No. 45479-3-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

JOYCE SMITH, ESTATE OF JAMES SMITH, ET AL,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS.

Respondents.

APPELLANTS' OPENING BRIEF

THADDEUS P. MARTIN, LLC
Thaddeus P. Martin, WSBA # 28175
Attorneys for Petitioner
tmartin@thadlaw.com

4928 109th St. SW
Lakewood, WA 98499
(253) 682-3420

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Pattern Instructions

I. INTRODUCTION

The Trial Court erred in dismissing the State of Washington, ruling that the State owed no duty after failing to supervise dangerous offender (Goolsby) in the field in the first place, and then were negligent in following procedures in issuing a DOC secretary's warrant. This is a case where the community or "field" supervision was non-existent for this violent, murderous gang member. As stated by appellants' expert William Stough (the pre-eminent expert in Corrections in Washington State), the most important aspects of community supervision of a violent offender includes the community correctional officer conducting field (community supervision) of an offender and enforcing the condition that the offender is living at a location approved by the DOC. In this case, the community correction officer never supervised Mr. Goolsby in the community, not one time, and Mr. Goolsby never lived at a DOC approved location. In this case, DOC not only breached the standard of care, they exercised no care with regard to the most important aspects of supervision. After the day that CCO Lang picked up Goolsby from Monroe prison, he was not supervised in the community, never went to drug treatment (supposed to go 3 times a week), never got on his mental health medications and never provided a valid address. This naturally led to offender Goolsby to

quickly go back to his life of drugs, guns, "gang banging" and violence. The Trial Court, Judge Serko, essentially followed her ruling in a similar case, the case of Janet Husted et al., v. State of Washington, Court of Appeals No. 44841-6, currently under consideration by this Court. Judge Serko stated on the record before appellants' attorney even argued:

> The Court: Are you familiar - - I think it was against the State in a similar case, the Wal-Mart shooting?
> Mr. Ahearn: That was my case, Your Honor.
> The Court: That was your case, okay. Appreciate that. And that was in this Courtroom.
> Mr. Ahearn: Yes, it was.
> The Court: And I dismissed it?
> Mr. Ahearn: Yes, you did.
> The Court: Based on the fact that he was on warrant status, is that right?
> Mr. Ahearn: Yes.
> The Court: All right.
> Mr. Ahearn: And just so the Court knows, that is on appeal.
> The Court: I hate to be inconsistent but, I mean, that was the case that immediately came to my mind when I read the facts of this case.

Report of Proceedings, Page 9:7-10:5. The Court then ruled after appellant's argument:

> I've heard enough. I mean, I did consider almost these same facts in the other case; although, frankly, I think this case is even more extreme than the other case and I don't find support in the law or in the cases that have interpreted the law for a duty given these particular facts. And certainly, as Mr. Ahearn has said, if there was even a duty, the proximate cause issue would foreclose continuing this case on to a jury. So for those reasons, I'm going to grant the defendant's motion for summary judgment.

> Obviously this is an issue that the Court of Appeals is going to be considering in the short term because that other case is on appeal, and the name of it escapes me.

Mr. Ahearn: Husted.

RP 15:16-16:4.

The Trial Court has misinterpreted the legal duty, law and causation and obviously decided this case intentionally consistent with Husted v. State of Washington, No 44841-6 and is essentially demanding the Court of Appeals to tell her otherwise.

II. ASSIGNMENTS OF ERROR

The Trial Court erred in dismissing the State of Washington, ruling that the State owed no duty to supervise Antwone Goolsby after they were grossly negligent in supervising the offender and negligently issued a secretary's warrant.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the Trial Court misapply the rules of summary judgment, when it dismissed on summary judgment grounds Plaintiff's claims? RP 15-17. Offender Goolsby was subject to Community Custody supervision by the State. Goolsby demonstrated that he never took his community custody seriously and DOC eventually issued a

Secretary's warrant for his arrest, after Goolsby repeatedly defied supervision, but did not follow its own policies in the execution of this warrant. Did the negligent issuance of the Secretary's warrant terminate the State's duty to supervise?

2. The Plaintiffs established that the State breached its duty to supervise Goolsby, and, that if the State had not breached its duty, Goolsby would have been unable to participate in the murder of James Smith in a different county where he was not supposed to be. Did the Trial Court err to the extent it dismissed the case based on a lack of proximate cause?

3. Does qualified immunity apply where the plaintiffs have only sued the State of Washington, and not any individual state employees?

IV. STATEMENT OF FACTS

A. FACTUAL SUMMARY

The lives of the Plaintiffs forever changed on August 5, 2009, when felon Antwone Goolsby ("Goolsby") gunned down and murdered James Smith in Tacoma less than 8 months after his release from prison. CP 214, 265-269 271-272, 377-383, 385-389, 564-566, 568-577. On this date, Goolsby drove to Tacoma and confronted James Smith for allegedly saying something disrespectful to his former girlfriend and shot him

multiple times, killing him. CP 537-550. He was convicted of this murder on May 11, 2012. CP 552-562. Joyce Smith, James Smith mother, conceded that she does not have an individual claim and plaintiff is not making an economic loss claim; Ms. Smith is only the personal representative. This claim is about the damages suffered by the minor children of James Smith (loss of love, affection, care, service, companionship, society, training and consortium) and any statutory estate recoveries, including James Smith pre-death terror. CP 1-14. Appellant are not making an economic loss claim.

Goolsby was listed and known as a "violent, high impact offender. CP 391-394, 410-416. The grossly negligent supervised offender, Antwone Goolsby, had a criminal history of rape of a 12 year-old girl (forced rape at gunpoint), unlawful possession of a firearm, robbery, harassment, failure to register as a sex offender and delivery/selling of cocaine. CP 342-344, 366, 368, 370-375, 396, 398, 400-404, 433-446, 537-550, 568-779. Goolsby was sentenced to community custody and was to be supervised as a prisoner in the community for 18 to 36 months with the conditions that included work at DOC approved employment, not to consume controlled substances, no gun possession, no unlawful possession of drugs, residential and living arrangements subject to prior approval of DOC. CP 368, 537-550, 564-566. The crime that landed Goolsby into prison and community custody involved a robbery in the first degree. CP 537-550. Goolsby agreed to the conditions of release and CCO Lang was

his supervising Community Corrections Officer (CCO). CP 433-446.

Almost a year prior to Goolsby's release, his Community Corrections Officer (CCO), Judith Lang began working with the Risk Management Team to plan for Goolsby's release and transition from Monroe to the community. CP 718-719. On July 23, 2008, CCO Lang wrote that "Goolsby's demeanor and behavior were not suitable to be released in the community." CP 720. As early as July, 2008, Goolsby could not provide an address of where he was living (six months prior to his release) and CCO Lang knew before he was released that this was a major concern and warning sign. CP 720. Before his release, CCO Lang was also concerned that he had a strong affiliation with the notorious Compton Crips. CP 720-721. CCO Lang made special note that she was concerned that Goolsby "did not have a good release plan or a reason to refrain from his historic criminal behaviors." CP 721. Lang noted that Goolsby would not assimilate well into the community, based on his criminal history and behaviors while incarcerated. CP 721-723. On October 27, 2008, DOC and CCO Lang had concerns about him living at a DOC approved location. CP 230, 363-364, 406. Goolsby made his intent to abscond from DOC supervision altogether known before his prison release and wanted to move in with family in Arizona, Compton, California or to Pierce County, even though he could not provide an address. CP 230, 448-494.

DOC informed Goolsby that he would be released homeless if he

could not produce a good address where he would live once released. CP 227-228. Although CCO Lang knew that Goolsby had no housing at least 6 months before he was released from prison, she made no progress in this regard from July 2008 until his release in January 2009. CP 723-724. Lang testified "the biggest issue is trying to find housing for especially sex offenders, Mr. Goolsby." CP 725. Lang listed her concerns of Goolsby being a high-risk offender releasing as homeless. CP 727.

If an offender did not have an approved address, DOC required them to live in a qualified shelter. CP 728. When told that he had to live in a shelter because he had not approved address, Goolsby was argumentative with Lang the entire trip from Monroe to Seattle, refusing to listen to Lang. CP 728, 731. Lang knew that when she picked him up he needed mental health medications and had not had medications for a month. CP 729. CCO Lang confirmed that Goolsby was required to sign in and give his address to King County Sheriff's once a week because he was homeless and was required to register weekly as a Level 3, high-risk sex offender. CP 730. Goolsby signed all of the supervision conditions on January 21, 2009, with Lang and there was certainly a take-charge relationship. CP 731. Goolsby alluded that he could not stay out of drug areas or abandon his gang affiliations. CP 731-732. On his first day out, on January 21, 2009, when CCO Lang ordered Goolsby that he was expected to stay in an approved shelter, he laughed and stated "you expect me to live in a shelter?" CP 733.

