Richard Blick was arrested June 1, 2000 in King County. He was held in the King County Department of Adult Detention (Jail) for his trial and sentencing. While incarcerated in the King County Jail, Mr. Blick accumulated earned release credits (good-time) pursuant to a procedure developed and promulgated by the King County Jail.[1]

Mr. Blick pled guilty. He was sentenced on March 16, 2001. CP 3-82 (Judgment and Sentence). After conviction and sentencing, Mr. Blick was transported to the Department of Corrections (the Department) on April 6, 2001.

On April 5, 2001, the King County Jail provided the Department a Jail Certification and Authorization for Earned Early Release Credit showing the straight-time Blick had spent while in custody, a total of 310 days.[2] CP 83. The certificate also stated Mr. Blick had earned 54 days of early release credits.

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[1]Earned release credits is used interchangeably with good-time and has the same meaning. Good-time is more common but the words "earned release credits" are used in various statutes.

[2]By "straight-time time," it is meant that time spent in a county jail on a day by day basis. It is what any good-time calculation is based upon.

The Department made its initial calculation of dates affecting Mr. Blick's release. CP 84 (Release Date Calculation, April 16, 2001). In this calculation the Department entered jail time-served and good-time earned and, (based on the sentence length), calculated his Earned Release Date (ERD) to be January 17, 2010. His ERD was calculated by subtracting from his maximum sentence, (the time he had already spent in jail), and jail good-time in addition to all possible good-time he would earn while serving his sentence under the jurisdiction of the Department.

Mr. Blick's Maximum Expiration Date (MXED) was calculated to be September 30, 2011. The MXED was calculated by subtracting all jail straight-time from the total sentence length. In other words, no credit was given for good-time earned in King County Jail.

Another release date was calculated - the Minimum Expiration Date (MNED).[3] The MNED is obtained by giving Mr. Blick credit for all the good-time earned at the King County Jail. It can be calculated by subtracting from the number of jail good-time earned from the MXED. It was calculated to be August 7,2011. This is the date which Mr. Blick would have been

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[3]In the Complaint, this was referred to as County Jail Maximum Release Date. However, in the Department's Release Date Calculation refers to it as the Minimum Expiration Date. CP 84, 97. So this language is used for consistency and understanding.

released if the Department had not taken away the good-time he earned in the jail.

While under the jurisdiction of the Department, Mr. Blick had been found guilty of an infraction. Because of that infraction resulting in the loss of 90 days good-time earned while under the Department's jurisdiction pursuant to policy. CP 85-96 (Policy 350.100 Earned Release Time). His new release date calculations showed his new ERD to be April 17, 2010 with the same MNED and MXED. CP 97 (Release Date Calculation, September 26, 2006).

After Mr. Blick made an inquiry into his good-time, the King County Jail recalculated his good-time and sent the Department an amended certificate. CP 98 (Jail Certification and Authorization for Earned Early Release Credit, April 29, 2008). The amended certificate changed the number of good-time days Mr. Blick had earned while under the jurisdiction of the King County Jail to 52 days. The number of straight days stayed the same. The Department then recalculated release dates. It removed two days of jail good-time based upon the amended certification. CP 99 (Release Date Calculation, May 6, 2008). This resulted a MNED now of August 9, 2011. The ERD was also recalculated to April 19, 2010.

Mr. Blick was required to obtain an approved address before he was eligible for release in accordance with the law in effect on the date of his

crimes of conviction. *Former* RCW 9.94A.120(10) (*citing* RCW 9.94.120(9)(b)(v)). Mr. Blick was not able to obtain an approved address while under the jurisdiction of the Department and was released to the community on his MXED, September 30, 2011.

When Mr. Blick was released on September 30, 2011, all good-time earned while he was under the jurisdiction of King County was forfeited solely by the actions of the Department. If the Department had not forfeited the 52 days of earned release credit s granted by the county jail, Mr. Blick's maximum sentence would have ended August 9,2011.

B. PROCEDURAL HISTORY.

Mr. Blick filed a summons and complaint on November 2, 2012. CP 1-14. In this complaint, he presented two state tort claims against the Respondents on behalf of himself and others so situated. One was for negligence and the other was for false imprisonment. The Respondents timely

filed an Answer to the Complaint with affirmative defenses. CP 15-24.

Mr. Blick filed a partial motion for summary judgment with exhibits. CP 70-127. The Respondents filed a motion for judgment on the pleadings with documents. CP 25-69, 128-132. Both parties responded. CP 133-259. Both parties filed a reply. CP 260-280. After a hearing held April 5, 2013, Respondents' motion was granted and Appellants' was denied. Respondents'

motion for judgment on the pleadings was converted to a motion for summary judgment. A formal order was entered April 23, 2013. CP 281-283. On May 21, 2013, a timely appeal of the final order was filed. CP 284-288.

III. ARGUMENT

Mr. Blick will first show that the legislature did not intend to commingle good-time from Washington jails and prisons. He will then show that the Respondents acted negligently when it took away jail good-time from Mr. Blick because he was not permitted to be released before his maximum release date. The Respondents will then be shown to have falsely imprisoned Mr. Blick for each day that jail good-time was taken away from him.

A. THE STANDARD OF REVIEW OF A SUMMARY JUDGMENT MOTION SUPPORTED SOLELY BY AFFIDAVITS IS *DE NOVO*.

Summary judgment is appropriate when the pleadings, affidavits, interrogatories, depositions and exhibits show there are no genuine issues of material fact and the moving party is entitled to judgment on the issues presented as a matter of law. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 177, 876 P.2d 435 (1994). "When reviewing an order of summary judgment, this Court conducts the same inquiry as the trial court." *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000). When reasonable minds could reach but one conclusion regarding the claims of disputed facts,

such questions may be determined as a matter of law. *Corbally v. Kennewick School Dist.*, 94 Wn.App. 736, 740, 937 P.2d 1074 (1999). "All questions of law are reviewed de novo." *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001).

