NO. 91644-6

SUPREME COURT OF THE STATE OF WASHINGTON

FRED BINSCHUS, individually and as Personal Representative of the Estate of JULIE ANN BINSCHUS; TONYA FENTON; TRISHA WOODS; TAMMY MORRIS; JOANN GILLUM, as Personal Representative of the Estate of GREGORY N. GILLUM; CARLA J. LANGE, individually and as Personal Representative of the Estate of LEROY B. LANG; NICHOLAS LEE LANGE, Individually and as Personal Representative of the Estate of CHESTER M. ROSE; STACY ROSE, Individually; RICHARD TRESTON and CAROL TRESTON, and the marital community thereof; BEN MERCADO; and PAMELA RADCLIFFE, individually and as Personal Representative of the Estate of DAVID RADCLIFFE, and TROY GIDDINGS, individually,

Respondents,

v.

SKAGIT COUNTY,
a political subdivision of the State of Washington,

Petitioner,

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS; OKANOGAN COUNTY, a political subdivision of the State of Washington; and SKAGIT EMERGENCY COMMUNICATIONS CENTER d/b/a "Skagit 911," an interlocal government agency,

Defendants.

REVISED *AMICUS CURIAE* BRIEF STATE OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The State of Washington operates numerous mental health treatment facilities and correctional institutions throughout the State.[1] Accordingly, the State has a profound interest in the new liability that the Court of Appeals has created for failing to rehabilitate offenders and mental patients to prevent harm to the public. This new governmental liability vastly expands existing special relationship duties. *Binschus v. Dep't of Corr.*, 186 Wn. App. 77, 93-94, 345 P.3d 818 (2015). Review should be granted under RAP 13.4(b)(1)(2) because the decision below conflicts with decisions of this Court and the Court of Appeals. *See Melville v. State*, 115 Wn.2d 34, 38-39, 793 P.2d 952 (1990) (no tort duty based on failure to rehabilitate offenders); *Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 256, 139 P.3d 1131 (2006) (no duty enforceable in tort to rehabilitate offenders).

In addition, the issue of whether government should be liable for failing to rehabilitate violent criminals while they are incarcerated presents a question of substantial public interest that implicates important public policy considerations warranting review by this Court. RAP 13.4(b)(4).

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[1] As of March 31, 2015, the DOC has a total of 18,426 offenders in confinement. *See* Washington State Department of Corrections, Statistics and Reports, Fact Card: *Facts About Offenders in Confinement* (2015), available at http://www.doc.wa.gov/aboutdoc/statistics.asp. A copy of the materials referenced in this footnote and footnote 3 have been filed in the State Law Library in accordance with this Court's letter of July 15, 2015.

The State of Washington respectfully submits this amicus brief to assist the Court in understanding the breadth of the problems that the Court of Appeals' opinion creates.

II. ISSUES ADDRESSED BY AMICUS

1. Did the Court of Appeals properly extend liability under *Restatement (Second) of Torts* §§ 315 and 319 (1977) to include claims of negligent failure to treat and rehabilitate offenders while they are incarcerated, when government does not have control over the minds of mental patients and criminal offenders?

2. Is the imposition of tort liability on state and local governments for failure to treat and/or rehabilitate offenders while they are incarcerated consistent with sound public policy, common sense and logic?

III. STATEMENT OF THE CASE

The claims in this case arise from a tragic crime spree by Isaac Zamora following his release from incarceration. His victims sued both Skagit County and Okanogan County for failing to provide mental health treatment that they allege would have prevented his criminal conduct.

Facts relevant to the liability claims include that Mr. Zamora was arrested on outstanding warrants on April 4, 2008, and held in the Skagit County Jail until Okanogan County took custody of Mr. Zamora on May 29, 2008, pursuant to a contract with the Skagit County jail for

housing Skagit County inmates. Mr. Zamora was released from Okanogan County Jail on August 2, 2008, after he completed his sentence. On September 2, 2008, Mr. Zamora committed the crimes at issue in this case.

The Court of Appeals concluded that both Skagit and Okanogan counties had a "take charge relationship" with Mr. Zamora giving rise to a duty to exercise reasonable care while Mr. Zamora was incarcerated in their custody to prevent him from harming third persons following his release. *Binschus*, 186 Wn. App. at 93-94. Based upon this determination, the Court of Appeals reversed summary judgment granted in favor of Skagit County, finding there was a question of fact as to whether Skagit County's failure to evaluate and treat Mr. Zamora's mental illness was the cause in fact for Mr. Zamora's crime spree on September 2, 2008. The Court of Appeals affirmed summary judgment in favor of Okanogan County based upon the absence of evidence Okanogan County knew or should have known of Mr. Zamora's unstable, mental health condition. *Id.* Skagit County timely petitioned for review to this Court.

IV. ARGUMENT

A. The Expansion of Tort Liability to Include Allegations of Negligent Failure to Treat And Rehabilitate Convicted Criminals While They Are Incarcerated is in Conflict With This Court's *Melville* Decision

This Court should grant review because the Court of Appeals' opinion conflicts with opinions of this Court and the Court of Appeals.