From this first day of release, after Goolsby signed the supervision conditions, CCO Lang gave him $40 and dropped him off at a shelter and she never once supervised him in the community after that date. CP 734. Goolsby did not stay at a shelter that day or any other day. CP 735. CCO Lang picked Goolsby up from his prison release at Monroe on January 21, 2009. CP 726-727, 227-228. From the first day of his release, Goolsby was argumentative on the ride from Monroe to Seattle and again said he wanted to go to California or Pierce County and refused to listen to CCO Lang. Id. When Goolsby was told to stay out of drug areas, he stated "everywhere is a drug area" and he stated that there were too many "Bloods" in Seattle, being that he was a Crip. Id. Goolsby was told he had to stay at a homeless shelter in Seattle and he replied, "You expect me to live in a shelter?" Id. Lang then gave Goolsby $40 dollars after arriving in Seattle and then showed him the door. CP 227-228.

DOC also expressed concern that Goolsby had an "I will do what I want to do" attitude related to where he would live once out of prison. Id. Prior to his release, on January 15, 2009, Goolsby CCO, Judith Lang, documented that Goolsby was a "high risk offender" releasing homeless and she was already "skeptical about this offender's motivation for change." CP 227-228.

From this day, January 21, 2009, until the day of the murder on August 5, 2009, Judith Lang never saw Goolsby in the community and never enforced the condition that he live at a DOC approved address- she

never knew where he lived. Id., CP 334-340. He never even stayed the night at any shelter. CP 227-228.

Goolsby was a sex offender and was required to register every week because he had not address, and he was also had mental health issues and needed medications. Id., CP 331-332, 600-620. Goolsby only registered once, the day he was released from prison, with his address listed as the address he had before prison in Tacoma, not a current or real address. CP 346-356. On January 21, 2009, Goolsby's address was homeless. CP 328. By early February, Goolsby stopped reporting daily as required, and did not take the required UAs. CP 739. The next time that CCO Lang heard anything from Goolsby was when he was arrested just a few days later on January 26, 2009. CP 226. Goolsby tested positive for marijuana use on this date. CP 274-276. On February 17, 2009, Goolsby had a violated his community custody and was found guilty of failing to have a DOC approved residence and employment, failure to report and using illegal drugs. CP 225, 297-301, 303, 318-322, 324-326, 408. This was conclusive evidence that Goolsby intended to live his life as usual as a highly violent criminal with no accountability. On this same date, Goolsby was ordered to come into the DOC office and provide the address of where he was living or he would be detained. Id, CP 312-316.

Two days later, the police in the community again contacted Goolsby. CP 226-227. King County Police arrested Goolsby again on February 20, 2009. CP 741.

When CCO Lang did talk to Goolsby in the DOC office, he was being volatile in his speech, complained about not being able to live in Tacoma or Tacoma, could not provide proof that he registered as a sex offender, and did not provide an address of where he was living, just stating he was "staying in a motel." CP 224. Even though DOC professed that they would detain Goolsby if he could not provide an address, they did not. Id. As testified by DOC expert Stough:

> This is a case where the actual "community supervision" was non-existent for this violent, murderous gang member and the DOC provided a complete absence of care of the major conditions of supervision, which included field supervision, ensuring that the offender was at an approved address, ensuring that the offender was on his mental health medications and ensuring that the offender went to treatment for his addiction to illegal drugs. The complete failure to supervise this offender in the community by CCO Lang led directly to this offender absconding and related to DOC eventually obtaining a Secretary's Warrant, they grossly violated their own policies in this regard, enabling this offender to escape supervision. The most important aspects of community supervision of a violent offender include the community correctional officer conducting field (community supervision) of an offender and enforcing the condition that the offender is living at a location approved by the DOC. Attached to this declaration is a true and correct copy of the Minimum contacts standard of DOC policy 380.200, which required CCO Lang to have two out of office or field contacts with Goolsby per month. **CCO Lang never had one field contact with Goolsby in 8 months**. In this case, the community correction officer never supervised Mr. Goolsby in the community, not one time, and Mr. Goolsby never lived at a DOC approved location. DOC's argument that it could not execute the warrant because it had no address is circular because it was

> DOC's gross negligence that led to the offender's failure to reside at a DOC approved address. DOC exercised no care with regard to the most important aspects of supervision. After the day that CCO Lang picked up Goolsby from Monroe prison, he was not supervised in the community. This naturally led to offender Goolsby to quickly go back to his life of drugs, guns, "gang banging" and violence.

CP 143-144.

Although Goolsby was required to attend narcotics Anonyms three times a week, he only went a couple times during his entire supervision. CP 223. Lang knew that Goolsby was not in community service and did not have a job, violating his conditions. CP 743. On March 2, 2009, CCO Lang only knew that Goolsby was living at a motel, she never went to see any of these motels or whether Goolsby was there. CP 222. On March 3, 2009, CCO Lang noted that Goolsby she did not know where Goolsby was living. CP 418-422. On March 6, 2009, Seattle police went to check the Airline Motel, they walked in on Goolsby in the hotel with another violent sex offender on supervision who ran to the toilet and attempted to flush crack cocaine down the toilet. CP 221, 286-289, 291, 303, 305-306. On March 12, 2009, CCO Lang learned that Goolsby was prostituting girls at the motel and affiliating with drug users. Id., CP 220, 260, 748. On March 23, 2009, DOC found guilty of associating with a drug seller, gang members, and possession of cocaine. CP 219,293-295. On this date, his address was listed as "homeless in Seattle." CP 276. On March 27, 2009, when CCO Lang asked Goolsby where he lived, he was evasive. CP 218. CCO Lang again gave an empty warning that if Goolsby could not provide

an approved DOC address where he lived that he would go back to jail. Id., 278-282. CCO Lang admitted in writing that this was a "High need and needs extra attention. Id. By April 2, 2009, CCO noted that Goolsby had failed to start chemical dependency treatment. CP 217. On April 10, 2009, CCO Lang found out that Goolsby was not staying at the shelter he was supposed to stay and represented he was staying and she warned Goolsby "one last time" and given another false warning that he would be arrested and detained if he did not stay at the shelter or approved residence. CP 216. This was the last time DOC had contact with Goolsby before the murder in August. Id. On April 21, 2009, DOC placed a warrant out for Goolsby arrest. Id.

CCO Lang's testimony conclusively proves gross negligence:

Q. Other than the date you transported Mr. Goolsby from Monroe Prison, did you ever see Mr. Goolsby in the field one time?

A. I can't recall.

Q. Based on the chronological notes that we've been going through for the past 90 minutes, so you see anywhere in those chronological notes that you made where you saw Mr. Goolsby in the field <u>one</u> time?

A. No.

Q. Based on the chronological notes that we've been going through, do you see anywhere in the chronological notes that you ever attempted to make a field contact with Mr. Goolsby?

A. Not from the notes, no. (CP 759-760).

Q. You never saw the offender in the field from 1/21/09 (prison release) to 8/5/09 (James Smith murder), correct?

A. Correct. (CP 765).

Q. Did Mr. Goolsby ever provide you with an address?

A. The physical address, no. (CP 761.)

Q. From the time that Mr. Goolsby left Monroe and you picked him up till the time of his involvement in this homicide on 8/5/2009, did Mr. Goolsby ever had a DOC-approved housing?

A. It was not approved by us, no. (CP 763.)

Q. Based on your chronological notes, was Mr. Goolsby ever on mental health medications?

A. Not to my knowledge. (CP 763).

CCO Lang only saw Goolsby two other occasions, in her office, after his release. (CP 765). His UA was only taken two times and was positive for illegal drugs. CP 766. Lang was aware that Goolsby was still active as a Compton Crip while under her supervision. CP 765-766. Lang also knew that Goolsby was associating with other offenders, drug dealers and gang members, using illegal drugs, selling drugs and prostituting girls while under her supervision. CP 766. Goolsby never went to narcotics anonymous. CP 776. DOC were grossly negligent and violated policy with regard to the Secretary's Warrant as well, according to expert Stough:

> The fact that DOC eventually initiated a bench warrant 5 months after repeated her knowledge that Goolsby was engaging in his historic criminal lifestyle of gangs, drugs, had no address does not absolve DOC's responsibility to apprehend and supervise this offender, especially since DOC was grossly negligent in initiating and prosecuting the

warrant and the fact that his CCO Judith Lang never once conducted a field visit did not release them from their obligation to supervise, monitor, locate, investigate, and discover Goolsby's whereabouts or his activities. Instead, the DOC gave final warning after final warning, but failed to enforce the conditions in the first place. This is especially true since DOC knew Goolsby, at one point, was living in a motel selling drugs, prostituting women and taking illegal drugs. As stated in the findings "the peak rates of committing a new crime or violating the terms of parole occur in the first days, weeks and months after release. Clearly, the first days and weeks out of prison are the riskiest for the releases and the general public."

In other words, DOC's failure to act on the clear red flags and warnings that Mr. Goolsby was not complying with the terms of his release, along with the complete absence of his community correctional officer to conduct a single field visit, to make sure he was living where he was supposed to, to get him into consistent drug treatment, to ensure he was on his medications, etc., directly led to him absconding supervision. DOC's failure to ensure that Goolsby had an approved address was particularly egregious in this case because he was a high-level sex offender and required to register his address with local law enforcement once a week, but this condition was not enforced. Had DOC done these things from the beginning, Goolsby would have been under control or incarcerated and would not have absconded and "blown off" supervision completely. Goolsby's acts of absconding and recidivating into his historic criminal behavior are a direct result of the DOC's gross negligence in failing to supervise him from his initial release.

