92190-3

NO. 45601-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

STEVEN KOZOL,

Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION

In 2011, the Department found that Respondent Steven Kozol deceived the Department with regard to acquisition of a guitar and accessories. This violated prison rules, which is called an infraction. Infractions subject inmates to a wide variety of potential sanctions ranging from warnings to loss of good time. Here, the infraction resulted in a modest sanction: Kozol was restricted to his cell for ten days. This petition now asks if Kozol can use a statutory writ of certiorari in RCW 7.16.040 to claim that Department staff erred in the procedures used during the internal hearing that reviewed and upheld this infraction.

This Court has long recognized that "[p]rison discipline is an essential function of the day-to-day management of a safe and secure correctional institution." *In re Grantham*, 168 Wn.2d 204, 215, 227 P.3d 285 (2010). Prison officials utilize the infraction and sanction system to help maintain discipline and ensure safety for inmates and staff. *Id.* Every year, the Department conducts tens of thousands of prison disciplinary hearings to address infractions. *In re Gronquist*, 138 Wn.2d 388, 398 n.8, 978 P.2d 1083 (1999) (the Department conducted over 50,000 general and serious infraction hearings in 1997). There is also a long history of deference to prison officials with regard to the day-to-day management of a prison. "Courts traditionally respond to the unique problems of penal

environments by invoking a policy of judicial restraint." *Foss v. Department of Corrections*, 82 Wn. App. 355, 918 P.2d 521 (1996). This policy gives prison officials "wide-ranging deference in the adoption and execution of policies and practices that in their judgments are needed to preserve internal order and discipline and to maintain internal security." *Foss*, 82 Wn. App. at 359 (citing *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)).

Kozol tried to attack his infraction by seeking declaratory judgments on various theories, all of which the court of appeals properly rejected. But the court held that Kozol could amend to pursue a statutory writ of certiorari based on his allegations that the Department committed errors in the internal review. That holding conflicts with precedent limiting application of the statutory writ of certiorari to judicial functions, and contradicts this Court's recognition that prison disciplinary hearings are part of the executive branch's power to administer prisons, not a judicial function. It also contradicts precedent and court rules allowing for a personal restraint petition (PRP) to review prison discipline.

The Court should grant review to address the conflict with prior cases. Without such review, superior courts will face a potential flood of cases seeking a statutory writ of certiorari to review prison disciplinary decisions.

II. IDENTITY OF PETITIONERS

The petitioners are the Department of Corrections (DOC), and DOC employees Eric Jackson and Greg Jones who were respondents at the court of appeals.

III. COURT OF APPEALS DECISION

DOC seeks review of the decision of the Washington Court of Appeals, Division Two, in *Kozol v. Washington State Department of Corrections, et al.*, 45601-0-II (2015). The decision was filed June 9, 2015, and Motions for Reconsideration were denied on July 29, 2015. The opinion is attached as Appendix 1 and the ruling denying reconsideration at Appendix 2.

IV. ISSUES PRESENTED FOR REVIEW

Whether a prison disciplinary decision can be reviewed under the statutory writ of certiorari in RCW 7.16.040?

V. STATEMENT OF THE CASE

A. Factual History

Steven Kozol is a prison inmate. In 2011, Kozol committed a serious infraction by deceiving prison staff about the purchase of a guitar and accessories. CP 68-69, 84-85. Hearings officer Greg Jones found that Kozol committed the serious infraction, and sanctioned Kozol to ten days of cell confinement. CP 31, 68, 84. Associate Superintendent Eric Jackson

upheld the hearing and sanction on appeal. CP 68-69. On April 21, 2011, Associate Superintendent Jackson found that Kozol was provided all necessary due process and the hearing followed procedures set forth in WAC 127-28. CP 68-69.

B. Procedural History

Kozol filed this suit against the Department of Corrections in January 2013 seeking a declaratory judgment under the Uniform Declaratory Judgment Act (UDJA), RCW 7.24. CP 4-6. Kozol's First Amended Complaint added Hearings Officer Jones and Associate Superintendent Jackson as defendants, and requested a declaratory judgment against them for failing to follow the rules governing prison discipline in WAC 137-28. CP 34-35. Kozol also requested a declaratory judgment alleging that Jackson committed a felony under RCW 40.16.030. CP 35. The first amended complaint requested damages and an order permanently enjoining the Department from using the serious infraction in any manner detrimental or adverse to Kozol. CP 35-36.

The defendants moved to dismiss. CP 37-56. The trial court granted the motion dismissing all UDJA and injunctive relief claims. Report of Proceedings (RP) (October 4, 2013) at 16. The trial court, however, believed there was a possible allegation of a tort in Kozol's request for damages and directed a separate hearing to present an order on

the court's ruling of dismissal and to hear argument, if necessary, on the possible remaining tort claim. RP (October 4, 2013) at 16-17.

In response, Kozol moved to amend his complaint a second time. CP 99-103. His proposed second amended complaint alleged the already dismissed UDJA claims, dropped his request for monetary damages, but added statutory and constitutional writ of certiorari claims. CP 105-09. At the presentation hearing, Kozol conceded he was not alleging a tort, but wanted a statutory and constitutional writ of certiorari. RP (November 1, 2013) at 4-5. The court denied the motion to amend and dismissed Kozol's first amended complaint. CP 148-49; RP (November 1, 2013) at 15-16. Afterwards, Kozol's counsel withdrew. CP 166-67.

Kozol appealed and argued the trial court erred in dismissing his UDJA claims and denying his motion to amend. The court of appeals affirmed dismissal of the UDJA claims. *See* Appendix 1, Decision at 6-9. However, it determined the trial court should have allowed Kozol to amend his complaint to seek review under the statutory writ of certiorari, RCW 7.16.040. *Id.* at 11-16. Specifically, Kozol sought a writ to review his claim that the DOC hearing affirming his infraction "was invalid because the DOC's officers, acting in a quasi-judicial capacity, failed to provide him with the procedures he was entitled to under the DOC's rules." *Id.* at 11.

The court of appeals concluded that prison disciplinary hearings are "held by inferior tribunals" and "involve the exercise of a judicial or quasi-judicial function." *Id.* Further, that because Kozol alleged that the Department staff had violated procedural rules for such hearings, he was making a claim that an inferior tribunal had "departed so far from the accepted and usual course of the proceedings as to call for review." *Id.* at 14. Finally, the court concluded that Kozol had no other "adequate remedy at law" to address his allegations of errors in the discipline hearing. *Id.* at 14-16.