B. THE LEGISLATURE ESTABLISHED SEPARATE AUTHORITIES TO AGENCIES HAVING JURISDICTION OVER INDIVIDUAL PRISONERS TO DEVELOP POLICIES GRANTING AND TAKING AWAY GOOD-TIME TO CLARIFY AUTHORITY AND TO PROMOTE PUBLIC POLICY.

1. The Legislature Drafted the Good-time Statutes to Address Jurisdictional Problems to Create a Chinese Wall Between the County Jails and Prison.

Prior to the Sentence Reform Act (SRA) when the Parole Board held sway, there was no statutory authority for the Department to credit individuals under its jurisdiction of the time they had spent in county jails awating trial and sentencing. See RCW 9.95.070. Without such statutory authority, those individuals who had bailed out potentially served shorter sentences than those individuals who did not make bail.[4] When this was challenged, the Supreme Court held that failure to credit a prisoner's maximum and mandatory minimum terms for the presentence jail time served

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[4]3This is because those who bailed out would get good-time credit once they reached the Department of Corrections for their complete sentence. Those who did not bailout would only receive good-time for that part of their sentence spent under the jurisdiction of the Department.

was in violation of the constitution. *See Reanier v. Smith*, 83 Wn.2d 342, 517 P.2d 949 (1982), *In re Pers. Restraint of Phelan*, 97 Wn.2d 590, 647 P.2d 1026 (1992). Subsequently, Phelan sought good-time credit for his presentencejail time served. This argument was denied based on the differences in rehabilitative effects of prisons and jails. *State v. Phelan*, 100 Wn.2d 508, 515, 671 P.2d 1212 (1983). Upon passage of the SRA, individuals were explicitly granted earned early release time for good behavior and performance. *Former* RCW 9.94A.150. There still existed no law stating that individuals could receive good-time during their incarceration at county jails. The only apparent source for this credit were the trial courts during sentencing. The sentencing judge would write on the Judgment and Sentence how many days the criminal defendant was entitled to. Because of the difficulty of obtaining credit for good-time based on time served in county jails, this inconsistent practice was challenged. *See In re Pers. Restraint of Mota*, 114 Wn.2d 465, 788 P.2d 538 (1990).

Mota had been convicted under the SRA and sent to the Department of Corrections after serving time in the county jail. The Department refused to grant Mota good-time based on the straight-time he spent in the county jail. In a companion case involving Baker, the trial court granted some credit for good-time earned while he under the county jail's jurisdiction but he believed he was entitled to more good-time. *Id.* at 469. The Department felt that the

trial court did not have the authority to grant any good-time. *Id.*

The Supreme Court decided that the Legislature had not intended for him to get good-time for the time spent in the county jail but that the equal protection clause of the Fourteenth Amendment had been violated because those individuals who received bail would receive a shorter sentence. *Id.* at 469. In the companion case involving Baker, the trial court granted credit for good-time earned while he under the county jail's jurisdiction. *Id.* The holding of *Mota* made it quite clear that the only authority to grant good-time was vested in the Department. *Id.* However, since Baker and Mota had been arrested, this has all changed.

In 1989, a problem still remained of how the Department would credit jail good-time to individuals who serve the rest of their sentence in prison. There simply was no formal mechanism to accomplish this goal. The only good-time laws pertained to time spent under the jurisdiction of the Department. At the request of the Sentencing Guidelines Commission, a law was proposed which would enable the prisoner housed at a county jail to have his or her sentence reduced by earning early release time for the time spent in the jail.

The law enacted by the Legislature granted jails the right to develop policies governing how jail inmates earned and lost earned early release time. *Former* RCW 9.92.151. The jails were then required to certify to the

Department the amount of time the individual spent in custody and the amount of early release time earned. *Id.* at 470-71 (*citing* Laws of 1989, ch 248 § 1 (Substitute Senate Bill 5191 (SSB 5191)); *former* RCW 9.94A.150). The stated purpose of the legislation was to standardize the application of good-time statutes. CP 100-101 (SSB 5191 Final Bill Report (1989)).

In 1990, the same year *Mota* was decided, both good-time statutes, RCW 9.92.151 and RCW 9.94A.150 were changed to clarify that it was not the facility that had the power to develop good-time policies, it was the agency having jurisdiction. Laws of 1990, ch 3 § 202 (Second Substitute Senate Bill 6259). Other subsequent changes to RCW 9.94A.150 reflected different categories of good-time based on crimes of conviction. RCW 9.94A.150 was subsequently recodified as RCW 9.94A.728. RCW 9.94A.728 was then split in two and recodified as RCW 9.94A.728 and .729. The language that established the separate but equal good-time statutes is now contained in RCW 9.94A.729(1).

2. Washington Courts Have Acknowledged the Actions of the Legislature to Separate Out Statutory Responsibility for the Development of Good-Time Policies to the Agency Having Jurisdiction.

Since the decision in *Mota* and the subsequent changes made to the good-time statutory scheme, our courts have examined the relationship between the two good-time statutes and the interaction between the various

agencies having jurisdiction. The examination of this relationship started right after the *Mota* decision and has continued to the present. *See In re Pers. Restraint of Williams*, 121 Wn.2d 655.