On a more probable than not basis, the scientific evidence (Research, studies) as discussed in the recent NCR Report demonstrates that adequate and

proper parole/probation supervision has been shown by research to significantly reduce recidivism and increase desistance from criminal behavior when supervision is adequate and when it is linked to appropriate treatments. In this case, the fact that DOC, admittedly, failed to provide any community or field monitoring of Mr. Goolsby and failed to ever learn of an actual address where he was residing also directly led to Mr. Goolsby absconding and engaging back into his criminal background of guns, violence, gangs and drugs. Goolsby as a high risk to the community, it is evident based on the facts of this case and as supported by the research attached and outlined in this declaration that Goolsby's recidivism and re-offense related to this case is directly linked to the lack of and poor probation supervision in that occurred here.

CP 156-158.

Defendants also argue that once they issue a Secretary's Warrant on an offender that their obligation to supervise the offender is over. This is absolutely wrong. Defendants provided a very cursory declaration of James Harm related to the Community Response Unit. Mr. Harm disingenuously fails to explain the purpose and job of the Community Response Unit (CRU), which is governed by DOC policy 370.380, a true and correct copy of the policy attached to my declaration as Exhibit 4 (CP 184-187). The mission of the CRU is to increase public safety through apprehension of DOC violators through working in formal partnerships with law enforcement. Based on this policy, DOC's main function in the CRU is to assist local law enforcement in the apprehension to absconded offenders under supervision and to engage in warrant operations. The officers in the CRU are permitted to carry unconcealed firearms and have arrest powers. The DOC had a specific policy on its obligations once an offender absconded, policy number 350.750, a true a correct

> copy is attached to my declaration as Exhibit 4. (CP 184-187)
>
> Pursuant to a Secretary's Warrant, once an offender absconds, CCO Lang was to make a reasonable attempt to locate the offender within 72 hours of learning of the absconding, then complete the Secretary's Warrant, then within the same 72 hours of attempting to locate the offender Lang was to email the warrant to DOC Headquarters Warrant Desk. The Warrant was then to be entered within 72 hours of receipt and then issued. Then CCO Lang was to serve the warrant personally or through law enforcement. In this case, the Secretary's Warrant was issued for Goolsby on April 21, 2009, yet CCO Lang made any attempt to locate the offender within 72 hours or ever, the warrant was not requested until May 7, 2009, 17 days after absconding, there was never any attempt by Lang or anyone at DOC to serve the warrant, even though Lang knew the name of the motel that Goolsby lived at and frequented and had access to look at all motel registration information for Seattle motels, the CRU was not notified of Goolsby's warrant until June 11, 2009 and there is no evidence that anyone from DOC ever communicated with, worked with or cooperated with law enforcement to serve the warrant or apprehend Goolsby. In other words, CCO Lang and the DOC completely "dropped the ball" here also.

CP 161-162.

Clearly, there are issues of fact that must be decided by a jury.

V. ARGUMENT AND AUTHORITIES

A. THE STANDARD OF REVIEW.

An Appellate Court reviewing a Trial Court's ruling on summary judgment makes the same inquiry as the Trial Court. The Court may only grant summary judgment where the evidence discloses no genuine issues of material fact and the moving party demonstrates it deserves a judgment as a matter of law. *Hertog v. City of Seattle,* 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Under Washington law, the court must consider all of the facts and all reasonable inferences from them in a light most favorable to the non-moving party. *Taggart v. State,* 118 Wn.2d 195, 199, 822 P.2d 243 (1992). The court reviews questions of law de nova. *Sherman v. State,* 128 Wn.2d 164, 183, 905 P.2d 355 (1995). The testimony of an expert witness, alone, suffices to preclude summary judgment. *Lamon v McDonnell Douglas,* 91 Wn.2d 345, 588 P.2d 1346 (1979).

In the case of *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963) are Supreme Court cataloged and listed the rules applicable to motions for summary judgment. *Balise* provides:

(1) The object and function of the summary judgment procedure is to avoid a useless trial; however, trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact. (2) Summary judgment shall be granted only if the pleadings, affidavits, depositions or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. (3) A material fact is one upon which the outcome of the litigation depends. (4) In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material facts exist, not to resolve any existing factual issue. (5) The court, in ruling upon a motion for summary judgment, is permitted to pierce the formal allegations of fact in the pleadings and grant relief by summary judgment, when it clearly appears, from uncontroverted facts set forth in the affidavits, depositions or admissions on file, that there are, as a matter of fact, no genuine issues. (6) One who moves for summary judgment has the burden of proving that there is no genuine issue of material fact, irrespective of whether he or she or he or his opponent, at the trial, would have the burden of proof of the issue concerned. (7) In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorable to the nonmoving party and, when so considered, if a reasonable man might reach different conclusions the motion should be denied. (8) When, at the

> hearing on a motion for summary judgment, there is contradictory evidence, or the movant's evidence is impeached, an issue of credibility is present, provided the contradicting or impeaching evidence is not too incredible to be believed by reasonable minds. The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion should be denied. (Citations omitted).

In this case, at a minimum, there were genuine issues of material fact as to whether or not DOC who, almost completely failed to supervise Mr. Goolsby, a highly dangerous offender who had a serious likelihood of reoffending, was "a proximate cause" in the untimely death of James Smith, a reasonably foreseeable victim of Goolsby's unchecked violent propensities. A party who moves for summary judgment has the burden of proving that there are no genuine issues of material fact, and all material evidence and reasonable inferences therefrom must be considered in the light most favorable to the **nonmoving** party. *Balise v. Underwood,* 62 Wn.2d 195, 199, 381 P.2d 966 (1963). Summary judgments should be granted only if the pleadings, affidavits, depositions, or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Id.* **Summary judgment is inappropriate where there is contradictory evidence and an issue of credibility is present.** *Id.* at 200. Before addressing the substantive

merits of the Appellants' claims, plaintiffs shall address the procedural issues deposited by DOC's summary judgment materials.

B. RESPONDENT BREACHED ITS DUTY TO CONTROL MR. GOOLSBY, WHO WAS SUBJECT TO DOC SUPERVISION.

As noted by Appellants' expert, William T. Stough, at Page 7, "This is a case where the actual "community supervision" was nonexistent for this violent, murderous gang member and the DOC provided a complete absence of care of the major conditions of supervision, which included field supervision, ensuring that the offender had an approved address, ensuring the offender was on his mental health medications and ensuring that the offender went to treatment for his addiction to illegal drugs". Long ago, Washington adopted Restatement (Second) of Torts § 315(a) which provides that there is a duty to control the conduct of a third party when "a special relation exists between the actor and the third person which supposes a duty upon the actor to control the third person's conduct ...". *See Petersen v. State,* 100 Wn.2d 421, 671 P.2d 230 (1983), *Taggart, supra, see also Joyce v. State,* 155 Wn.2d 306, 119 P.3d 825 (2005). Additionally, the State, in its capacity of supervising criminals following their release from incarceration also has a duty pursuant to Restatement (Second) of Torts § 319 which provides:

> "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if

> not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." *See Taggart*, 118 Wn.2d at 219-20; *see also Estate of Jones v. State,* 107 Wn.App. 510, 15 P.3d 180 (2000), *Hertog v. City of Seattle,* 88 Wn.App. 41, 943 P.2d 1153 (1997), affirmed, 138 Wn.2d 265, 979 P.2d 400 (1990).

The scope of DOC's duty was discussed in detail in *Joyce v. State,* 115 Wn.2d at 315:

> "Once the theoretical duty exists, the question remains whether the injury was reasonably foreseeable. Depending on the facts of the case, it may be appropriate to instruct a jury on the specifics of the judgment and sentence and the condition of release, to aid them in deciding whether the State failed to exercise reasonable care, or whether its negligence caused the plaintiff's injury. But the department seeks to drastically narrow the State's duty of reasonable care as a matter of law. It notes, rightly, that the State's authority to supervise arises from the conditions of release contained in a judgment and sentence for a crime. Under some circumstances, the specifics of those documents may limit the State's duty. But Stewart's conditions of release were not limited to payment of financial obligations as we discuss below in the context of *Couch v. DOC,* 13 Wn.App. 556, 54 P.3d 197 (2002) review denied, 149 Wn.2d 1012, 69 P.3d 874 (2003). Stewart's conditions of release for his two felonies were extensive, including the requirement that he obey all laws and maintain an address and employment. Alternative, the Department argues, there must be a nexus between the crime for which the offender is convicted and the subsequent act, which causes harm and that, this nexus is lacking. We conclude that such a nexus may be relevant and properly brought before the jury, but while the offender's conditions of release are relevant to what is foreseeable; it is not the only basis for determining foreseeable dangerous propensities.
>
> Finally, the Department argues that there is something so fundamentally different between a community corrections officer and a probation officer that our prior holdings do

not apply. We disagree. We have answered all the questions raised by the State about its duty to perform. The leading case is *Taggart* where the State contends that none of its actions were a legal proximate cause of Taggart's injury when a supervised offender, last incarcerated for car theft, assaulted Taggart. We rejected the State's legal cause argument and concluded "Parole officers have a duty to protect others from reasonably foreseeable dangers engendered by parolee's dangerous propensities. Essentially that is the same question before us today. We also reject the State's argument that recognizing this duty would require the State to monitor more intensively than the State resources allow. We reasoned: 'The parole officer is the person through whom the State ensures that the parolee obeys the terms of his or her parole. Additionally, parole officers are, or should be, aware of the parolee's criminal histories, and monitor, or should monitor, their parolee's progress during parole. Because of these factors, we hold the parole officers have 'taken charge' of the parolees they supervisor for purposes of § 319. When a parolee's criminal history and progress during parole show that the parolee is likely to cause bodily harm to others if not controlled, the parole officer is under a duty to exercise reasonable care to control the parolee and prevent him or her from doing such harm.' ... Furthermore, we have already recognized the duty to use reasonable care in supervising offenders under other types of community supervision programs ... Again, we have been here before. We surveyed the nature of the State's duty in supervising offenders in detail in *Bishop,* and again held that relevant threshold questions are whether the State had a take-charge relationship with the offender, and whether the State knew or should have known of the offender's dangerous propensities. And again, we affirm that the conditions of release are important because they create the relationship. However, once the relationship is created, it is the relationship itself which ultimately imposes the duty upon the government', the failure to adequately monitor and report violations, thus a failure to adequately supervise a probationer may result in liability."