The court of appeals denied the Department's motion for reconsideration on July 29, 2015. Appendix 2, Order Denying Motions for Reconsideration.[1]

VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The court of appeals held that a prisoner may use the statutory writ of certiorari to obtain judicial review of an individual prison disciplinary

[1] The Court of Appeals did not determine if denial of Kozol's constitutional writ of certiorari was proper because it found he could amend his complaint and seek a statutory writ of certiorari. *See* Appendix 1, Decision at 9 n.10. Thus, the question of a constitutional writ is not presented by this petition. Even if it were, Kozol has no colorable claim for a constitutional writ because his allegations are that Department staff did not satisfy procedural requirements related to an infraction hearing. This is a far cry from the facts required to seek the extraordinary constitutional writ. *See generally Vinson*, 172 Wn.2d at 769-70 (requiring "facts that, if verified, would establish that the lower tribunal's decision was illegal or arbitrary and capricious" and where "illegality refers to an agency's jurisdiction and authority to perform an act."); *see also id.* ("[A]n alleged error of law is insufficient to invoke the courts constitutional power of review." *quoting Wash. Pub. Emps. Ass'n*, 91 Wn. App. 640, 657, 658, 959 P.2d 143 (1998).

decsion. But the statutory writ of certiorari is available only if the official is exercising judicial functions illegally or in excess of the official's jurisdiction, and only if there is no other adequate remedy at law. RCW 7.16.040; *Clark Cnty. Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 845, 991 P.2d 1161, 1164 (2000). The statutory writ of certiorari is an extraordinary remedy, and all these prerequisite factors must exist to invoke this remedy. *City of Seattle v. Holifield*, 170 Wn.2d 230, 239, 240 P.3d 1162 (2010); *Commanda v. Cary*, 143 Wn.2d 651, 655, 23 P.3d 1086 (2001) (citing *Bridle Trails Cmty. Club v. City of Bellevue*, 45 Wn. App. 248, 252, 724 P.2d 1110 (1986).

The court of appeals decision should be reviewed and reversed. The prison disciplinary process is purely an executive function, and not a judicial function. There is no plausible dispute that the Department acted legally within its legal authority to discipline prisoners. And prisoners have other adequate remedies to review disciplinary decisions by filing a personal restraint petition.

A. Standard of Review

"The extent of a superior court's authority to grant a writ of certiorari is a question of law." *Fed. Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 764, 261 P.3d 145 (2011). Thus, the court of appeals decision presents a de novo question of law.

B. The Statutory Writ is an Extraordinary Remedy and It is Not Available to Review a Purely Executive Function

"The statutory writ of certiorari is an extraordinary remedy." *Commanda*, 143 Wn.2d at 655 (citation omitted). The statutory writ may only be used to review an agency action if the agency is exercising a judicial power. *Williams v. Seattle Sch. Dist. No. 1*, 97 Wn.2d 215, 218, 643 P.2d 426 (1982); *see also Washington Federation of State Employees v. State Personnel Board*, 23 Wn. App. 142, 145, 594 P.2d 1375 (1979). And the writ "may not be used to obtain judicial review of purely legislative, executive or ministerial acts of the agency." *State ex rel. New Washington Oyster Co. v. Meakim*, 34 Wn.2d 131, 134, 208 P.2d 628 (1949).

The grounds for a statutory writ of certiorari are:

> A writ of review shall be granted by any court, except a municipal or district court, *when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer*, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, *and there is no* appeal, nor in the judgment of the court, any *plain, speedy and adequate remedy at law.*

RCW 7.16.040 (emphasis added). The writ thus depends on whether there is a claim "(1) that an inferior tribunal (2) exercising judicial functions (3) exceeded its jurisdiction or acted illegally, and (4) there is no adequate

remedy at law." *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244, 821 P.2d 1204 (1992), citing *Bridle Trails*, 45 Wn. App. at 250.

This Court has emphasized the constitutional importance in limiting the writ to reviewing judicial functions, as opposed to legislative or executive functions. This distinction and limit maintains the constitutional separation of powers and ensures that there is not "an improper encroachment upon the exclusive constitutional territory of another branch of government." *Standow v. City of Spokane*, 88 Wn.2d 624, 629, 564 P.2d 1145 (1977), *overruled on other grounds by State v. Smith*, 93 Wn.2d 329, 610 P.2d 869 (1980). *Standow* insightfully observes that many functions performed by executive bodies "closely resemble the work of courts" but teaches that categorizing a particular action is not to be based on "labels of convenience . . . but rather to establish, in a given factual setting, the appropriate scope of judicial review." *Id.* at 630.

Informed by these purposes, Washington courts use a four-part test to determine if the agency action is a judicial function for purposes of using the statutory writ: (1) Whether a court could have been charged with making the agency's decision; (2) whether the action is one historically performed by courts; (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the action resembles the

ordinary business of courts as opposed to that of legislators or administrators. *Id.* As *Standow* emphasizes, these factors are applied to decide if the substance of the underlying action is executive or legislative before subjecting it to a statutory writ of certiorari. *Id.*

C. Prison Discipline is a Critical Executive Function and Not a Function of a Judicial Tribunal

To conclude that Kozol could amend his complaint and seek a statutory writ, the court of appeals determined that the Department's prison disciplinary process is quasi-judicial. Appendix 1, Decision at 11. But this conclusion ignores this Court's precedent finding prison disciplinary actions are a uniquely executive function essential for the "day to day management of a safe and secure correctional institution." *In re Grantham*, 168 Wn.2d at 215. "Prison disciplinary proceedings are not criminal prosecutions or judicial proceedings but are civil and remedial in nature." *In re Higgins*, 152 Wn.2d 155, 163, 95 P.3d 330 (2004).

1. The Legislature Assigned the Executive Branch Responsibility for Prison Discipline

RCW 72.09.130 and RCW 72.01.090 authorize the Department to devise and implement a disciplinary system that affects a prisoner's earned early release days and good conduct time if they do not behave during their incarceration, or fail to participate in educational and work programs. RCW 72.09.130(1). Based on this authority and more, the Department has

rules and policies promoting security and order within its prisons. It also has procedural rules for prison disciplinary hearings so that its disciplinary process respects, when applicable, the due process rights of prisoners as identified by state and federal courts. *See* WAC 137-28-230, -270 through -330; *Wolff v. McDonnell*, 418 U.S. 539, 563-67, 94 S. Ct. 2963, 2978-80, 41 L. Ed. 2d 935 (1974); DOC Policy 460.000.[2]

WAC 137-25 and WAC 137-28 identify more than 120 categories of serious and general infractions regulating all aspects of prison life from violent physical and sexual assaults, to compliance with staff directions, to the theft or misuse of prison resources. *See* WAC 137-25-030; WAC 137-28-220. The Department also has sanction guidelines to assist if an infraction is found to have been committed. DOC Policy 320.150 Attachment 2—Prison Sanctioning Guidelines.[3] The wide range of sanctions for different categories of infractions relates to the seriousness level and affords staff discretion to take into account the surrounding circumstances and the prisoner's previous conduct. *See* DOC Policy 320.150.