See RAP 13.4(b)(1), (2). First, the Court of Appeals' opinion conflicts with this Court's decision in *Melville*. In *Melville*, this Court rejected a claim substantially the same as the present case when it held that the Department of Corrections was not liable for failing to provide mental health treatment to an inmate, which allegedly would have prevented the inmate's crimes upon release. *Id.* at 39. Although the *Melville* decision is controlling and was cited in the briefs below, the Court of Appeals failed to address or even mention it.

The *Melville* case involved a wrongful death action against the Department of Corrections based on a former inmate's actions three months after release from an eight-month prison sentence. *Id.* at 35. Just as in the present case, the plaintiffs there alleged that the Department had negligently failed to provide mental health services. *Id.* at 36. Despite the plaintiffs' reliance on a statute directing the Department to establish a comprehensive system of corrections that ensured public safety and made wise investment in effective rehabilitation, the court rejected plaintiffs' claims that the Department had tort liability for failing to provide mental health treatment. *Melville*, 115 Wn.2d at 37-38.

The *Melville* court relied on numerous prior cases that had also rejected claims involving the alleged failure of the government to treat or rehabilitate offenders in its custody. For example, the Court observed that in *In Re Young*, 95 Wn.2d 216, 219, 622 P.2d 373 (1980), the Court had

held that the requirement in an earlier statute that the DOC create rehabilitative programs was "for the benefit of the prison population generally, and to serve society's interest in the rehabilitation of criminals, rather than to vest any right in individual prisoners." *Id.* at 219. More on point, this court also cited cases that had rejected obligations to create drug and alcohol treatment programs in order to rehabilitate offenders. *Melville* at 38; (citing *Aripa v. Dep't of Soc. & Health Servs.*, 91 Wn.2d 135, 139, 588 P.2d 185 (1978); *Bresolin v. Morris*, 88 Wn.2d 166, 171, 167 558 P.2d 1350 (1977)). The Court of Appeals' opinion here conflicts with *Melville* and the precedent cited therein because it imposes a tort duty on government to rehabilitate prisoners while they are in custody, extending liability for criminal conduct following release from custody.

In their answer to the Petition for Review, Plaintiffs attempt to distinguish *Melville* based upon the enactment of a statute, RCW 70.48.130(1), that provides county jails have a general duty to provide medical care to inmates. The beneficiary of the duty is the inmate while in jail, not the public at large following an inmate's release from incarceration. Moreover, the general duty discussed in RCW 70.48.130(1) is much less specific than the statutes that were rejected as the basis for the purported duty to rehabilitate inmates in *Melville*. *See Aripa*, 91 Wn.2d at 139 (no requirement to a provide drug treatment program in order to rehabilitate inmates); *Bresolin*, 88 Wn.2d at 171 (establishment of

rehabilitative alcohol treatment program was discretionary). In addition, as Plaintiffs apparently acknowledged, even absent RCW 70.48.130(1), the State would be obligated to provide for medical care for inmates. *E.g.*, Answer to Petition for Review at 11 (citing constitutional provisions and case law prior to enactment of statute to show state's duty to provide medical care). Thus, the codification of this obligation in statute does not distinguish this case from *Melville*.

The nature of the take charge relationship in the tort duty recognized in *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992), is based upon the control the Department has over offenders through the enforcement of conditions of supervision by arresting and incarcerating the offender when those conditions are violated. The duty at issue in this case is fundamentally different. It is not based upon the failure to incarcerate or incapacitate someone who poses a danger. *See, e.g., Petersen v. State*, 100 Wn.2d 421, 424-25, 671 P.2d 230 (1983) (liability was premised upon the failure to seek further commitment of a mental health patient who was known to pose a serious risk of harm). Here, the Court of Appeals found jails have a duty to prevent criminal recidivism through rehabilitative treatment. This duty fictitiously assumes government has control over the minds of patients and offenders that imposes responsibility on public officials to modify and improve the

behavior of violent criminals – even when the government no longer has physical control over or active supervision of the offender.

The scope of liability claims under this expansive duty will undoubtedly yield lawsuits based upon negligent failure to provide mental health treatment, alcohol treatment, drug treatment, anger management treatment, and sex offender counseling, etc. This Court should accept review to reverse the decision below that is in direct conflict with this Court's decision in *Melville* and generally inconsistent with this Court's precedent that has premised a take-charge relationship on the ability to control the person of an offender through incarceration, rather than to control the mind of an offender through treatment and rehabilitation.[2]

In recognition of the serious and inherent risks in releasing violent criminals back into society, no court in the country has gone as far as the Court of Appeals did in this case, imposing a general tort duty on government to protect the public at large from the recidivistic conduct of violent offenders based upon a negligent failure to treat and rehabilitate.