Mr. Goolsby was a highly dangerous criminal with a history of rape, was a registered sex offender, was a violent gang member, apparently a pimp, and someone who has engaged in violent felonies in the past. He was also a drug addict, who was resistant to treatment and resisted to compliance with the terms of his parole. Despite DOC's knowledge regarding Mr. Goolsby's highly violent propensities its employees did next to nothing to enforce the conditions of his release. In fact, the State's inaction all but guaranteed that Mr. Goolsby was free to roam the streets of the Pacific Northwest, engaging in criminal misconduct including, but not limited to consorting with gang members, doing drugs, and apparently operating as a "pimp". He was not even required to maintain an address from which he could be subject to supervision, nor were any true efforts made to ensure that he was in an appropriate drug-treatment program. Also no effort was made to ensure that his was on his mental health medications.[1] Thus, given the near absence of supervision occurring prior, it should not have been surprising to the DOC that in fact Mr. Goolsby had positioned himself to lose contact with the Department, or in the defense's words, "absconded". In other words, the DOC's failures "set the stage" for what transpired thereafter. Thus, the court should reject the DOC's rather perverse argument that because, after an object failure at

[1] It is also noted that Goolsby failed UAs and apparently CCO Lang was also aware that Mr. Goolsby was still active in the Compton Crips.

supervision, a warrant was ultimately issued, that that somehow means that there was no "take charge" relationship subjecting DOC to liability. That is far from the case, and contrary to the law, as discussed in *Joyce*.

As discussed in *Joyce,* the "scope" of the State's duty is, at least in part, defined by the judgment and sentence, as well as the conditions of release. In other words, such instruments in and of themselves, define and establish "the continuing relationship", which is supposed to occur (absence negligence) between the State and the criminal subject to supervision. Again, it is simply perverse, for DOC to argue that because there had been a previous failure of supervision, prior to Mr. Goolsby's murder of decedent, and the coincidental issuance of a warrant, that somehow DOC is absolved from liability due to a lack of a "relationship". It is respectfully suggested, if the relationship is defined as DOC suggests, then it would be rewarded for its own negligence and failings, in not providing supervision and, according to DOC, not having a "relationship" with this particular parolee. Such a proposition is facially preposterous and patently absurd.

The fact that Mr. Goolsby was still under active supervision, separates this case from *Hungerford v. State,* 135 Wn.App. 240, 139 P.3d 1131 (2006). In *Hungerford,* the criminal had completed the terms of his sentence, and his active supervision had ended. Absent such active

supervision, the court in *Hungerford* noted that the State generally has no general duty to guarantee that criminals subject to supervision are rehabilitated. Further, appellants' position is fully supported by an eminently qualified expert who is unequivocal in his opinions regarding DOC's failures with respect to the supervision of this highly violent offender.

There is at a minimum a question of fact as to whether or not the respondent breached its well-recognized duty, which was established long ago in the *Taggart* opinion.[2]

C. THE STATE OF WASHINGTON HAD A "TAKE CHARGE" RELATIONSHIP WITH GOOLSBY THAT CREATED A DUTY TO PROTECT THE PUBLIC FROM HIS VIOLENT PROPENSITIES.

In Washington, the relationship between a parole officer and the parolees he or she supervises creates a duty to exercise reasonable care to control the parolee to protect anyone who might reasonably be endangered by the parolee 's behavior. *Taggart v. State,* 118 Wn.2d 195, 219-222, 822 P.2d 243 (1992). The relationship between a parole officer and a parolee constitutes a "special relationship" under the Restatement of Torts (Second) § 315 (1965). The relationship gives

[2] To the extent that DOC, and its employees violated its own internal standards, under the *Joyce* opinion, violations of such internal policies naturally are "evidence" of negligence. *See Joyce*, 155 Wn.2d at 360; WPI 60.03; *see also* RCW 5.40.050.

rise to a duty to protect the public from harm that the parolee might cause. *Taggart,* 118 Wn. 2d at

219. The court explained at 220, as follows:

> When a parolee's criminal history and progress during parole show that the parolee is likely to cause bodily harm to others if not controlled, the parole officer is under a duty to exercise reasonable care to control the parolee and prevent *him* or her from doing such harm.

The court cited to the Restatement (Second) of Torts § 319 (1965) for the proposition that "[O]ne who takes charge of a third person whom he knows or should know to be likely to case bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." *Taggart,* 118 Wn.2d at 219.

Various aspects of the relationship between the government and the offender under supervision satisfy the "take charge" element of the duty. The statutes that authorize and empower supervision establish a "take charge" relationship. *Taggart,* 118 Wn. 2d at 219-220; *Joyce v State,* 155 Wn.2d 306, 317, 119 P.3d 825 (2005); *Couch v State,* 113 Wn.App. 556, 565, 54 P.3d 197 (2002). The terms of the judgment and sentence or other court order can create the relationship. *Bishop v.*

Miche, 137 Wn.2d 518, 526, 973 P.2d 465 (1999); *Joyce,* 155 Wn.2d at 318; *Bordon v. State,* 122 Wn.App. 227, 236, 95 P.3d 764 (2004). *See also, Hertog v City of Seattle,* 138 Wn.2d 265, 277, n.3, 979 P.2d 400 (1999). The supervising agency's rules and regulations governing supervision can create the take-charge relationship as well. *Bishop,* 137 Wn. 2d at 528.

The supervising agency need not actually know of the court order sentencing the offender to supervision for the take-charge relationship to arise. *Bordon,* 122 Wn. App. at 232, 236-238. In addition, the take-charge relationship can exist in the absence of the power to arrest or full custodial control of the offender. *Hertog,* 138 Wn.2d at 290,

Once the special relationship exists, the State has a duty of reasonable care and may face liability for lapses of reasonable care when damages result. *Joyce,* 155 Wn.2d at 310. Once the duty exists, thequestion remains whether the injury was reasonably foreseeable. *Joyce,* 155 Wn.2d at 316. The duty arises from the special relationship between the government and the offender. The judgment and sentence and the conditions of release create the relationship, which in turn creates the duty. Once the relationship exists, the relationship itself

ultimately imposes a duty on the government, and the failure to adequately monitor and report violations, thus failure to adequately supervise a probationer, may result in liability. *Joyce,* 155 Wn.2d at 318-319, citing *Bishop,* 137 Wn.2d at 526.

As explained below, the State had a "take charge" relationship with Goolsby that continued through June 2, 2009 and beyond.

D. THE JUDGMENT AND SENTENCE IMPOSED THAT RESULTED IN GOOLSBY SENTENCE TO COMMUNITY CUSTODY AND DOC'S INITIATION OF SUPERVISION CREATED A SPECIAL RELATIONSHIP THAT GAVE RISE TO DOC'S DUTY TO SUPERVISE GOOLSBY.

Goolsby's previous sentence imposed a sentence of confinement and Community Custody supervision. Thus, the Judgment and Sentence and the initiation of community supervision by the DOC created a recognized "take charge" relationship between DOC and Goolsby sufficient to give rise to a duty to supervise. *See, Bishop,* 137 Wn.2d at 526.

1. THE DEPARTMENT OF CORRECTIONS' CONDITIONS, REQUIREMENTS AND INSTRUCTIONS CREATED A SPECIAL RELATIONSHIP WHICH GAVE RISE TO DOC'S DUTY TO SUPERVISE GOOLSBY.

Upon Goolsby's release from confinement in March of 2007, DOC required him to report to "sign paperwork." CP 248-249. The next

day, Goolsby signed DOC's "Conditions, Requirements and Instructions," which subjected Goolsby to additional conditions CP 374-376, p.4 *infra.* These administratively imposed conditions created a take-charge relationship between DOC and Goolsby sufficient to give rise to DOC's duty to supervise him. *Bishop,* 137 Wn.2d at 528.