Williams had been arrested and housed at the King County Jail. He was convicted of first degree murder and sent to the Department of Corrections. In accordance with standard procedure, the King County Jail sent a certification to the Department that Williams had been incarcerated for 232 days at the jail and had earned 77 good-time credits. *Id.* at 658. His good-time was apparently miscalculated by King County. Williams filed a Personal Restraint Petition asking that Department be ordered to grant him all the good-time he had earned while in the King County Jail.

At oral arguments, the Department acknowledged that if Williams had been granted all his good-time by the jail, he would have received 116 days of good-time. *Id.* at 659. The *Williams* court acknowledged it was either an error in calculation or the jail withheld 39 days because of Williams' conduct, but the record was unclear. *Id.* at 660. Williams argued that the Department violated the good-time statute by failing to give maximum good-time earned in the jail and cited *Mota*. *Id.* at 661. The Court disagreed, stating that the SRA good-time statute, RCW 9.94A.150(1) divies authority over the award of good-time between the two agencies, the county jail and the Department. Nothing in the language required the Department to recalculate the jail's

good-time award. *Id.* at 661. "Indeed, the statute appears to give the various correctional authorities, both county jails and the state correctional system, plenary authority over good-time awards for offenders under their jurisdiction." *Id.*

Both parties then took contrary positions about what to do with the certification. The Department argued that it had only a passive role and it was not required to provide oversight of county jails. *Id.* Williams argued the Department should ignore the certification and correct his good-time based on the time he had spent at the jail. *Id.* at 664. The Supreme Court took a third position - that the Department is prohibited from accepting certifications based on apparent or manifest errors of law. Even though it gave the Department authority to reject wrongful certifications, in no way did this mean the Department could render a certification null and void on its own. "Under this reading, the county jails retain plenary authority over the grant or denial of good-time to offenders within their jurisdiction." *Id.* It based this reading on the implicit language of the statute. *Id.* Once the problem has been rectified by the jail, the Department is entitled to use the certification to calculate release dates. *Id.* at 666. This interpretation was also deemed to coincide with the purpose of good-time statutes - jailor prison discipline.

The *Williams* Court emphasized that the focus of good-time was based primarily on its effects on discipline, not rehabilitation. *Id.* (*citing Mota*, 114 Wn.2d at 476). Discipline is best enforced when the agency having jurisdiction can punish or reward behavior when it happens.

> To effectuate this purpose, RCW 9.94A.150(1) divides authority over the grant or denial of good-time between the county jails and the Department. Under our reading of the statute, the county jail retains complete control over the good-time credits granted to offenders within its jurisdiction.

Id. at 655. From Williams derives all subsequent decisions on the two separate but equal good-time statutes for each agency having sole jurisdiction.

3. The Holding of *Williams* Was Subsequently Upheld in Support of the Department of Corrections' Continued Requests.

The concept set forth in *Williams* that each agency was responsible for developing policies granting or denying good-time for an individual under their jurisdiction has been continually affirmed until the present. *See State v. Donery*, 131 Wn. App. 667, 128 P.3d 1263 (2006); *In re Pers. Restraint of Erickson*, 146 Wn. App. 576 191 P.3d 917 (2008): *In re Pers. Restraint of Talley*, 172 Wn.2d 642, 260 P.3d 868 (2011). Donery had been convicted of persistent prison misbehavior, a felony in Washington. *Donery*, 131 Wn. App. at 669 (*citing* RCW 9.94.070). One of the elements of this crime requires that the inmate be housed in a state correctional institution to have

"los[t] all potential earned early release time credit." *Id.* at 670. Donery had previously earned 38 days of good-time while spending time in the county jail awaiting trial and sentencing. *Id.* Donery argued there was insufficient evidence for conviction because he still had 38 days of jail good-time. The Department argued that it "did not take away the county jail time because it believed it did not have the authority to do so." *Id.*

To address his claim, the *Donery* court first determined what the meaning of the phrase "all potential earned early release time credit" meant. *Id.* (*citing* RCW 9.94.070(1)). After acknowledging that it was not statutorily defined, it looked at the language of then RCW 9.94A.728, now RCW 9.94A.782 and .729. It also looked other statutes referencing this language. *Id.* at 671 (*citing former* RCW 9.94A.030(21)). It finally examined the Washington Supreme Court's prior ruling in *Williams*, 121 Wn.2d 655. *Id.* Based upon this review, the Court rejected Donery's argument because it determined that "earned early release time means the time Donery could earn in the state [prison] system." *Id.* at 672. The Court concluded that "[b]ecause the state institutions do not have the authority to alter countyjail good-time awards, only the possible early release time that an inmate of a state institution can earn is time granted by DOC." *Id.* at 673.

Donery further argued that the administrative code prevents the Department from rescinding any of the good-time awarded by a county jail.

This argument was soundly rejected by the *Donery* court because "[u]nless the statute expressly or by necessary implication gives the power to oversee county jails' good-time policies, DOC does not have that power." *Id.* (citations omitted). "Thus, the WAC provisions can only govern early release time DOC awards." *Id.*

Donery finally argued that the inability of Department to rescind good-time earned in county jails would inhibit the ability of the Department to control its prisoners.[5] *Id.* at 674. In effect, Department would have the authority to impose more punishment if it had the ability to rescind good-time earned in the jails. The state argued against this very position and the Court agreed, citing the public policy discussion in *Williams* where good-time is a means of maintaining jail and prison discipline. *Id.* This argument was soundly rejected because both jails and prisons need good-time for discipline and the *Donery* Court warned that there would be a subsequent loss of disciplinary power in the county jails.