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[2] Many years ago, under the old parole system, this Court acknowledged the inherent risks of releasing criminals: "The courts have long recognized to, that although releasing a convicted felon on parole may be beneficent and rehabilitative and in the long run produce a genuine social benefit it is also a risky business. The parole may return loose upon society individuals of the most depraved, sadistic, cruel and ruthless character who may accept parole with no genuine resolve for rehabilitation nor to observe the laws and customs promulgated by the democratic society, which in the process of self-government granted the parole." *January v. Porter*, 75 Wn.2d 768, 879-80, 453 P.2d 876 (1969).

In recognizing such an expansive tort duty, the Court of Appeals' decision is in conflict with this Court's decision in *Melville* and the Court of Appeals' decision in *Hungerford.* For these reasons, this Court should grant review. RAP 13.4(b)(1)(2).

B. The Imposition of Tort Liability on State And Local Governments For Failing to Treat And Rehabilitate Violent Criminals is Contrary to Sound Public Policy, Common Sense And Logic

The determination of how far legal liability should extend is dependent upon "mixed considerations of logic, common sense, justice, policy and precedent." *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985). Consistent with this Court's decision in *Melville*, 115 Wn.2d at 37-39, other jurisdictions have similarly refused to impose liability for harm caused by third persons released from a state rehabilitative program. *See State v. Sandsness*, 72 P.3d 299, 302 (Alaska 2003). In *Sandsness*, the Alaska Supreme Court relied heavily upon a decision from the Vermont Supreme Court, *Sorge v. State*, 171 Vt. 171, 762 A.2d 816, 823 (Vt., 2000):

> The court surveyed relevant case law and noted that similar attempts to impose liability had been rejected by courts 'that have recognized that most juvenile and adult programs dealing with persons committed to the custody of the State are intended to rehabilitate conduct rather than control it.

Sandsness, 72 P.3d at 302 (citing *Sorge*, 762 A.2d at 820-21).

Similarly, in *Ferree v. State*, 784 P.2d 149 (Utah, 1989), the Utah Supreme Court concluded that imposing liability for releasing offenders before they were rehabilitated would impose too broad a duty of care on the part of correction officials, exposing the state to potentially every wrong that flows from the necessary programs of rehabilitation and paroling of prisoners. "Given the increase in prison populations, the effect could well be to burden correctional officials and chill legitimate rehabilitative programs." *Id. See also VanLuchene v. State*, 244 Mont. 397, 797 P.2d 932 (Mont., 1990) (the state has no duty to rehabilitate prisoners nor is it a guarantor of its rehabilitation facility).

The current prison population has been sentenced for a wide range of crimes and a myriad of criminal histories. The scope of the duty the Court of Appeals has created is amorphous at best. It will depend upon the characteristics of the offender involved and many other factors, which include: (1) the degree to which the offender is willing, if at all, to participate in treatment; (2) the offender's amenability to treatment; (3) the complexity of the offender's treatment needs; e.g., whether the offender has a history of drug abuse, alcohol abuse, child abuse, domestic violence, and mental illness; (4) how much time is available to treat the offender – the length of the sentence; (5) the availability of treatment in rehabilitative programs in the facility where the offender is incarcerated; and, (6) the

impact that events occurring in prison or after release that undo or undermine the rehabilitative effects of treatment.[3]

Quite simply, Government doesn't have control over the minds and thoughts of the criminal offenders and mental patients in its care. This Court should accept review because the Court of Appeals dramatic expansion of the duty of jails, prisons and mental health institutions presents an issue of substantial public importance. RAP 13.4(b)(4).

V. CONCLUSION

Correctional officials do not have control over an inmate's mind or the ability to force offenders into rehabilitative treatment. They often lack the authority or resources to rehabilitate willing offenders. The law should not require the impossible. The Court of Appeals recognition of a duty to rehabilitate violent criminals is in conflict with this Court's decision in *Melville*, and contrary to sound public policy and common sense. For these reasons, this Court should accept review pursuant to RAP 13.4(b)(1), (2), and (4).

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[3] Recidivism statistics demonstrate the multiplicity of factors that affect whether a criminal will reoffend, including age of the offender, gender of the offender, nature of the offense, etc. Studies have shown that the effective incarceration on offender recidivism is complex and likely to be offender specific. For some offenders, incarceration and longer confinements seem to increase the risk of recidivism. For other offenders, the likelihood of re-offense will be either unaffected or reduced by longer terms of incarceration. Lin Song with Roxanne Lieb, *Recidivism: The Effect of Incarceration and Length of Time Served,* Washington State Institute for Public Policy (1993). http://www.wsipp.wa.gov/rptfiles/IncarcRecid.pdf. Michael Evans, *Washington State Department of Corrections Recidivism Rate Outcomes for 2007* (2011). www.doc.wa.gov/aboutdoc/measuresstatistics/docs/WashingtonStateDOCRecidivismRatesUpdate2.docx.

RESPECTFULLY SUBMITTED this 20th day of July, 2015.

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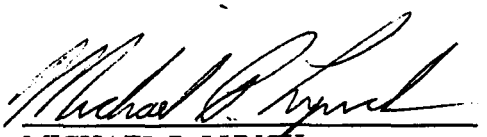

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of July, 2015, at Tumwater, WA.

Lisa Savoia

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