2. THE STATUTES REQUIRING AND EMPOWERING THE STATE TO SUPERVISE GOOLSBY GAVE RISE TO DOC'S DUTY TO SUPERVISE GOOLSBY.

RCW 9.94A.720[3] compelled and empowered DOC's supervision:

> (l)(a) Except as provided in RCW 9.94A.501, all offenders sentenced to terms involving community supervision, community restitution, community placement, or community custody shall be under the supervision of the department and shall follow explicitly the instructions and conditions of the department. The department may require an offender to perform affirmative acts it deems appropriate to monitor compliance with the conditions of the sentence imposed. The department may only supervise the offender's compliance with payment of legal financial obligations during any period in which the department is authorized to supervise the offender in the community under RCW 9.94A.501
>
> (b) The instructions shall include, at a minimum, reporting as directed to a community corrections officer, remaining within prescribed geographical

[3] In effect at the time of Goolsby's December 6, 2005 conviction as well as at all times relevant in this matter. RCW 9.94A.501 did not apply to Goolsby because Goolsby had been convicted of a crime against a person.

boundaries, notifying the community corrections officer of any change in the in the offender's address or employment, and paying the supervision fee assessment.

(c) For offenders sentenced to terms involving community custody for crimes committed on or after June 6, 1996, the department may include, in addition to the instructions in (b) of this subsection, any appropriate condition of supervision, including but not limited to, prohibiting the offender from having contact with any other specified individuals or specified class of individuals.

(d) For offenders sentenced to terms of community custody for crimes committed on or after July 1, 2000, the department may impose conditions as specified in RCW 9.94A.715.

The conditions authorized under (c) of this subsection may be imposed by the department prior to or during an offender's community custody term. If a violation of conditions imposed by the court or the department pursuant to RCW 9.94A.710 occurs during community custody, it shall be deemed a violation of community placement for the purpose of RCW 9.94A.740 and shall authorize the department to transfer an offender to a more restrictive confinement status as provided in RCW 9.94A.737. At any time prior to the completion of an offender's term of community custody, the department may recommend to the court that any or all of the conditions imposed by the court or the department pursuant to RCW 9.94A.710 or 9.94A.715 be continued beyond the expiration of the offender's term of community custody as authorized in RCW 9.94A.71 5(3) or (5).

The department may require the offenders to pay for special services rendered on or after July 25, 1993, including electronic monitoring, day reporting, and telephone reporting, dependent upon the offender's ability to pay. The department may pay for these services for offenders who are not able to pay.

(2) No offender sentenced to terms involving community supervision, community restitution, community custody, or community placement under the supervision of the department may own, use, or possess firearms or ammunition. Offenders who own, use, or are found to be in actual or constructive possession of firearms or ammunition shall be subject to the violation process and sanctions process under RCW 9.94A.634, 9.94A.737, and 9.94A.740.

"Constructive possession" as used in this subsection means the power and intent to control the firearm or ammunition.

"Firearm" as used in this subsection has the same definition as in RCW 9.41.010.[4]

RCW 9.94A.715 provided, in part:

Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5).

The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of

[4] RCW 9.94A.720(2006); RCW 9.94A.720(2009).

the community, and the department shall enforce such condition pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety.

In addition, the RCW 9.94A.700(4) contains the following conditions:

(a) the offender shall report to and be available for contact with the assigned community corrections officer as directed

(b) the offender shall work at department-approved education , employment, or community restitution , or any combination thereof; (c) the offender shall not possess or consume control led substances except pursuant to lawfully issued prescriptions; (d) the offender shall pay supervision fees as determined by the department ; and (e) the residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement. *See* RCW 9.94A.700(4)(2006); RCW 9.94A.700(4)(2009).

RCW 9.94A.700(5) contains the following conditions: (a) the offender shall remain with in, or outside of, a specified geographical boundary; (b) the offender shall not have direct or indirect contact with the victim of the crime or specified class of individuals; (c) the offender shall participate in crime-related treatment or counseling services; (d) the offender shall not consume alcohol ; or (e) the offender shall comply with any crime- related prohibition. *See* RCW 9.94A.700(4)(2006) ; RCW 9.94A .700(4)(2009), The department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

In this case, DOC had the legal authority to impose significant conditions on Goolsby during his term of Community Custody pursuant to RCW 9.94A.720, 9.94A.715, 9.94A.700(4), and 9.94A.700(5). DOC did impose such conditions, including requiring Goolsby to obey all laws.

Pursuant to RCW 9.94A.740 and 9.94A.737, DOC had the power to arrest, confine, and sanction Goolsby up to 60 days per violation of the terms of his Community Custody supervision. DOC had acted pursuant to these powers prior to February 2009 and sanctioned Goolsby multiple times for his violations of the conditions of his Community Custody supervision. CP 177-179, 378-380, 381-392, 393-397, 400-404, 410, 411, 413-415, 451, The powers and duties that RCW 9.94A.720, 9.94A.715, 9.94A.700(4), 9.94A.700(5), 9.94A.740 and 9.94A.737 gave DOC to respond to violations through arrest and sanctions, clearly created a "take charge" relationship, and corresponding duty to supervise Goolsby. *Taggart,* 118 Wn. 2d at 219-220.

E. THE ISSUANCE OF THE SECRETARY'S WARRANT DID NOT TERMINATE DOC'S "TAKE CHARGE" RELATIONSHIP WITH AND SUPERVISION OF GOOLSBY BECAUSE THE LEGISLATURE INTENDED THAT COMMUNITY SUPERVISION WOU LD NOT BE

CURTAILED BY AN OFFENDER'S ABSENCE FROM SUPERVISION FOR ANY REASON.

Despite the clarity in the case law and the facts of this case, DOC persuaded the Trial Court that it lacked any duty because DOC issued a Secretary's Warrant to arrest Goolsby when he failed to report and DOC issued its warrant. In oral argument, the State mischaracterized the effect of the warrant and the legal underpinnings of its duty to supervise Goolsby (RP 18):

> Once they issue that warrant, the duty ends because there is no longer -- the underpinnings of what that duty is, the ability to monitor, the ability to engage and perhaps requiring an offender to do a UA or calling up an offender's treatment provider and saying, what 's going on, is he coming for treatment or is she coming in for treatment? All those types of ability to take charge or in essence control the offender are gone because that offender is a fugitive now.

Actually, the duty to supervise Goolsby flowed from the relationship created between him and DOC, based on the judgment and sentence, the statutes mandating and empowering DOC supervision and DOC's own "Conditions, Requirements and Instructions." *Taggart,* 118 Wn. 2d at 219-220; *Joyce,* 155 Wn.2d at 318; *Bishop,* 137 Wn. 2d at 528. Contrary to DOC's contentions, the duty does not require a

custodial relationship or the power to arrest. *Bishop,* 137 Wn.2d at 528.

Nonetheless, the Trial Court agreed with DOC, and announced that the case presented "an issue of first impression from what Joyce did and from what Borden did." RP 9.

No case decided by any Washington Appellate Court has ever held that the "take charge" relationship and duty to supervise comes and goes according to the inclination of the offender to submit to supervision. In fact, in the only case to consider the issue, our Supreme Court unequivocally rejected the idea that DOC's authority to supervise switches on and off. *In the Matter of the Personal Restraint of Amel W. Dalluge, Petitioner,* 162 Wn.2d 814, 177 P.3d 675 (2008). There, the court had to decide whether OOC's power to enforce the conditions of Community Custody became suspended while the offender was confined. The court viewed this as a question of statutory interpretation. *Dalluge,* 162 Wn.2d at 817-818.

RCW 9.94A.625(3) provided that a "period of Community Custody ...shall be tolled during any period of time the offender is in confinement for any reason." The offender contended that since

confinement tolled the "period", it also tolled the Department's power to enforce community custody conditions as well. The court disagreed. It held as follows, at 818-819 (emphasis the court's in original):

> The Sentencing Reform Act of 1981, Chapter 9.94A RCW, says nothing about the Department's power and responsibility being tolled while offenders are confined and instead uses sweeping language. E.G., RCW 9.94A.720(1)(a) ("all offenders sentenced to terms involving ...*Community Custody shall be under the supervision of the Department and shall follow explicitly the instructions and conditions of the Department.* (Emphasis added)). It would be peculiar, to say the least, if an offender could evade the requirements of Section 720(1)(a) by committing an offense that results in confinement. It also seems very unlikely to us that the legislature intended that Community Custody conditions, such as no contact orders, would be suspended while an offender is in jail. *Cf United States v. Camarata,* 828 F.2d 974, 981 (3d Cir. 1987)(parole could be revoked before it began based on offender violation of laws; *see also State v. Keller,* 98 Wash.2d 725, 728, 657 P.2d 1384 (1983)(court will not read statutes in an absurd or strained way).

The *Dalluge* court highlighted the legislature's intent that Community Custody supervision continues uninterrupted, at 819 (emphasis the court's in original):

The Department's reading is consistent with the legislature's uncodified statement of purpose:

> The legislature intends that all terms and conditions of an offender's supervision in the community, *including the length of supervision,* and payment of legal financial obligations, *not be curtailed by an offender's absence from supervision for any reason, including confinement in any correctional institution.*
>
> Laws of 2000 ch. 226, § 1. Based on all these statutes, we conclude that the legislature intended the department to retain supervisory power and responsibility while offenders on community supervision are confined.

Dalluge makes it clear that an offender's refusal to report did not suspend the DOC's power and duty to supervise him. The legislature's uncodified statement of purpose provides unequivocally that "an offender's supervision in the community, including the length of supervision ...not be curtailed by an offender's absence from supervision

for **any** reason, including confinement in a correctional institution." *Dallug e*, at 819, emphasis added.