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[2] DOC Policy 460.000 can be found at: http://www.doc.wa.gov/policies/default.aspx?show=400.

[3] DOC Policy 320.150 can be found at: http://www.doc.wa.gov/policies/default.aspx?show=300.

All rules, infraction types, and sanctions are provided to prisoners upon entry into prison. DOC Policy 310.000.[4] The rules also are posted throughout the system in living units and libraries. *See State v. Brown*, 142 Wn.2d 57, 64, 11 P.3d 818 (2000) (prisoners are very familiar with the Department's disciplinary system) (Talmadge dissenting).

The Court should also note that the Legislature excluded prison discipline from the general laws governing agency hearing and judicial review in the Administrative Procedures Act (APA). *See* RCW 34.05.030(1)(c); *Matter of Reismiller*, 101 Wn.2d 291, 293, 678 P.2d 323 (1984). This Court has recognized that the Legislatures' intent to exclude APA hearing requirements and judicial review rights was for prison disciplinary matters "[i]n light of the nature of the prison setting and the needs of prison administrators to determine discipline matters fairly and swiftly, while preserving calm and order within the institution.". *Dawson v. Hearing Committee,* 92 Wn.2d 391, 396, 597 P.2d 1353 (1979); *see also Vinson*, 172 Wn.2d at 768 (upholding legislative intent to eliminate any statutory right of review for particular action).

[4] DOC Policy 310.000 can be found at: http://www.doc.wa.gov/policies /default.aspx?show=300.

2. The Court of Appeals Erred by Categorizing Prison Discipline as a Judicial Function Subject to a Statutory Writ of Certiorari

The court of appeals acknowledged that courts do not regularly determine whether an inmate has committed a prison infraction, but ultimately concluded that prison discipline was a judicial function because courts could, hypothetically, make such determinations. Appendix 1, Decision at 12-13. This conclusion ignores the substance of prison discipline and how it is part of the executive branch's role in operating a safe and secure prison.

The courts have never been responsible for prison disciplinary proceedings in Washington. Moreover, the judicial branch is simply not well-suited to conduct the tens of thousands of prison disciplinary proceedings that occur each year. *See Grounquist*, 138 Wn.2d 388, 398 n.8. In particular, the judiciary does not manage the "tightly controlled environment populated by persons who have chosen to violate the criminal law," where the "disciplinary hearings must be conducted in such a way as to minimize the range of heated confrontation...." *Dawson*, 92 Wn.2d at 396. And the courts are not equipped to conduct the tens of thousands of prison hearings that "must take place swiftly, in many cases no more than 5 days after an event giving rise to the charge...." *Id.* at 397; WAC 137-28-290 (twenty-four hour notice); WAC 137-28-300 (review of evidence,

presentation of defense, review of confidential information); WAC 137-28-310 (decision within three working days from hearing). Regardless of any superficial resemblance to an adjudicatory function, prison discipline has always been an executive function. It optimizes the operation of the prison, and promotes safety and order within its walls.

The court of appeals relied on two analogies to conclude that discipline was a judicial function by a lower tribunal. It noted that sometimes a court must determine if an inmate committed infractions if an inmate is charged with the crime of persistent prison misbehavior. Appendix 1, at 12-13. But that situation makes the infraction an element of a crime; it does not undermine the fact that prison discipline is the direct responsibility of the executive branch. *See* RCW 9.94.070.

Second, the court of appeals also reasoned that courts are called upon to review prison discipline in the context of a PRP. Appendix 1, Decision at 12. But that logic again places form over substance, contrary to this Court's direction in *Standow*. The PRP is based on the judiciary's review of the "unlawfulness" of a person in "restraint" not on whether discipline is a judicial function. *See* RAP 16.4. The PRP is available because a prisoner has "no other meaningful mechanism for judicial review" of the executive branch's prison disciplinary actions. *In re Grantham*, 168 Wn.2d at 212. Thus, the fact that restraint caused by a

Department sanction is reviewed does not answer the question of whether the discipline process, as a whole, is a judicial function. (Moreover, the existence of a PRP, viewed properly, demonstrates that the statutory writ of certiorari is unavailable because a prisoner has another adequate remedy. *See below* at 16-19.)

This Court in *Standow* disapproved of reliance on superficial resemblances, like the court of appeals observation that prison disciplinary hearings use terminology of "guilty" or "not guilty." *See* Appendix 1, Decision at 13. The use of particular words do not transform an executive function into a judicial function. The Department could just as easily use the terms like "responsible for the infraction" "committed," or "accountable" to describe a violation of a prison rule; the use of a legal term does not render the proceeding judicial. *See Williams*, 97 Wn.2d at 220 (adherence to processes used by the judiciary does not make an executive action judicial or quasi-judicial for purposes of a writ of certiorari).

In summary, prisoner operation including day-to-day discipline is solely within the power of the executive and not the judiciary. *See In re Grantham*, 168 Wn.2d at 214-16; *In re Higgins*, 152 Wn.2d at 163. Rather than treat prison disciplines like inferior judicial tribunals for purposes of a writ of certiorari, the courts give substantial deference to the day-to-day

operation of prisons because that is within the province and professional expertise of corrections officials. *See also Matter of Reismiller*, 101 Wn.2d at 294 (decisions that invade the daily prison operations "undermine prison administrators' decisions and lead to greater involvement of the courts in matters of internal prison discipline."); *In re Grantham*, 168 Wn.2d at 215 (recognizing prison discipline "is an essential [executive] function of the day to day management of a safe and secure correctional institution."); *In re Gronquist*, 138 Wn.2d at 405-06 (noting U.S. Supreme Court requiring deference to prison authorities on prison management and prisoner discipline); *Sandin v. Conner*, 515 U.S. 472, 482, 115 S. Ct. 2293, 2299, 132 L. Ed. 2d 418 (1995) ("courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.").

D. The Personal Restraint Petition is an Adequate Remedy to Challenge a Disciplinary Hearing Decision

The court of appeals compounded its erroneous view of prison discipline as a judicial function when it concluded that Kozol had no other adequate remedy—a second predicate for a statutory writ of certiorari. In fact, a PRP under RAP 16.4 has long been used to review prison discipline. This alternative remedy provides an independent reason to reverse. The court of appeals, however, found that Kozol could not use a

PRP to challenge his prison disciplinary proceeding because it concluded he could not demonstrate "restraint" under RAP 16.4(b). The court reasoned that the discipline in question did not cause "an atypical or significant deprivation contrary to the normal incidents of prison life." Appendix 1, Decision at 16 (citation omitted). This reflects an erroneous view of the restraint element. A prisoner meets the restraint condition if the prisoner is confined. RAP 16.4(b) states this explicitly: "A petitioner is under a 'restraint' if . . . the petitioner is confined[.]"