> But there would be a corresponding loss of disciplinary power in the county jails. Under the State's proposed interpretation, the county's good-time certification is a more powerful reward for prisoners if the State cannot take it away. As the time prisoners spend in county jail is usually much shorter than in DOC, and because the county cannot take away good credit

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[5]In this argument, the Department is arguing opposite to the position it has taken in this case.

> time an inmate might earn in state prison, the county arguably needs to have a greater incentive to be able to improve discipline. Therefore, holding that DOC does not have authority to take away county time furthers the legislature's purpose of allowing both county jails and state institutions to exercise plenary authority.

Id. (*citing Williams*, 121 Wn.2d at 661).

Subsequently, *Williams* was reaffirmed by this Court in 2008. *See In re Pers. Restraint of Erickson*, 146 Wn. App. 576. In this case, Erickson was given credit for 368 days served by the sentencing court based upon a pleas agreement. *Id.* at 581. The actual jail certification gave Erickson 49 days of good-time based on the 98 days of actual time spent in custody at the jail. *Id.* Erickson wanted the Department to give him good-time credit for the straight-time he was given by the trial court, not just the straight-time he spent in jail. *Id.*

In examining this case, this Court stated that "[t]he institution in which the offender is actually incarcerated retains complete control over the good-time credits granted to offenders within its jurisdiction." *Id.* at 584 (*citing Williams*, 121 Wn.2d at 665). Because Erickson had only spent 98 actual days in the King County Jail, he was only entitled to 49 good-time days pursuant to the county's policies. *Id.* at 588.

What has been shown is that every time the Department would lose a case by arguing that it has the power to give or take away good-time given

an inmate by the county jail, it states it cannot do it. The most recent case showing this simple fact involved an inmate who was not given any good-time credit for the time he spent in the county jail. *See In re Pers. Restraint of Talley*, 172 Wn.2d 642. Talley argued that both the Skamania County Jail and the Department of Corrections violated former RCW 9.92.151(1) while the Jail argued that the statutory issue was not properly before the court.[6] *Id.* at 644. Again, the Department argued it could rely on Skamania County's jail certification based on the holding in *Williams*. *Id.* at 651. In the Department's supplemental brief before the Supreme Court, it argued that

> early release credits for offenders sentenced to the custody of the DOC are to be based on the policies of the agency that has jurisdiction over the facility where the offender is confined.

Appendix A: Supplemental Brief of Respondent Department of Corrections, *In re Pers. Restraint of Talley*, Supreme Court, No. 83284-6, p. 8 (*citing* RCW 9.94A.728(1). The Department went on to say that "[t]he county jail has jurisdiction over the determination of Talley's jail good-time. *Id.* Hence, the DOC is not the proper entity to respond to Talley's equal protection claim

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[6]The difference between the former and the present RCW 9.92.151 are not relevant to this case. The only change made now prohibits county jails from giving good-time to individuals serving confinement pursuant to RCW 9.94A.670(5)(a).

involving the jail's early release time." *Id.* Once again, the Department asserts it has no power over the jail good-time.

It is clear that every time an inmate has asked the Department of Corrections to modify the amount of good-time they earned in the county jail, the Department has relied on the consistent case law in Washington to state they have no power to make any changes. If the Department cannot give or take away jail good-time in these other cases, it cannot take away good-time here, contrary to the opinion held by the trial court.

C. THE RULES OF STATUTORY CONSTRUCTION ESTABLISH THE LEGISLATURE INTENDED TO ESTABLISH TWO SEPARATE AND EQUAL STATUTORY SCHEMES FOR AGENCIES HAVING JURISDICTION OF AN INMATE TO ESTABLISH POLICIES GRANTING AND TAKING AWAY GOOD-TIME.

The Respondents will argue that RCW 9.94A.729(5) provides the authority to take away jail good-time if an individual cannot timely find an approved address for release. The rules of statutory construction say otherwise. Both the language of each statute and its legislative and judicial history makes it clear that each agency has separate but equal jurisdiction over the good-time earned by individuals under their jurisdiction.

1. <u>The Rules of Statutory Construction Makes It Clear That the Two Statutory Schemes Create a Separate-But-Equal Good-Time Statutory Scheme.</u>.

Washington's statutory construction rules support the separation of

jurisdiction between the two good-time schemes. It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. *State v. Farmer*, 100 Wn.2d 334, 341, 669 P.2d 1240 (1983). Words used in a statute are to be given their usual and ordinary meaning. *Garrison v. Washington State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). A legislative body is presumed not to use nonessential words. *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002). Each word is to be accorded meaning. The legislature is presumed to have used no superfluous words. *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (citations omitted).

RCW 9.94A.729(1) makes it clear that the Department only has jurisdiction to develop procedures and policies in the "correctional agency having jurisdiction in which the offender is confined." (Emphasis added.) There is no authority for the Department to develop procedures to give or take away good-time for the time period under which the individual is under the jurisdiction of a county jail. This meshes with the clear language of RCW 9.92.151 which permits reduction in good-time "in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction." (Emphasis added.) Not only is the language clear but the two statutes are not in conflict. If authority were given to the Department to rescind the good-time granted by the county jails, jurisdiction

would have two separate meanings resulting in a conflict in meaning between the two statutory schemes.

This is also why the jail is required to provide the Department with a certification showing not only the actual amount of time the individual spent in jail including all the good-time they are entitled to pursuant to the jail's policies governing good-time. If the Department had the authority to take away jail good-time, there would be no point in obtaining the amount of good-time from the county jail because based upon the sentence and the amount of straight-time certified, the Department could make the calculation itself. The whole purpose of this process is to enable the inmate to get full credit for his good-time.