Appellants agree with DOC's argument m *Dalluge* that an offender's absence from supervision, even confinement in prison, does not terminate DOC's power to enforce the terms of community custody. In a like manner, an offender's refusal to report certainly would fall within the scope of the legislature's contemplation of "any reason."

In this case, DOC's contentions, and the Trial Court's ruling, thwart the intent of the legislature. If the legislature intended that an offender would not terminate supervision by committing acts that subjected the offender to confinement it surely intended that an offender would not terminate supervision by failing to appear for an appointment with a CCO. One simply cannot reconcile the Trial Court's ruling that Goolsby's failure to report terminated DOC's supervision with the will of the legislature as explained in *Dalluge.* DOC retained the power and duty to supervise Goolsby, even after he missed his appointment and DOC issued the warrant. The Trial Court erred when it ruled otherwise.

F. DOC'S OWN POLICY DEMONSTRATES THAT COMMUNITY CUSTODY SUPERVISION OF AN OFFENDER CONTINUES AFTER AN OFFENDER ABSCONDS, AND AFTER THE ISSUANCE OF A SECRETARY'S WARRANT.

DOC's Field Policy No. DOC 350.750, regarding warrants and detainers, demonstrates that even DOC understood that absconding and issuance of a secretary's warrant did not terminate DOC's power and duty to supervise. This policy provided that and Exert Stough testified at CP 161-162, 184-187:

- DOC had the authority to issue a Secretary's Warrant to law enforcement and designated corrections staff to arrest and detain offenders in violation of Community Custody.

- DOC also had the authority to arrest and detain an offender. The policy gave DOC the authority to request a bench warrant and recommend the detention and arrest of an offender who absconds from or violates supervision.

- The policy gave community corrections supervisors and community corrections officers the authority to issue or recommend issuance of warrants and detainers.

- The policy also defined absconding as an offender "failed to make a required contact and cannot be located or failed to return to the state of Washington when ordered to do so..."

- According to the policy , if an offender absconds, "the CCO **will** make reasonable attempts to located

him/her" (emphasis added) "within 72 hours..."

- For a High Violent offender (like Goolsby) who absconds, "the CCO **must** conduct a field contact at the last known residence ..." (emphasis added).

- The policy requires the CCO to "document all attempts to located the offender in the offender's electronic file."

- The policy permits the CCO to issue or request the immediate issuance of a warrant in emergent situations without first making an attempt to locate the offender. If this occurs, the CCO **must** document the emergency and the need for immediate request for a warrant, and within 72 hours "the CCO **will** make attempts to locate the offender and document the attempts in the electronic file." (emphasis added)

- If the CCO cannot locate the offender within the 72 hours, "s/he **will** issue or request the issuance of a warrant and document in the offender's electronic file." (emphasis added)

- The policy also requires a CCO to "e-mail DOC 11-005 Wanted Person Entry Request to the Headquarters Warrants Desk and to the Section Correctional Records Supervisor to provide details of the incident." The policy also describes the Warrant Service Area. An offender's risk level determines the Warrant Service Area. For High Violent offenders (such as Goolsby), the service area is "Nationwide Washington Crime Information Center/National Crime Information Center (WACIC/NCIC). "

- The policy also authorizes a CCO to issue bench warrants and detainers to effect the arrest of an

> offender. The policy provides that "warrants for offenders who pose the highest risk to the community ...will be referred to the Fugitive Task Force(s) for more concentrated search efforts."

In this case, DOC argued to the Trial Court that once an offender fails to report for supervision DOC becomes powerless to supervise him. The argument lacks credibility. DOC, in issuing policy DOC 350.750, obviously did not contemplate that CCO's lost their power or responsibility to supervise absconding offenders. The policy assumes that the CCO would act and try to find the offender, utilizing different tools depending upon the risk the offender posed to the community.

Further, CCO Lang was grossly negligent in the Secretary's Warrant process, as testified by Expert Stough:

> Pursuant to a Secretary's Warrant, once an offender absconds, CCO Lang was to make a reasonable attempt to locate the offender within 72 hours of learning of the absconding, then complete the Secretary's Warrant, then within the same 72 hours of attempting to locate the offender Lang was to email the warrant to DOC Headquarters Warrant Desk. The Warrant was then to be entered within 72 hours of receipt and then issued. Then CCO Lang was to serve the warrant personally or through law enforcement. In this case, the Secretary's Warrant was issued for Goolsby on April 21, 2009, yet CCO Lang made any attempt to locate the offender within 72 hours or ever, the warrant was not requested until May 7, 2009, 17

> days after absconding, there was never any attempt by Lang or anyone at DOC to serve the warrant, even though Lang knew the name of the motel that Goolsby lived at and frequented and had access to look at all motel registration information for Seattle motels, the CRU was not notified of Goolsby's warrant until June 11, 2009 and there is no evidence that anyone from DOC ever communicated with, worked with or cooperated with law enforcement to serve the warrant or apprehend Goolsby. In other words, CCO Lang and the DOC completely "dropped the ball" here also.

CP 161-162.

While the policy permits referral to the Fugitive Task Force, nothing stated therein excuses the CCO from further responsibility to supervise the offender. The policy actually sets forth mandatory procedures for CCO's to take action and record that action in the offender's electronic file.

Counsel for the State posited the question to the Trial Court, 'Once that warrant is issued, the next question is do we have a duty to go out and apprehend him?'

DOC's own policies answer that question "yes," despite the State's protestations otherwise. The Trial Court erred when it ruled that DOC lost its power to supervise an offender when it issued a Secretary's warrant for missing an appointment. This court should reverse.

G. THE ABSENCE OF CONTACT BETWEEN AN OFFENDER AND CCO DOES NOT TERMINATE COMMUNITY CUSTODY SUPERVISION.

Joyce recognized that a gap in contact between an offender and CCO did not terminate DOC's duty to supervise. The offender in *Joyce* had failed to report to DOC for seven months in one instance, and for three months prior to the criminal act that was at issue in that case. *Joyce,* 155 Wn.2d at 313-3 14, 320. Despite the lack of reporting and lack of contact between the offender in *Joyce* and DOC for three months prior to the criminal act, the Washington State Supreme Court still recognized that a duty existed.

The Court of Appeals in *Bordon* went even further and held that DOC owed a duty to supervise even though it did not know of the court order sentencing an offender to undergo supervision. *Bordon,* 122 Wn.App. at 236. The court in *Bordon* sentenced the offender to 12 months of community supervision. DOC, however, never received a copy of the judgment and sentence and had done nothing to supervise the offender. Nonetheless, the Court of Appeals found that because DOC should have known about the conviction and because RCW 9.94A.120(13) mandated that DOC supervise offenders under supervision, a duty existed. *Bordon,* 122 Wn.App at 232, 236-238.

The State can cite no case supporting the argument that an offender can discharge himself from DOC supervision by failing to show up for an appointment. The argument makes no sense. The imposition of supervision represents a legislative determination that offenders need oversight to ensure compliance with the terms of the judgment and sentence and to protect the public. The duty to supervise requires the State to take reasonable precautions to protect anyone foreseeable endangered by the offender's dangerous propensities. *Taggart,* at 224. The notion that properly conducted supervision will control the offender and protect the public clearly underlies the legislature's decision to impose supervision and the Supreme Court's long line of supervision decisions beginning with *Taggart.* The State's argument, and the Trial Court's ruling, removes control of supervision from DOC and places it into the hands of the offender. The State can offer no policy rationale for delegating its duty to control the offender and protect the public to the whim of an offender.

Moreover, the fact that the legislature and DOC gave CCO's tools to apprehend absconding offenders shows that the State's power to supervise continues even if an offender absconds. Apprehending an absconded offender constitutes a part of

supervision. It is supervision. DOC cannot label an offender as an absconder unless the court has imposed supervision pursuant to a judgment and sentence. The ability and power to apprehend an absconded offender only exists by virtue of the powers granted DOC by virtue of judicially imposed supervision. The purpose of apprehending an absconded offender is to compel him to submit to supervision.

The Trial Court erred in ruling that an offender ends DOC's duty to supervise by failing to show up for an appointment. DOC does not abandon its effort to supervise absconding offenders like Goolsby. The duty to supervise continues, and can include efforts to apprehend the offender to make him submit to supervision.

In this case, Goolsby's OMNI Chronological database entries show that after referring the hunt for Goolsby to the law enforcement, the CCO in charge did nothing, and never took steps to locate him. The trier of fact must decide whether DOC's efforts to supervise Goolsby, including its efforts to apprehend him, breached its duty.

H. PROXIMATE CAUSE PRESENTS AN ISSUE OF FACT.

Proximate causation consists of two elements: (1) cause in fact and (2) legal causation. *Taggart,* 118 Wn.2d at 225. As explained below, sufficient evidence of both cause in fact and legal causation exists, and this matter should be permitted to go to the jury.

1. CAUSE IN FACT DOES NOT REQUIRE PROOF OF "WHEN GOOLSBY WOULD HAVE BEEN APPREHENDED AND WHAT SANCTION WOULD HAVE BEEN IMPOSED."