Washington courts apply the plain language in RAP 16.4(b) as written, often finding and stating that restraint is satisfied by confinement. *E.g., In re Garcia*, 106 Wn. App. 625, 630, 24 P.3d 1091, 1094 (2001) ("[petitioner] is confined so the 'restraint' requirement is satisfied."); *In re Isadore*, 151 Wn.2d 294, 299, 88 P.3d 390, 392 (2004) ("petitioner need show only that he is restrained under RAP 16.4(b)"). More telling, prisoners have routinely filed and courts have routinely heard PRPs challenging prison disciplinary proceedings.[5] In fact, this Court has often addressed the different standards of PRP review if a prisoner is using a

[5] *See e.g., In re Grantham*, 168 Wn.2d at 213-14; *Reismiller*, 101 Wn.2d at 294; *In re Gronquist*, 138 Wn.2d at 396; *Petition of Johnston*, 109 Wn.2d 493, 494, 745 P.2d 864, 865 (1987); *In re Higgins*, 152 Wn.2d at 158; *In re McVay*, 99 Wn. App. 502, 503, 993 P.2d 267, 268 (1999); *In re Krier*, 108 Wn. App. 31, 33, 29 P.3d 720, 721 (2001); *In re Malik*, 152 Wn. App. 213, 215, 215 P.3d 209, 210 (2009); *Matter of Hunter*, 43 Wn. App. 174, 175, 715 P.2d 1146 (1986); *In re Leland*, 115 Wn. App. 517, 521, 61 P.3d 357, 359 (2003). In addition to this sampling of cases where a PRP challenged a prison discipline, there are innumerable unpublished decisions by the court of appeals that address PRP challenges to a prison discipline.

PRP because there is "no other meaningful mechanism for judicial review" as with disciplinary decision. *In re Grantham*, 168 Wn.2d at 212.

The court of appeals narrow view of restraint may have resulted from confusing the "restraint" element in RAP 16.4(b) with the complex question of whether the "nature" of the restraint is "unlawful" under RAP 16.4(c)(1)-(7). The unlawfulness analysis described by subsection (6) often focuses on whether a prisoner is deprived of a liberty interest without providing due process. *E.g. In re Grantham*, 168 Wn.2d at 217. But whether a prisoner's claim involves deprivation of a liberty interest without due process is not part of proving "restraint" under RAP 16.4(b); it is part of analyzing "unlawfulness" under RAP 16.4(c) and whether due process requirements were violated. The court of appeals reasoned that no PRP was available because even if the sanction "touched upon Kozol's liberty and property interests" it was not "an atypical and significant hardship" for purposes of triggering due process rights. Appendix 1, Decision at 14. These sentences illustrate how the court confused the question of Kozol's discipline involved loss of a liberty interest recognized by federal due process with whether he was restrained. A PRP, however, may be pursued for both constitutional violations or if the "manner of the restraint" violates Washington law, which is the nature of Kozol's proposed writ of certiorari claim. RAP 16.4(c)(6).

This is not to say that Kozol had a plausible PRP claim of restraint that is illegal or in violation of Washington law.[6] It is simply that the court of appeals narrow view of the "restraint" element stands alone. This Court has never limited PRP review to Department disciplines that cause a loss of liberty interest. Rather, this Court allows PRPs to review if "a prison discipline decision ... was so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding so as to work to the offender's prejudice." *Grantham,* 168 Wn.2d at 217, *citing Reismiller*, 101 Wn.2d at 294. While this is a deferential standard of review, that standard of review has long been held necessary so that courts will not micromanage prison disciplinary decisions and, potentially, compromise important penological interests of safety and security. *Reismiller,* 101 Wn.2d at 294; *McNabb v. Dep't of Corr.*, 163 Wn.2d 393, 405-06, 180 P.3d 1257, 1264 (2008) (citations omitted) ("the courts recognize the prison system should not be micromanaged by the courts, particularly relating to prison security.").

[6] Kozol challenged the disciplinary decision by alleging he did not receive proper notice, copies of most evidence submitted in support of the infraction, and that he was unable to present documentary evidence. CP 106-07. But he received his infraction report on February 3, 2011, a five-page infraction report was re-issued on March 29, 2011, and Kozol had his disciplinary hearing on April 6, 2011. CP 68. Kozol received a two-hour hearing to tell his story and argue against the infraction. CP 68. And Kozol received a written statement of the evidence relied upon and reasons for the disciplinary action. CP 84-85. Additionally, the decision cites sufficient evidence showing Kozol deceived staff about the source of his guitar. CP 68-69, 84-85.

VII. CONCLUSION

The court of appeals erred by allowing Kozol to pursue a statutory writ of certiorari. The ruling, if not reviewed and corrected, will encourage similar claims for a statutory writ in superior courts across the state. But prison disciplines should be reviewed using a PRP which ensures appropriately deferential review and consistent application of that standard. The Department respectfully asks the Court to grant this petition, reverse the court of appeals, and affirm the superior court ruling denying permission to pursue a statutory writ of certiorari.

RESPECTFULLY SUBMITTED this 28th day of August, 2015.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the Petition for Review with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

STEVEN P KOZOL DOC # 974691
STAFFORD CREEK CORRECTIONS CENTER
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ABERDEEN WA 98520

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

EXECUTED this 28th day of August, 2015, at Olympia, WA.

s/ Tera Linford
TERA LINFORD
Legal Assistant

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STEVEN P. KOZOL, Appellant, v. WASHINGTON STATE DEPARTMENT OF CORRECTIONS, ERIC JACKSON, and GREG JONES, Respondents.	No. 45601-0-II UNPUBLISHED OPINION

JOHANSON, C.J. — Steven P. Kozol appeals the superior court's orders denying his motion to file a second amended complaint, granting the Department of Corrections' (DOC) motion to dismiss his Uniform Declaratory Judgments Act[1] (UDJA) complaint challenging a prison disciplinary infraction, and dismissing his claims with prejudice. Because Kozol's claims were not within the scope of the UDJA, the superior court did not err in dismissing Kozol's UDJA claims and we affirm that order. But because the superior court should have allowed Kozol to amend his complaint to include his proposed statutory writ of certiorari, we reverse the order denying the motion to amend in part and remand to allow Kozol to amend his complaint to include the statutory writ and for further proceedings.

[1] Ch. 7.24 RCW.