Closer inspection of the language of RCW 9.94A.729(5)(a) seconds this interpretation. It permits an individual to be transferred to community custody only through the good-time earned in "this section." Section is a term of art which refers to a specific part of the statue in question. When the Revised Code of Washington was enacted, it was created with titles, chapters and sections. RCW 1.04.010. Thus, RCW 9.94A.729 is defined as Title 9, Chapter 9.94A and section 729. Therefore, given that an individual can only be transferred to community custody based on good-time earned while incarcerated solely under the jurisdiction of the Department of Corrections, the Respondents cannot take away Mr. Blick's good-time earned at King

County. This interpretation also fits with the definition of community custody. Community custody is defined as follows:

> [T]hat portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department.

RCW 9.94A.030(5).

Significantly, it only applies to the SRA, chapter RCW 9.94A. Also, "earned release" is limited to the definition set forth in RCW 9.94A.728, which references RCW 9.94A.729. RCW 9.94A.030 (23). Clearly, the legislature intended the constraints on release in RCW 9.94A.729(5) to only apply to good-time earned or lost while individuals were under the jurisdiction of the Department. No other interpretation is possible.

2. The Legislature Is Presumed to Be Aware of Existing Statutes When Passing Subsequent Legislation – It was Aware of Amending Past Statutes.

The legislature is presumed to have considered existing statutes and the effect an amendment to one statute may have on other statutes. *Fray v. Spokane County*, 134 Wn.2d 637, 651, 952 P.2d 601 (1998). The Washington Legislature first passed a statute granting the court the right to require an approved address in 1988. *In re Pers. Restraint of Capello*, 106 Wn. App. 576, 581, 24 P.3d 1074 (2001) (*citing* the former RCW 9.94A.120). After adopting this language permitting the Department to

develop policies to review and approve or deny the release of certain offenders to a particular address, the Legislature passed SSB 5191. The conclusion that must be drawn is that the Legislature was aware of the Department's authority to take away good-time if an individual could not find an approved address back when it was the sole good-time decider. When the legislature provided explicit jurisdictional language in each statute granting authority to the agency having jurisdiction, it knowingly limited the Department's authority strictly to the good-time granted in the former RCW 9.94A.155, now RCW 9.94A.728 and .729.

3. The Legislature Is Presumed to Know Past Judicial Interpretations of Statutes When Amending Statutes.

Statutory construction in Washington also assumes the legislature is aware of past judicial interpretation of statutes when amending statutes. *State v. Whitney*, 78 Wn. App. 506, 512, 897 P.2d 374 (1995). RCW 9.94A.728 has been amended approximately 17 times since 1989. Most of these amendments were passed after *Williams* was decided by the courts. Because the legislature is presumed to be aware of Williams and progeny, the case for separate but equal authority, and the purpose behind the structure, the two good-time statutes must be read as separate and equal. Not once since the passage of *Williams* and progeny have any of the relevant statutes been changed to expressly grant the Department control over good-time granted by

a county jail. The conclusion that must be drawn is that this separation is deliberate and final.

As further proof that it only refers to time spent under the Department jurisdictions, not once in the SRA does it refer to the RCW 9.92.151. If the legislature had wanted to give the Department this authority, the statues would have been amended to provide explicit authority.

4. The Community Notification Statutes Have No Relevance.

The Department of Corrections is also required to notify law enforcement and certain members of the society when an inmate will be released. RCW 72.09.710 and .712. These two statutes are part of the chapter titled Department of Corrections. Because the Department is limited by RCW 9.92.151 and the decisions in *Williams* and progeny, it cannot hold individuals past their MNED for any reason because the Department cannot take away jail earned good-time for any purpose, whether an address has been denied or because notification has not been conducted. (Emphasis added.)

Also, there is no difference between planning notification for someone being released on their MXED as it is their MNED. The Department always anticipates when it may have to hold someone to their maximum sentence length and does its notification in a timely fashion. The Department cannnot take away jail good-time for notification any more than it can take away jail good-time for any other reason.

D. THE HOLDING OF *MATTSON* HAS NO RELEVANCE TO THE STATUTORY INTERPRETATION OF THE RELEVANT STATUTES.

Respondents argued below that the Supreme Court decision in *In re Pers. Restraint of Mattson,* 166 Wn.2d 730 permits taking away the jail good-time pursuant to RCW 9.94A.729. The words "liberty interest" and its lack of application to good-time were bandied about to argue that individuals like Mr. Blick had no such liberty interest in early release. But as Mr. Blick made clear both before the trial court and now this Court, the issues presented does not rely on any liberty interest at all. It is not a due process question, it is a question of how the statutory schemes for good-time and release meld together. If RCW 9.94A.729 was the only good-time statute for individuals in prison who served time in the county jails and the jails did not have jurisdiction to determine and take away good-time pursuant to RCW 9.92.151, then this lawsuit would not exist. But RCW 9.92.151 does exist – both county jails and the Department have separate statutory authority over the good-time earned and taken away while the inmate was under their jurisdiction. This is the heart of the argument that supports Mr. Blick's tort claims again the Respondents, not some argument about a liberty interest which Mr. Blick has never claimed existed.

E. THE DEPARTMENT AND ITS EMPLOYEES HAD A DUTY TO GIVE CREDIT FOR ALL JAIL GOOD-TIME TO MR. BLICK AND IT BREACHED THAT DUTY, RESULTING IN MR. BLICK BEING DEPRIVED OF LIBERTY FOR 52 DAYS.