The State argued to the Trial Court that cause in fact did not exist because "[p]laintiffs cannot establish the requisite factual causation, i.e. that Mr. Goolsby would have been in jail on the day of the shooting, June 2, 2009, without relying upon speculative assumption piled upon speculative assumption." CP 96-97. This argument ignores controlling Supreme Court precedent, ignores evidence, and impermissibly denies the plaintiff favorable inferences from the evidence.

To establish cause in fact, a plaintiff must establish that the harm suffered would not have occurred but for an act or omission of the respondent. Cause in fact usually presents a question for the jury. The court may determine it as a matter of law only when reasonable minds cannot differ. *Joyce,* 155 Wn.2d at 322, *Taggart,*

Hertog, and *Joyce* illustrate that cause m fact in a supervision case generally presents a jury question. In *Taggart,* the offender's extensive criminal history included sexual deviation, excessive drinking and personality disorders. *Taggart,* at 199. Upon release on parole, he entered a halfway house for four months. After leaving, his parole officer did not require the offender to submit to urinalysis and the monitoring consisted of seeing the offender weekly. The parole officer never contacted the offender's employers or girlfriend. If the parole officer had, he would have learned that the offender drank regularly. The offender's attacks on women usually involved alcohol. *Taggart,* at 226. Approximately seven months after parole, the offender assaulted Taggart after meeting her in a bar. While the court agreed that the evidence would allow the State to defend the parole officer, the court refused to declare as a matter of law that no actions of the State or its agents caused Taggart's injuries. *Taggart,* at 227.

Hertog involved an offender who raped a six year old while on probation for a lewd conduct conviction. *Hertog,* 138 Wn.2d at 268. The court held a revocation hearing, and declined to revoke probation but ordered the offender to submit to alcohol and sexual deviancy treatment. The probation officer only saw the offender one time in a

three-month period before the rape. The offender had been using drugs and alcohol at least two weeks before the rape, and had consumed alcohol and cocaine on the night of the rape. The court found that if, after the revocation hearing, the probation counselor had attempted to learn earlier whether monitoring by random urinalysis was being done and learned it was not, the probation counselor could have sought revocation earlier. *Hertog* at 272-273.The court held that a material issue of fact remained as to cause in fact regarding whether the probation counselor sufficiently inquired about urinalysis or other testing *Hertog,* at 283.

Joyce involved an offender under DOC's community supervision as a result of a conviction for assaulting his girlfriend and threatening her with a gun. *Joyce,* 155 Wn.2d at 310. While under supervision, the offender stole a car under the influence of marijuana, drove erratically, and struck and killed Paula Joyce. *Joyce,* at 314. From the beginning of supervision, the offender in *Joyce* seldom reported as required, did not perform community service, did not receive domestic violence counseling, and with few exceptions, failed to make payments towards his monthly financial obligations.

During a violation hearing that occurred months before the offender struck and killed Paula Joyce, the judge ordered the offender to sign a release of his medical records so DOC could review the offender's psychiatric history. This never occurred, despite the fact that DOC knew that the offender had been in the psychiatric ward at Providence Hospital. The court explained that "[h]ad [DOC] required [the offender] to sign the medical release as ordered by [the judge] and had [DOC] obtained [the offender's] medical records, [DOC] and [the judge] would have learned of [the offender's] psychiatric condition and may have been able to craft appropriate modifications to [the offender's] conditions of release." The court continued:"[DOC] and the judge also would have learned the [the offender] had been using marijuana that he had stolen another vehicle from a relative by popping the ignition, and that he pleaded guilty to driving without a license." *Joyce,* at 311-313.

Our Supreme Court rejected DOC's argument that, as a matter of law, DOC's negligence did not constitute a factual cause of Paula Joyce's death (155 Wn.2d at 322-323):

> The Department contends that there was insufficient evidence to support the jury's finding of cause in fact. We

> disagree. Stewart had a known history of drug abuse. Had the State obtained medical records as directed by Judge Pasette, it would have learned of Stewart's drug use, visual and auditory hallucinations, and episodes of psychotic behavior. The State knew of Stewart's propensity to drive stolen vehicles of speeds at least up to 86 miles per hour.
>
> It is undisputed that Stewart committed numerous violations of his supervision that were not reported to the court or diligently pursued by community corrections officials. A court had previously sentenced Stewart to jai l time for reported violations. Joyce's expert, William Stough, testified that if the Department had obtained a bench warrant for Stewart prior to the accident, he "would have been in jail, either awaiting a hearing or doing time on the violations" without bail on August 8, 1997. 5 Report of Proceedings (RP) at 792. While we recognize that a reasonable jury could have decided against the plaintiffs on this issue, especially if properly instructed, the Trial Court did not err in denying the Department's motion to dismiss as a matter of law.

The *Joyce* Court rejected the State's proximate cause argument that "even the DOC had properly monitored Stewart and reported violations to the court; it is unknown what action, if any, the Courtcould

have taken." 155 W n.2d at 321. The Court explai ned (emphasis the coull·s):

> It is true that *if* the Department had properly supervised the offender and reported his violations, and *if* a judge had nonetheless decided to leave Stewart at large in the community, the causal chain may have been broken as a matter of law. That is what we held in *Bishop [v. Miche,* 137 Wash.2d 518, 973 P.2d 465 (1999)]. Even though the judge in *Bishop* was aware that the supervised offender had violated conditions of probation, that he had a severe alcohol problem, and that he had willfully '[driven] after his license had been suspended, the judge did not revoke probation.' 137 Wash.2d at 532, 973 P.2d 465. 'As a matter of law, the judge's decision not to revoke probation under these circumstances broke any causal connection between any negligence and the accident.' *Bishop,* 137 Wash.2d at 532, 973 P.2d 465. If the Department had properly monitored Stewart and reported his violations to either of the two sentencing judges, and if the Department had unsuccessfully asked for judicial action, the causal chain would have been broken.

Joyce, 155 Wn.2d at 321. The causal chain was not broken in *Joyce* and the State could not avoid the plaintiff s proximate cause showing or liability with that argument. 155 Wn.2d at 321-322.

DOC ignored *Taggart, Hertog* and *Joyce.* Instead, it focused its argument on *Hungerford v Dep't of Corrections,* 135 Wn.App.

240, 139 P.3d 1 131 (2006), and *Estate of Bordon v Dep't of Corrections,* 122 Wn.App. 227, 95 P.3d 764 (2004), *review denied,* 154 Wn.2d 1003 (2005). DOC argued that the courts in *Bordon* and *Hungerford* held that a plaintiff must produce evidence establishing that the offender *would* have been incarcerated on the date of the plaintiff's injury but for DOC's alleged negligence. CP 96-97. Our Supreme Court, however, has declined to adopt DOC's position, as shown by *Hertog and Joyce.* Moreover, *Bordon* predated *Joyce,* and one can distinguish *Hungelford* from the case at bench.

Hungerford involved an offender who murdered a woman while on DOC supervision for misdemeanor theft conviction and for legal financial obligations imposed as a result of an assault conviction. Prior to the murder, the court in the misdemeanor theft conviction at a revocation hearing limited the offender's supervision to only legal financial supervision. *Hungerford,* 135 Wn.App. at 246-248. The plaintiff argued two theories of causation. First, had the offender been properly supervised the offender would have been rehabilitated and would not have committed the murder. Next, had the judge at the misdemeanor revocation hearing revoked the

offender's probation, the offender would have been in jail on the date of the crime. *Hungerford,* at 255-256.

The Court of Appeals rejected the first theory by recognizing that DOC has no duty enforceable in tort to rehabilitate offenders. *Hungerford,* at 256. With respect to the second theory, the court found no evidence showing that the Trial Court did not have all the relevant facts at the revocation hearing. Consequently, the court's decision to place the offender on only legal financial obligations constituted an intervening cause under *Joyce. Hungerford,* at 252.

In *Hungerford,* unlike here, DOC's active supervision, i.e.. its take- charge relationship, or the offender ended l0 months before the murder. 135 Wn.App. at 246 . In contrast, DOC" s take-charge relationship with Goolsby continued beyond June 2, 2009.

The *Hungerford* court never held that a plaintiff can only prove causation through evidence that the offender would have been in jail on the date of the injury. The court simply addressed the theories of causation presented by the plaintiff. The court could not and did not change any of our Supreme Court's precedent regarding required proof of causation in a supervision case.

Bordon involved an offender who drove intoxicated and killed another driver. A court had sentenced the offender to DOC community supervision for a crime of eluding and he was supposed to be under DOC's supervision at the time of the collision. DOC never received a copy of the judgment and sentence for the eluding conviction and therefore did not supervise the offender. *Bordon,* 122 Wn.App. at 231-232.

The plaintiffs' sole theory of causation argued that if DOC had supervised the offender more closely, the offender would have been in jail when the accident occurred. *Bordon,* at 234-235. The court found a lack of evidence to support that theory. In particular, the plaintiff did not show when a violation report would have been filed and when it would have been heard. The plaintiff presented no evidence (expert or otherwise) that the court would have sentenced the offender to additional jail time if DOC had reported the offender violating driving conditions, or that any jail time would have encompassed the date of the incident. *Bordon,* at 241-242.

The Court found that, given the lack of evidence, a jury would have to guess not only whether and when the violation would have been pursued but also whether a judge would have done something

differently if he or she had known about the violation and what different result would have transpired *Bordon,* at 241 -242.