APPENDIX A

FACTS

I. Prison Disciplinary Infraction

Kozol is an inmate confined in a DOC facility. On April 6, 2011, following a disciplinary hearing, DOC disciplinary hearings officer Greg Jones found Kozol guilty of a serious prison disciplinary infraction committed on September 10, 2010. Jones sanctioned Kozol to 10 days cell confinement and required him to send some of his personal property consisting of "music-related items" out of the prison system. Clerk's Papers (CP) at 68. Kozol appealed the infraction, and DOC Associate Superintendent of Programs Eric Jackson affirmed Jones's decision.

II. First Amended Complaint

In January 2013, Kozol filed a complaint in the Thurston County Superior Court against the DOC requesting declaratory judgment and injunctive relief. Kozol moved to amend his complaint, this time including a claim for monetary damages; the DOC did not oppose this motion. But the DOC moved to dismiss any 42 U.S.C. § 1983 claims under CR 12(c). The superior court dismissed with prejudice any 42 U.S.C. § 1983 claims against the DOC. The court also granted Kozol's motion to amend.

Kozol's amended complaint added Jones and Jackson as defendants. Kozol asserted that Jones, acting in his official capacity, had violated his (Kozol's) due process rights by failing to timely provide Kozol with copies of all of the evidence used against him at the infraction hearing as required under WAC 137-28-290(2)(f) and by failing to allow Kozol to present documentary evidence in his defense as required under WAC 137-28-300(6). Kozol further asserted that

Jackson, acting in his official capacity, had filed a false public record in violation of RCW 40.16.030[2] when he filed the decision affirming Jones's decision.

Kozol asked the superior court to enter a declaratory judgment under the UDJA finding that (1) the DOC and the individually named defendants had violated WAC 137-28-290(2)(f) and WAC 137-28-300(6), (2) Jackson's act of filing the appeals decision amounted to a filing of a false public record and "constitutes a felony violation of RCW 40.16.030," and (3) the guilty finding was "unlawful and void." CP at 19. He also asked that the court prohibit the DOC from using this infraction against him in any way. In addition, Kozol requested significant monetary damages for the injuries caused by the alleged violations of the WACs and Jackson's alleged act of filing a false public record.

III. Motion to Dismiss

The DOC again moved for dismissal under CR 12(c). It argued that the superior court did not have jurisdiction over a felony allegation filed in a civil action, that there was no private cause of action for violations of ch. 137-28 WAC, that Kozol's challenges to his infraction were more properly presented as a personal restraint petition (PRP), and that Kozol could not obtain declaratory relief under the UDJA on his prison disciplinary infraction claim.

Relying on *Bainbridge Citizens United v. Department of Natural Resources*, 147 Wn. App. 365, 198 P.3d 1033 (2008), the DOC argued that the UDJA could not be used to determine if an agency had properly applied or administered an agency regulation or to enforce the criminal law.

[2] RCW 40.16.030 states that it is a class C felony to knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office.

Citing *Kitsap County v. Smith*, 143 Wn. App. 893, 180 P.3d 834 (2008), Kozol[3] asserted that the UDJA applied because they involved issues of public importance and the interpretation and application of a criminal statute or rule and this was the only way he could obtain review within the Washington court system. Kozol also argued that he could not file a PRP because he could not establish that he was under restraint as defined by RAP 16.4.

The superior court rejected Kozol's argument that he could request declaratory judgment on the issue of whether Jackson had violated a criminal law. It distinguished *Kitsap County* where the court needed to determine if a criminal statute had been violated before it could resolve the UDJA action. The superior court then stated that the UDJA "is intended for specific situations where there is a need for a court to come in and define the rights and responsibilities of the parties" and that the issues must be of "great public importance," but neither was present in this case. Report of Proceedings (RP) (Oct. 4, 2013) at 15. The court also stated that Kozol's complaint addressed a single disciplinary hearing and that application of the DOC's rules in one instance was not a matter of widespread importance. Additionally, the court found that because Kozol could file a 42 U.S.C. § 1983 action, he had another available remedy.

After announcing that it was granting the DOC's motion to dismiss Kozol's UDJA claims, the superior court commented on Kozol's request for damages. The superior court stated that it was unclear whether Kozol was attempting to also proceed under "some kind of tort theory" that might be able to go forward. RP (Oct. 4, 2013) at 16. The superior court advised the parties that

[3] Kozol was now represented by counsel.

it would hear argument about whether Kozol was attempting to bring a tort claim when the parties next appeared to present the orders on the DOC's motion to dismiss the UDJA claims.

IV. Kozol's Second Motion to Amend

Shortly before the next hearing, Kozol moved to file a second amended complaint. Kozol's proposed second amended complaint (1) purported to dismiss any damages claims, (2) attempted to recharacterize his previous UDJA claims as seeking a declaration of "all inmate['s]" rights under the WACs, (3) alleged that the DOC had violated its own regulations, and (4) requested a constitutional and/or statutory writ of certiorari. CP at 108. The DOC argued that this motion to amend was untimely because the superior court had already dismissed all claims except for a possible tort claim.

At the next hearing, the superior court addressed Kozol's second motion to amend. The court stated that the newly proposed amended UDJA claims were essentially new claims because they would require examination of the prison disciplinary system as a whole rather than just the procedure that was applied to Kozol. The court also stated that although it was possible that Kozol could pursue a writ of certiorari, that legal theory was also broader than the claims Kozol originally alleged. Accordingly, the superior court denied Kozol's second motion to amend; it also signed the order granting the DOC's motion to dismiss and dismissing Kozol's claims with prejudice.

Kozol appeals the order granting the DOC's motion to dismiss and dismissing his claims with prejudice and the order denying his second motion to amend.

ANALYSIS

I. MOTION TO DISMISS

Kozol argues that the superior court erred in dismissing his UDJA claims. We hold that the superior court properly dismissed these claims because they were not within the scope of the UDJA.

A. STANDARD OF REVIEW

We review de novo a trial court's ruling dismissing a case under CR 12(c).[4] *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012). We examine the pleadings "to determine whether the claimant can prove any set of facts, consistent with the complaint, that would entitle the claimant to relief." *Parrilla v. King County*, 138 Wn. App. 427, 431, 157 P.3d 879 (2007). On a CR 12(c) motion, we presume that the allegations asserted in the complaint are true. *Parrilla*, 138 Wn. App. at 431-32.

B. CLAIMS NOT WITHIN SCOPE OF UDJA

One of the grounds the superior court cited for the dismissal was that Kozol's claims were outside the scope of the UDJA. The superior court was correct.