1. The Department Has A Duty to Give Each Prisoner Like Mr. Blick All Good-Time They Earned While Under the Jurisdiction of a County Jail And It Breached That Duty.

Mr. Blick has a negligence claim under Washington law. To prove such a claim, Mr. Blick must show the following:

> (1) there is a statutory or common-law rule that imposes a duty upon defendant to refrain from the complained-of conduct and that is designed to protect the plaintiff against harm of the general type; (2) the defendant's conduct violated the duty; and (3) there was a sufficiently close, actual, causal connection between defendant's conduct and the actual damage suffered by plaintiff.

Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929,932,653 P.2d 280 (1982). It has been shown that under the statutory scheme by which criminal Respondents get good-time credit for the straight-time they spend in a county jail while awaiting trial and sentencing, they are entitled to all good-time earned after they come under the jurisdiction of the Department of Corrections. Therefore, the Department has a duty to give each and every prisoner under its jurisdiction like Mr. Blick credit for each day of good-time earned by that individual while under the jurisdiction of the county jail.

There is no question that Mr. Blick was held 52 days past his MNED and released on his MXED. When the Department held Mr. Blick one day

past his MNED, it breached its duty to give him all the good-time credit Mr. Blick earned under the jurisdiction of the King County Jail. The Department has breached its duty to release Mr. Blick and others on their MNED, not MXED. There is no statutory authority permitting this. The Department clearly breached its duty.

The Respondents, by ignoring statutory language and twenty years of case law when developing their good-time release policies, have denied Mr. Blick and others like him their good-time earned while under the jurisdiction of the county jails and are directly responsible for having caused harm.

> The term "proximate cause" means a cause which in a direct sequence [unbroken by any superseding cause,] produces the [injury] [event] complained of and without which such [injury] [event] would not have happened.

WPI 15.01 (6th ed.). The Respondents directly caused Mr. Blick and others to be held past their MNED. This resulted in the loss of liberty. A person who has suffered one day of lost liberty has suffered damages. Mr. Blick suffered 52 days of lost liberty. He has been injured.

2. <u>All the Respondents Are Liable Under Respondeat Superior Liability</u>.

The Respondents did not personally decide to hold Mr. Blick past his MNED. However, because the employees of the Department of Corrections who prevented Mr. Blick's timely release were performing their employer's assigned duties, the employer is liable pursuant to *respondeat superior.*

> The doctrine of *respondeat superior* -literally, "let the master answer" - holds that an employer is liable for the negligent acts of its employees that are "within the scope or course of employment." The test for determining when an employee acts within the scope of employment is well settled: "whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer; or, as sometimes stated, whether he was engaged at the time in the furtherance of the employer's interest."

Rahman v. State, 170 Wn.2d 810, 816-17, 246 P.3d 182 (2011) (citations removed).

The functioning of the Department of Corrections depends on employees following the policies and procedures. The policies are formally ratified by the secretary of the Department. This was a proper function of a secretary of the Department of Corrections. The secretary is explicitly responsible for the administration of the department by statute. RCW 72.09.050. This statute permits the delegation of the secretary's functions and duties to employees along with the promulgation of standards to be used by the employees. *Id.* If they do not follow these policies and procedures, employees face discipline or worse.

There are also procedures that must be followed in order to house, feed, and care for the approximately 16,000 inmates under the Department's jurisdiction. One procedure that affected Mr. Blick was the algorithm used by the Department to calculate the various dates which affect his release as

shown on his Release Date Calculation sheet. The data from the Judgment and Sentence must be properly entered by the data entry employee. CP 102-104. Employees developed this algorithm which resulted in the calculation of the MNED and MXED dates.

Employees need to know when to release inmates. They rely on policies to do their jobs correctly so that prisoners do not get improperly released. There is a policy governing transition and release. CP 105-12 (DOC Policy 350.200). This policy is quite clear that prisoners can be released on their Maximum Expiration Release date, not their MNED. *Id.*, p. 2 (section II.B)). This policy was last updated in 2010 and is still being used without amendment. At the time of the update, it was signed by Mr. Vail. For the period of time in question, Secretaries Vail and Warner were employed by the State of Washington. The Respondents Vail, Warner and the State of Washington are responsible for the actions of Department employees that failed to release Mr. Blick and others like him after serving their Minimum Expiration Date.

F. MR. BLICK WAS FALSELY IMPRISONED BY THE Respondents AND THEIR EMPLOYEES

In the State of Washington, "[t]he gist of an action for false arrest or false imprisonment is the unlawful violation of a person's right of personal

liberty or restraint of that person without legal authority." *Bender v. Seattle*, 99 Wn.2d 582,591,664 P.2d 492 (1983). The restraint must be intentional.

> A person is restrained or imprisoned when he is deprived of either liberty of movement or freedom to remain in the place of his lawful choice; and such restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used.

Kilcup v. McManus, 64 Wn.2d 771, 777, 394 P.2d 375 (1964). Prison is the ultimate restraint. "[A] person may be as effectually restrained and deprived of liberty as by prison bars." *Id.* at 777-78. Acting under the color of authority with the power to restraint acts with force and can cause an imprisonment. *Id.* at 777. The "existence or nonexistence of malice is immaterial to the question of liability .... for false imprisonment." *Bender*, 99 Wn.2d at 591.

The pleaded facts, as summarized above, are sufficient for this Court to find that Respondents did unlawfully incarcerate Mr. Blick. He was entitled to be released on August 9, 2011. He was held past this date by employees of the Department of Corrections. They were acting under the color of authority granted to them by the Secretary. These employees were without lawful authority to act. Mr. Blick and the others like him were unlawfully detained.