The UDJA allows courts to "declare rights, duties, status and other legal relations" between parties. RCW 7.24.010. Kozol sought a declaration that the DOC had failed to follow the hearing

[4] Kozol has filed a statement of additional authorities citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), for the premise that this was actually a dismissal on a summary judgment motion under CR 56(c). It does not appear that the superior court considered anything outside of the pleadings. Accordingly, we review this as a CR 12(c) motion. We note, however, that our decision would be the same even if this were a motion for summary judgment because we review CR 12(c) motions and CR 12(b)(6) motions under the same standards. *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012).

procedures required under ch. 137-28 WAC and related injunctive relief, such as prohibiting the DOC from using the infraction against him in any way. He was not seeking to establish what requirements the regulations imposed and the DOC was not asserting that Kozol misinterpreted those regulations. Furthermore, Kozol was not seeking a declaration of status or any other legal relationship between the parties. And as we noted in *Bainbridge Citizens United*, declaratory judgment is proper to determine the facial validity of an enactment, not its application or administration. 147 Wn. App. at 374 (refusing to reach the issue of whether the Department of Natural Resources properly applied or administered certain regulations under the UDJA). Thus, this was not a proper action under the UDJA.

Kozol argues this approach unnecessarily limits the UDJA and that the UDJA allows courts to determine whether a party's actions violated the law. He cites several cases that he asserts provide examples of courts determining if a party violated the law. But these cases either involve declaratory judgments under statutes other than the UDJA;[5] do not involve any UDJA or

[5] *See City of Seattle v. Egan*, 179 Wn. App. 333, 335-36, 317 P.3d 568 (2014) (declaratory judgment under the privacy act); *Wash. State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 182, 293 P.3d 413 (declaratory judgment under the Washington Laws Against Discrimination, ch. 49.60 RCW), *review denied*, 178 Wn.2d 1010 (2013).

declaratory judgment whatsoever;[6] or required the interpretation of statutes,[7] which is clearly within the UDJA's scope. Thus, none of these cases are helpful to Kozol.[8]

Kozol also attempts to distinguish *Bainbridge Citizens United*, arguing that unlike in that case, he was not attempting to force an agency to act. Kozol is correct that the petitioners in *Bainbridge Citizens United* sought an order requiring an agency to act under its rules. 147 Wn. App. at 369. Although Kozol was not attempting to force the DOC to act and was, instead, seeking declaratory judgment that the DOC had failed to follow its own rules, that distinction is not dispositive. *Bainbridge Citizens United* clearly describes the scope of the UDJA. 147 Wn. App. at 374. Because *Bainbridge Citizens United* is factually distinct from the facts here does not mean that we cannot apply the law as stated in that case.

Kozol also argues that he was entitled to declaratory judgment as to whether Jackson filed a false public record in violation of RCW 40.16.030. He argues that Washington courts have reviewed whether a party's actions have violated the law. Although courts have examined whether a party's actions have violated the law in UDJA cases, they have done so when such determinations

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[6] *See Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 308 P.3d 716 (2013).

[7] *See Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 788, 246 P.3d 768 (2011); *Wash. State Coal. for the Homeless v. Dep't of Soc. & Health Services*, 133 Wn.2d 894, 900, 949 P.2d 1291 (1997); *City of Lakewood v. Koenig*, 176 Wn. App. 397, 400, 309 P.3d 610 (2013), *remanded*, 182 Wn.2d 87, 343 P.3d 335 (2014); *Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110, 115, 231 P.3d 219 (2010); *Kitsap County*, 143 Wn. App. at 916; *City of Raymond v. Runyon*, 93 Wn. App. 127, 134-37, 967 P.2d 19 (1998); *Protect the Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 675-76, 833 P.2d 406 (1992).

[8] We note that although the UDJA allows courts to determine questions of fact (such as whether a hearing complied with ch 137-28 WAC) when necessary or incidental to declaration of legal relations, *Trinity Universal Insurance Co. v. Willrich*, 13 Wn.2d 263, 268, 124 P.2d 950 (1942), that is not what Kozol was attempting to do here. Kozol was alleging solely a factual issue.

are related to the declaration of the parties' legal relations. *See, e.g., Kitsap County*, 143 Wn. App. at 916 (determination of whether former employee removed public records in violation of RCW 40.14.010 or RCW 40.14.020 and various county codes necessary to determine if county was entitled to declaratory relief). Whether Jackson violated RCW 40.16.030 by filing a false public record is not relevant to Kozol's disciplinary infraction, so the superior court properly dismissed this claim.

We hold that the superior court did not err when it dismissed Kozol's UDJA claims because they were not within the scope of the UDJA.[9]

II. DENIAL OF SECOND MOTION TO AMEND

Kozol next argues that the superior court erred when it denied his second motion to amend the complaint. He argues that the allegations in the proposed second amended complaint merely clarified his legal claims, that the amended complaint was based entirely on the same set of facts, and that there was no prejudice to the respondents. The superior court did not err when it denied his motion to amend his UDJA claims. But we agree that the superior court erred in denying Kozol's motion to amend his complaint to include his proposed statutory writ of certiorari.[10]

[9] Because of this holding, we do not address Kozol's other arguments related to the dismissal of his UDJA claims.

[10] Because we hold that Kozol may bring a statutory writ, we do not address whether he can also bring a constitutional writ. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 533, 79 P.3d 1154 (2003) (constitutional writ is only available when both direct appeal and statutory writ of review are unavailable).

A. STANDARD OF REVIEW

We review for abuse of discretion a trial court's ruling on a motion to amend the complaint. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Wilson*, 137 Wn.2d at 505. To amend a pleading after the opposing party has responded, the party seeking to amend must obtain the trial court's leave or the opposing party's consent. CR 15(a). A trial court must grant leave freely "when justice so requires." CR 15(a). A motion to amend raising new claims is usually allowed, even if made shortly before trial, if the new claims "required essentially the same proof' as the previously alleged claims. *Karlberg v. Otten*, 167 Wn. App. 522, 529-30, 280 P.3d 1123 (2012); *see also Herron v. Tribune Pub. Co.*, 108 Wn.2d 162, 166-67, 736 P.2d 249 (1987).

"The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party." *Wilson*, 137 Wn.2d at 505. "In determining whether prejudice would result, a court can consider potential delay, unfair surprise, or the introduction of remote issues." *Kirkham v. Smith*, 106 Wn. App. 177, 181, 23 P.3d 10 (2001) (citing *Herron*, 108 Wn.2d at 165-66).

B. UDJA CLAIMS

To the extent Kozol was merely revising his previous UDJA claims, as we discussed above, these claims were outside the scope of the UDJA. Accordingly, the superior court did not abuse its discretion when it refused to allow Kozol to amend these claims.

To the extent his proposed second amended complaint attempted to recast his UDJA claims as requests for the superior court to provide declaratory judgment establishing the rights of all

prisoners under the DOC's regulations, the superior court also properly refused to allow Kozol to add those claims. Kozol's newly alleged UDJA claims were broader and went beyond the facts alleged in the first amended complaint. The new UDJA claims would have required the DOC to address the rights prisoners had under the prison disciplinary rules rather than whether those rules were properly applied in a particular instance, namely Kozol's disciplinary hearing. The revised UDJA claims were not just presenting a new legal theory based on the same set of circumstances or facts that Kozol set forth in his earlier pleadings. And we agree that it was unfairly prejudicial to require the DOC to respond to issues related to the disciplinary system as a whole rather than to issues related to a single disciplinary hearing, especially in light of the fact the court had already orally dismissed Kozol's original claims. Accordingly, we hold that the superior court did not abuse its discretion in denying Kozol's motion to amend his complaint to include these new UDJA claims.

C. Writ of Certiorari

In his proposed second amended complaint, Kozol attempted to bring a writ of certiorari, asserting that his disciplinary hearing was invalid because the DOC's officers, acting in a quasi-judicial capacity, failed to provide him with the procedures he was entitled to under the DOC's rules. The DOC argues that the motion to amend was futile, and because it was untimely, it was prejudicial. We disagree with the DOC.

1. Futility: Writ's Availability

We first address whether the amendment was futile because Kozol did not allege facts establishing that a statutory writ was available to him. We hold that a statutory writ of certiorari was available to him so the amendment was not futile.

RCW 7.16.040 sets out four factors that a court must find in order to issue a statutory writ: "'(1) that an inferior tribunal (2) exercising judicial functions[11] (3) exceeded its jurisdiction or acted illegally, and (4) there is no adequate remedy at law.'" *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244, 821 P.2d 1204 (1992) (quoting RCW 7.16.040). We hold that Kozol alleged sufficient facts to establish he was entitled to pursue a statutory writ.

a. INFERIOR TRIBUNAL EXERCISING JUDICIAL FUNCTIONS

The fact courts are able to review prison disciplinary hearings (usually by means of PRPs) demonstrates that disciplinary hearings are held by inferior tribunals. *See, e.g., In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 205, 227 P.3d 285 (2010). Further, prison disciplinary hearings involve the exercise of a judicial or quasi-judicial function.

We consider four factors when determining whether an action is quasi-judicial:

> "(1) [W]hether a court could have been charged with making the agency's decision; (2) whether the action is one which historically has been performed by courts; (3) whether the action involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators."

Dorsten v. Port of Skagit Co., 32 Wn. App. 785, 788, 650 P.2d 220 (1982) (quoting *Wash. Fed'n of State Employees v. State Pers. Bd.*, 23 Wn. App. 142, 145-46, 594 P.2d 1375 (1979)); *see also In re Det. of Enright*, 131 Wn. App. 706, 716, 128 P.3d 1266 (2006). We find all four factors here.

First, although courts do not regularly determine whether an inmate has committed a prison disciplinary infraction, they do make such determinations when an inmate is charged with

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[11] Judicial functions include all actions that are "'judicial' in nature," including quasi-judicial administrative actions. *Williams v. Seattle Sch. Dist. No. 1*, 97 Wn.2d 215, 218, 643 P.2d 426 (1982).

persistent prison misbehavior. RCW 9.94.070. Thus, it is clear that prison disciplinary hearings involve matters that a court could have been charged with making. Second, similar to a criminal charge, a disciplinary infraction requires a tribunal to determine whether the defendant or inmate is guilty or not guilty of the alleged act and this is clearly an action that courts have historically performed. Third, in determining whether an inmate had violated a prison regulation, the hearing officer applies existing law to past or present facts for the purpose of declaring guilt or innocence. And, finally, determining guilt or innocence also clearly resembles the business of the courts as opposed to that of legislators or administrators. Thus, all four factors are met here and it is clear that the disciplinary hearing at issue involved an inferior tribunal exercising a quasi-judicial function.

b. EXCEEDED JURISDICTION OR ACTED ILLEGALLY

Having met the first two factors necessary to support a statutory writ, we must next examine whether Kozol alleged facts establishing that the tribunal exceeded its jurisdiction or acted illegally. The DOC argues that Kozol did not allege an "illegal" act as defined in *City of Seattle v. Holifield*, 170 Wn.2d 230, 244-45, 240 P.3d 1162 (2010).[12] We disagree.

Holifield held,

> [F]or purposes of RCW 7.16.040, an inferior tribunal, board or officer, exercising judicial functions, acts illegally when that tribunal, board, or officer (1) has committed an obvious error that would render further proceedings useless; (2) has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act; or (3) *has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by an appellate court.*

[12] The DOC does not challenge Kozol's motion to amend to add a writ on the grounds that the DOC was not acting as a quasi-judicial tribunal.

170 Wn.2d at 244 (emphasis added). Although prisoners have limited rights in disciplinary proceedings, the DOC's own rules require that prisoners be allowed to review the DOC's evidence and to present evidence in their defense. *See* WAC 137-28-290(2)(f), -300(6). Kozol alleges that the DOC failed to follow these rules and these allegations, if true, would demonstrate that the hearing officer departed so far from the accepted and usual course of the proceedings as to call for review. Thus, Kozol has alleged facts capable of establishing this factor.

c. NO OTHER ADEQUATE REMEDY AT LAW

Finally, we must address whether Kozol had other remedies at law. Kozol had four other possible remedies: (1) a UDJA action, (2) a 42 U.S.C. § 1983 claim, (3) a PRP, or (4) a tort claim. None of these was a viable alternative.

As to a possible UDJA claim, as discussed above, Kozol's claims fell outside the scope of the UDJA. Thus, a UDJA claim was not an available remedy.

As to a possible 42 U.S.C. § 1983 action, although the superior court determined that Kozol could bring a 42 U.S.C. § 1983 action, we disagree. To obtain relief under 42 U.S.C. § 1983, Kozol must show that he had been deprived of a right secured under the constitution or federal law. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 11-12, 829 P.2d 765 (1992). Kozol's allegations did not establish that the sanctions imposed deprived him of any constitutional or federal right.

The sanctions imposed, 10 days of cell confinement and being unable to keep certain personal property, touched on Kozol's liberty and property interests. But a prisoner's interests are limited to those deprivations that subject a prisoner to "atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin v. Connor*, 515 U.S. 472, 484, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). A 10-day cell confinement is not an atypical and significant

hardship. *In re Pers. Restraint of Gronquist*, 89 Wn. App. 596, 601-02, 950 P.2d 492 (1997) (stating that cell or room confinement not to exceed 10 days for a general infraction does not impose atypical and significant hardship on an inmate), *rev'd on other grounds*, 138 Wn.2d 388, 978 P.2d 1083 (1999). Furthermore, prisoners also have limited rights to retain their personal property. *See* WAC 137-36-030.[13] And Kozol has not shown that his being unable to keep specific personal property in prison created an atypical and significant hardship in light of his already restricted ability to retain his personal property. Because Kozol cannot show that the sanctions imposed deprived him of any constitutional or federal right, Kozol did not have another available remedy under 42 U.S.C. § 1983.