IV. CONCLUSION

For the reasons stated above, Mr. Blick respectfully requests that this Court reverse the trial court's order dismissing his partial summary judgment motion. He would further request this Court grant his partial summary judgment motion and deny Respondent's summary judgment motion, and remand to the trial court for further proceedings.

DATED this 26th day of August, 2013.

Respectfully submitted,

MICHAEL C. KAHRS, WSBA #27085
Attorney for Appellant Richard Blick

CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on August 26, 2013, in Seattle, County of King, State of Washington, I deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. APPELLANT'S OPENING BRIEF

Daniel Judge, Rhonda Larson
Attorney General's Office
P.O. Box 40126
Olympia, WA 98504-0126

By: _____ Date: 8/26/13
MICHAEL C. KAHRS

APPENDIX A

NO. 83284-6

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of

TEDDY GLEN TALLEY,

Petitioner,

SUPPLEMENTAL BRIEF OF RESPONDENT DEPARTMENT OF CORRECTIONS

ROBERT M. MCKENNA
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I. INTRODUCTION

In his personal restraint petition, Talley challenges the Skamania County Jail's policies regarding the award of earned early release time ("jail good time") for pre-sentence detainees. The Department of Corrections (DOC) does not control the county jail's policies, and by statute and case law is required to credit an inmate's sentence with the amount that a county jail certifies unless the certification contains apparent or manifest errors of law. This Court has held that the DOC is not required to review and approve the individual good-time policies adopted by the county jails.

In this case, the certification did not contain apparent or manifest errors of law and the DOC acted properly in crediting Talley the amount of good time certified. Counsel for the DOC does not represent the jail, and therefore takes no position on the jail's policy.

II. STATEMENT OF THE CASE

A. Factual Background

Talley pleaded guilty to second degree murder. Appendix 2, Judgment and Sentence.[1] The trial court sentenced him to 123 months of confinement. *Id.* at 6. The Skamania County Jail , where Talley had been confined prior to sentencing, issued a certification to the DOC showing

[1] All references to appendices are references to the appendices attached to the DOC's Response to Talley's Motion for Discretionary Review.

516 days of jail time served and zero days of jail good time. Appendix 5, Jail Certification. Pursuant to former RCW 9.94A.728(1) (2005),[2] the DOC followed the jail's certification and applied zero days of jail good time to Talley's sentence. Appendix 4, Sentence Information Screen (showing zero "Cause ERT Credit"). *See* former RCW 9.94A.728(1) ("If an offender is transferred from a county jail to the department, the administrator of a county jail facility shall certify to the department the amount of time spent in custody at the facility and the amount of earned release time").

In March 2008, Talley wrote to DOC alleging that the DOC's sentence calculation was off by 55 days because he should have earned good time credits while at the jail at a rate of 10 percent. Appendix 6, Letter from Talley to DOC dated March 11, 2008. In another letter, he claimed that he was denied early release time based on the unavailability of programs. Appendix 7, Letter from DOC to Talley dated April 28, 2008. The DOC responded that he needed to contact the jail to take issue with jail good time. Appendix 8, Inmate Kite.

B. Procedural History

Talley filed a personal restraint petition in the Court of Appeals, alleging that DOC miscalculated his prison early release credits by 55

[2] Currently codified as RCW 9.94A.729(1)(b).

days, that the DOC miscalculated presentence time served ("jail time served") by two days, that the DOC miscalculated jail good time by 58 days, and that the DOC's miscalculation of jail good time violated Talley's equal protection rights. Personal Restraint Petition of Talley, at 3-4. The DOC responded that Talley's math was wrong regarding the 55 days of DOC good time and the 2 days of jail time, and that Talley's equal protection claim regarding jail good time was without merit. Response of the Department of Corrections, at 1.

The Washington Court of Appeals granted the petition with regard to the two days of jail time and denied the petition with regard to the other claims. Order Granting Petition in Part and Denying Petition in Part, *In re PRP of Talley*, No. 39080-9-II (June 17, 2009). Talley then moved for discretionary review. This Court ordered the DOC to respond, citing RCW 9.92.151(1). *See* Ruling dated October 28, 2009.

In the DOC's response, it addressed the merits of Talley's claim but it also stated that the Court should instead substitute the county prosecutor as the proper respondent because counsel for the DOC does not represent the jail and therefore can defend the DOC but not the jail's policies. Response of the DOC to Motion for Discretionary Review, at 1. The Court did not substitute the prosecutor but instead added the

prosecutor as co-respondent, leaving the DOC in the case. *See* Ruling dated February 11, 2010.

III. ARGUMENT

A. The DOC Properly Relied On The Jail Certification In Crediting Jail Good Time

The Skamania County Jail's policy of not allowing presentence detainees to participate in work programs does not implicate the DOC. The DOC is not required to review and approve the individual good-time policies adopted by the county jails. *In re Williams*, 121 Wn.2d 655, 664, 853 P.2d 444 (1993).

The DOC received a jail certification from the Skamania County Jail that included no days of good conduct time. The jail certification on its face does not show any apparent or manifest errors of law. By statute and case law, the DOC was entitled to rely on the jail's certification.