Nor does Kozol have the option of filing a PRP. To obtain relief by means of a PRP, Kozol would have to establish that he is under "restraint" as defined in RAP 16.4(b). RAP 16.4(b) provides,

> A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

But as we discuss above, a lawfully incarcerated individual such as Kozol has only the "'most basic'" liberty interests. *In re Pers. Restraint of Lain*, 179 Wn.2d 1, 14, 315 P.3d 455 (2013) (quoting *Hewitt v. Helms*, 459 U.S. 460, 467, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983), *overruled in part on other grounds by Sandin*, 515 U.S. 472)). And those limited interests are not violated

[13] WAC 137-36-030(1) states that "[o]nly authorized items may be retained by an inmate in the custody of the [DOC]." The rule then states that the DOC can limit the quantity and value of personal items for a variety of penological purposes and that the superintendents were required to establish regulations regarding personal property.

unless the restraint imposed amounts to "an atypical and significant deprivation from the normal incidents of prison life." *In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 393, 20 P.3d 907 (2001) (citing *Sandin*, 515 U.S. at 484). Because Kozol's 10-day cell confinement and deprivation of personal property do not amount to atypical or significant deprivations from the normal incidents of prison life, he does not establish that he is currently under restraint as defined by RAP 16.4(b), and he cannot obtain relief by means of a PRP. And finally, although a tort claim could potentially address Kozol's loss of his property, it is not an adequate remedy because it would not address the disciplinary infraction itself.[14] Because Kozol cannot bring this action under the UDJA or as a 42 U.S.C. § 1983 claim, a PRP, or a tort claim, he does not have any other adequate remedy at law.

Accordingly, Kozol shows that the statutory writ was available to him. Because the writ was an available remedy, the DOC has failed to show that amendment was futile. We next turn to whether the amendment was prejudicial.

[14] In his brief, Kozol asserts that because a prior 42 U.S.C. § 1983 claim was dismissed with prejudice, the DOC cannot assert that he has other alternative relief by means of a 42 U.S.C. § 1983 or tort claim because res judicata precludes such claims. The DOC argues that in so arguing, Kozol has admitted that he had other alternative relief available. The record before us, however, shows that Kozol filed a claim in the federal district court only alleging conversion of his property in 2010 and that he amended this claim to assert a retaliation claim on March 17, 2011. But the DOC's own documentation shows that Kozol voluntarily dismissed this case. Res judicata requires, among other things, concurrence of subject matter and a final judgment on the merits of the prior suit. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004); *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983). Based on the record, it does not appear that the previous action related to the disciplinary infraction, so there is no concurrence of subject matter. Furthermore, because there was no final judgment on the merits, res judicata cannot apply.

2. NO PREJUDICE

The DOC argues that allowing Kozol to bring the writ was prejudicial because the amendment was untimely and went beyond the scope of the presentment hearing.[15] Although the writ was a new claim, this claim relied on the same facts and the same allegation that the hearing officer did not provide Kozol with the proper procedures. Even though the specific type of claim changed, the DOC was aware of the underlying nature of the claim well before Kozol brought his second motion to amend, and the DOC does not show how merely changing the claim to a writ was prejudicial despite any delay. The DOC also fails to allege any specific prejudice, such as the loss of evidence, which resulted from any potential delay.

Furthermore, CR 15(a) states that "leave shall be freely given when justice so requires." And a motion to amend raising new claims is usually allowed, even if made shortly before trial, if the new claims "required essentially the same proof" as the previously alleged claims. *Karlberg*, 167 Wn. App. at 529-30; *see also Herron*, 108 Wn.2d at 166-67. Kozol's right to proper process outweighs any potential prejudice caused by the delay in Kozol's bringing the writ given the similarities of the claims and the lack of any evidence of any specific prejudice.

Accordingly, we hold that because Kozol has shown that his claim falls within the scope of a statutory writ of certiorari, his claim was not futile. We further hold that because the writ was based on the facts alleged in the original and first amended complaint, the DOC is not prejudiced by this new claim. Thus, the superior court should have allowed Kozol to amend his complaint to

[15] The DOC also asserts that the amendment was prejudicial because it would require the DOC to relitigate a claim the trial court previously determined was inadequate. Although this may have been the case for the UDJA claim, the trial court had not previously addressed any possible writ or otherwise address Kozol's claim that the hearing officer did not follow proper procedure.

include the statutory writ. We reverse, in part, the superior court's order denying Kozol's motion to amend.

III. KOZOL'S REQUEST FOR FEES AND COSTS

Finally, Kozol requests fees and costs under RCW 7.16.260 and RCW 7.24.100 as the prevailing party. RCW 7.16.260 allows for costs to be awarded if he or she files a successful writ of mandamus. RCW 7.24.100 allows for the award of costs under the UDJA. Kozol has not filed a writ of mandamus and the superior court properly dismissed his UDJA claims, so Kozol is not entitled to fees or costs under either of these statutes. Accordingly, we deny his request for fees and costs.

We affirm the superior court's order dismissing Kozol's UDJA claims. But we reverse the order denying the motion to amend in part and remand to allow Kozol to amend his complaint to include the statutory writ and for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Worswick, J.
WORSWICK, J.

Melnick, J.
MELNICK, J.

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STEVEN P. KOZOL,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

No. 45601-0-II

ORDER DENYING MOTIONS FOR RECONSIDERATION

APPELLANT, Steven P. Kozol, and RESPONDENT, Washington State Department of Corrections, filed a motion for reconsideration on June 25, 2015, and June 29, 2015, respectively, of the Court's June 9, 2015, opinion. Upon consideration, the Court denies both motions. Accordingly, it is

SO ORDERED.

PANEL: Jj. Johanson, Worswick, Melnick,

DATED this 29th day of July, 2015.

FOR THE COURT:

Johanson, C.J.
CHIEF JUDGE

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APPENDIX B

WASHINGTON STATE ATTORNEY GENERAL

August 28, 2015 - 3:58 PM

Transmittal Letter

Document Uploaded: 2-456010-Petition for Review.pdf

Case Name: Washington State Department of Corrections v. Steven Kozol
Court of Appeals Case Number: 45601-0

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

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Comments:

No Comments were entered.

Sender Name: Tera E Linford - Email: teral@atg.wa.gov