Statute requires that when an offender is transferred from jail to the DOC, the jail must certify to the DOC the amount of time spent in custody at the jail and the amount of early release time earned there. Former RCW 9.94A.728(1). The Department is entitled to give presumptive legal effect to this certification. *In re Williams*, 121 Wn.2d at 664. The statute prohibits the Department from accepting a jail certification only if the certification is based on apparent or manifest errors of law. *Id.* Under this

"apparent or manifest error of law" standard, the DOC is not required to review the accuracy of the jail certifications. *Id.* It also is not required to review and approve the individual good-time policies adopted by the county jails. *Id.*

In *Williams*, the petitioner alleged that DOC failed to adequately award jail good time. *Williams*, 121 Wn.2d at 658. In that case, the jail certification had stated that Williams was incarcerated for 232 days and earned 77 days of good time. *Id.*, 121 Wn.2d at 658. The Court of Appeals dismissed his petition, mistakenly concluding that the 77 days of jail good time was all he was entitled to under the statute. *Id.* This Court determined that Williams had not received the statutory maximum good time credit, and because the record did not indicate why the county jail credited Williams with less than the statutory maximum, it remanded for clarification. *Id.*, 121 Wn.2d at 658-59.

In its analysis, the Court clarified the legal effect of a jail certification. *Id.*, 121 Wn.2d at 664. The Court recognized that a county jail retains complete control over good time awards to offenders within its jurisdiction, but the Court rejected the idea that DOC has a purely passive role in accepting the certifications from the jails. *Id.*, 121 Wn.2d at 664-65. The Court construed the statute to prohibit DOC from "accepting certifications that are based on apparent or manifest errors of law." *Id.*

The Court in *Williams* did not further elaborate, however, except to state that under this standard, the DOC is not obligated to review the accuracy of certifications from county jails if the certifications contain no apparent or manifest errors of law. *Williams*, 121 Wn.2d at 666.

The *Williams* court emphasized that former RCW 9.94A.150 (later codified as former RCW 9.94A.728(1)) "divides authority over the award of good-time between the county jail and the Department." *Williams*, 121 Wn.2d at 661. The Court found that nothing in the statute's structure or language indicates that the DOC should ignore the certification from the county jail and recalculate the award of good-time. *Id.* "Indeed, the statute appears to give the various correctional authorities, both county jails and the state correctional system, plenary authority over good-time awards for offenders under their jurisdiction." *Id.*

The Court also reasoned that the "purpose of the award or denial of good-time also belies" an interpretation that would require the DOC to ignore a county's good time calculation. *Id.* The Court noted that good time serves important disciplinary goals and the structure of the statute (i.e., former RCW 9.94A.728(1)) reflects this. *Id.* It is important that a jail actually have control over the award of good time for offenders under its jurisdiction. *Williams*, 121 Wn.2d at 662. "Good-time would be useless in controlling prison discipline in county jails if offenders knew

IV. CONCLUSION

The DOC respectfully requests that the Court find that DOC has correctly followed applicable law in relying on the jail's certification of time served and good time.

RESPECTFULLY SUBMITTED this 15th day of April, 2011.

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they would be automatically credited with full good-time upon their transfer to the Department." Hence, the statute gives control over the award or denial of good time to the institution in which the offender is actually incarcerated. *Id.*

In this case, the DOC followed former RCW 9.94A.728(1) and applied the credits listed in the jail certification because there were no apparent or manifest errors of law on it. The mere absence of good time on the certification is not an apparent or manifest error because the absence of good time could just as easily have been due to the jail not having any good time policy for its inmates, or to Talley having failed to earn the good time for which he may have been eligible while in the jail.[3]

B. The DOC Has No Jurisdiction Over The Jail's Good Time Procedures

Talley argues that RCW 9.92.151[4] requires the jail to award him good time for presentence incarceration. Former RCW 9.94A.728

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[3] When the DOC believes that an error in jail time served or jail good time may exist, records staff will investigate, usually by communicating with the jail. *See, e.g., In re Erickson,* 146 Wn. App. 576, 191 P.3d 917 (2008) (DOC investigated jail good time where sentencing court had ordered much more credit for time served than jail records indicated defendant had served, and where amount of good time is dependent on amount of time served).

[4] RCW 9.92.151 states in part:

> [T]he sentence of a prisoner confined in a county jail facility for a felony, gross misdemeanor, or misdemeanor conviction may be reduced by earned release credits in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction. . . . Any program established pursuant to this section shall

provides that early release credits for offenders sentenced to the custody of the DOC are to be based on the policies of the agency that has jurisdiction over the facility where the offender is confined. RCW 9.94A.728(1) ("The term of the sentence of an offender committed to a correctional facility operated by the department may be reduced by earned release time in accordance with procedures that shall be developed and adopted by the correctional agency having jurisdiction in which the offender is confined"); *Williams*, 121 Wn.2d at 664, 666; *In re Erickson,* 146 Wn. App. 576, 585, 191 P.3d 917 (2008). The DOC does not have jurisdiction over offenders when they are in the county jail. RCW 9.92.151 does not apply to the DOC. It applies to the jail.

The county jail has jurisdiction over the determination of Talley's jail good time. Hence, the DOC is not the proper entity to respond to Talley's equal protection claim involving the jail's early release time.

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allow an offender to earn early release credits for presentence incarceration.

CERTIFICATE OF SERVICE

I certify that on the date below I served a copy of the SUPPLEMENTAL BRIEF OF RESPONDENT DEPARTMENT OF CORRECTIONS on all parties or their counsel of record as follows:

- ☒ US Mail Postage Prepaid
- ☐ United Parcel Service, Next Day Air
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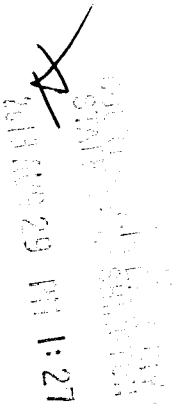

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 1st day of April, 2011 at Olympia, Washington.

KIMBERLY SOBOL
Legal Assistant