The *Bordon* court did not hold that, to establish cause in fact in a supervision case, a plaintiff must produce evidence establishing that the offender would have been in jail on the date of appellants' injury but for DOC's negligence. Instead, the court simply held that there must be some evidence of a direct link between DOC's negligence and the harm, at 243- 244 (emphasis the court's):

> We hold that some evidence of a direct link between DOC's negligence and the harm to a third party is necessary to survive a CR 50 motion in negligent supervision cases. In previous cases, the nature of that evidence has varied. It has included expert testimony about how judges rule in particular proceedings, factual evidence that the very nature of the negligence led to an offender's release, testimony of the sentencing judge, or expert testimony that the State's negligence directly caused the injury. Causation evidence could also include statistical evidence about what judges do in similar cases. While we agree that expert testimony is not always required, *some* evidence establishing causation must be presented to survive a CR 50 motion. That evidence must allow a *jury* to determine causation without resorting to speculation.

Obviously, analyzing evidence of cause in fact involves a case specific inquiry. Our Supreme Court 's rulings in *Taggart, Hertog,* and *Joyce* confirm that the evidence required to take the matter to the jury need not be overwhelming, but simply consist of some evidence from which a jury can conclude that but for the acts or omissions of DOC, the injury complained of would not have happened.

2. THE EVIDENCE SUPPORTS MULTIPLE THEORIES OF FACTUAL CAUSATION.

The Respondent argues that the Appellants' theories of causation based on recidivism, probation revocation, and jail time must be dismissed. However, the Washington Supreme Court of Washington has repeatedly held that the questions of causation and foreseeability are for the jury. *See, e.g., Bell v. State*, 147 Wn.2d 166, 179, 52 P.3d 503 (2002); *Tyner v. DSHS,* 141 Wn.2d 68, 82, 1 P.3d 1148 (2000); *Taggart v. Sandau*, 118 Wn.2d 195, 224-25, 822 P.2d 243 (1992). Recently in *Bell*, the Court reiterated:

> A plaintiff in a negligent parole supervision action must show not only inadequate supervision, but must also carry the burden to demonstrate the damage sustained by the plaintiff would have been avoided but for the inadequate supervision. **This is a fact question properly presented to the jury.**

Bell, 147 Wn.2d at 179 (emphasis added).

The Respondent cites to *Estate of Bordon v. DOC,* 122 Wn. App. 227, 95 P.3d 764 (2004), in support of its motions. In that case, the

plaintiff **voluntarily abandoned** her theory that the parolee would not have been driving on the day of the subject motor vehicle collision had he been properly supervised. *Id.* at 234-35. She relied solely on the theory that the parolee would have been in jail at the time the collision occurred. Yet at trial, the plaintiff presented no evidence about when a violation report was filed or when it would have been heard. *Id.* at 241. She presented no evidence regarding whether the violation would have been pursued or proven. *Id.* She presented no evidence that the parolee would have been sentenced to additional jail time if the violation had been reported, or that the jail time would have encompassed the date of the collision. *Id.*

Bordon is easily distinguishable. Here, the Plaintiffs have **not** abandoned their theory that Goolsby would not have been living as a violent criminal had he been properly supervised. To the contrary, they have provided evidence of his community custody conditions, which specifically forbade him from leaving Seattle, possessing guns, using drugs. They have provided evidence that in spite of Goolsby's horrendous criminal record, including prior supervision violations and convictions, DOC failed to take any action to supervise him on supervision.

The Respondent reliance on *Hungerford v. State Dept. of Corrections*, 135 Wn. App. 240, 139 P.3d 1131 (2006) is misapplied, as discussed above. There, the parolee had been placed on felony LFO (legal

financial obligations) status, so there was no longer a "take charge" relationship between the DOC and the parolee. *Id.* at 245. The DOC owed no duty to potential future victims with regard to the parolee's limited supervision. *Id.* at 246. At trial, the plaintiff was unable to prove that the parolee would have been incarcerated on the date of the subject collision because the court had already ended his direct probation supervision. *Id.* In the present case, the evidence supports multiple theories from which a jury could conclude that but for DOC's breach of its duty, Goolsby would not shot James Smith.

Corrections expert William Stough explained that regardless of the date that DOC would have apprehended Goolsby, Goolsby would have been in violation of at may conditions of supervision, each one of which could result in confinement of up to 60 days, or a total of 420 days or more. Stough testified that given his experience, Goolsby's history, and recent sanctioning practices with regard to Goolsby, Goolsby would have been in jail on the day of the murder of James Smith.

Unlike *Bordon* and *Hungerford* the evidence shows that Goolsby had violated supervision conditions after as soon as he was released, that if DOC had not breached its duty Goolsby would have

been sanctioned for violating those conditions, and that the sanction would have placed Goolsby in jail on the day of James Smith murder. Certainly given Goolsby's history, the prior sanctioning practice, and the number of supervision conditions Goolsby had violated when he failed to report to DOC, any sanction imposed would have been significant even if it did not somehow land Goolsby in jail. A review of all of the evidence, drawing all inferences favorably to the plaintiffs, makes it quite difficult to comprehend any conceivable way in which the crime could have occurred if DOC had satisfied its duty. Clearly, cause in fact presents a jury question. The Trial Court erred to the extent it dismissed the case based upon cause in fact. This court should reverse.

3. LEGAL CAUSATION EXISTS BECAUSE THE STATE HAD A TAKE CHARGE RELATIONSHIP WITH GOOLSBY AND FAILED TO SUPERVISE HIM IN THE COMMUNITY, ALLOWING HIM TO QUICKLY GO BACK TO HIS CRIMINAL LIFESTYLE.

"Legal causation rests on considerations of policy and common sense as to how far the respondent's responsibility for its actions should extend." *Taggart,* 118 Wnn.2d at 226. "Legal causation is intertwined with the question of duty." *Hertog,* 138 Wn.2d at 284. The question here

concerns whether policy and common sense should compel DOC to face liability to the plaintiffs for failing to supervise Goolsby?

DOC contended that it should "not be held liable when an offender absconds from supervision and causes harm," because "[w]hen an offender absconds from supervision any realistic ability the officer has to control the offender disappears." This argument ignores that the duty to supervise arises from the judgment and sentence, the statutes mandating supervision and DOC's own Conditions, Requirements and Instructions. *Taggart,* at 219-220; *Bishop.* at 526, 528. Those factors created DOC's duty to supervise Goolsby, not "any realistic ability" to control him. Whether he absconded or not, the take charge relationship existed and so did DOC's duty.

DOC's argument essentially rehashes its recurring argument that it should have no duty in the absence of a custodial relationship with the offender. This argument has failed since *Taggart,* and it should fail here as well *(Taggart,* 118 Wn.2d at 223):

> We reject this approach and hold that a parole officer takes charge of the parolees that he or she supervises despite the lack of a custodial or continuous relationship.

The *Taggart* court emphasized that the duty existed without a custodial relationship, and without exercising "continuing hourly or daily dominance and dominion" over offenders. *Taggart,* at 224. An offender's absconding, like the absence of a custodial relationship, does not show the lack of legal causation.

DOC's duty arose as a result of its special relationship with Goolsby. Imposing liability for damages that occurred as a result of DOC's failure to adequately supervise Goolsby is not too remote from that duty and DOC's breach. DOC, however, proposed that it would be bad policy to impose liability in situations where an offender has "absconded." Contrary to what DOC suggests, social policy is better served when DOC acts to control dangerous offenders under supervision who roam loose in the community without oversight. Imposing liability on DOC for its failure to meet its duty, when those failures result in the death and injury to innocent members of our community, is sound policy. The duties at issue in this case are well established. The defense's suggestion that the DOC's negligence was no longer the "legal cause" of appellants' injuries because ultimately the offender absconded is simply meritless. This is not a case where the "period of supervision" had ended by way of expiration and/or court order.

Thus, the respondent's reliance on *Couch v. State,* 13 Wn.App. 556, 540 P.3d 197 (2000) and *Hungerford,* 135 Wn.App. 240, 139 P.3d 1131 (2006) is inapposite.

In this case, Mr. Goolsby should have been on active supervision at the time of his crime. His supervision had not terminated, and his "absconding", was a reasonably foreseeable byproduct of the State's negligence in his supervision, which included not even verifying his address. Again, the respondent's logic in this regard is rather perverse. According to the respondent, apparently if they do an extremely lousy job of supervision, and fail to gain the respect and/or control of the criminal subject to supervision then, DOC is entitled to a free pass not based on any action by any court or by the natural expiration of court orders, but rather based on the criminal acts of the person whom they are supposed to control.

Again, such arguments defy both logic and common sense. The Trial Court erred when it dismissed the case. This Court should order the matter to go to the jury.

I. THE STATE IS NOT ENTITLED TO DISCRETIONARY IMMUNITY FOR ITS FAILINGS IN THIS CASE.

It is troubling that the State is arguing that it is entitled to "discretionary" immunity without citing to a number of cases, which have already rejected such a proposition. *See e.g., Estate of Jones v. State,* 107 Wn.App. 510, 521, 15 P.3d 180 (2000). As discussed in *Estate of Jones* at 522:

> "The State is also not covered by discretionary immunity. The Trial Court dismissed the claims against the State of Washington and the Juvenile Rehabilitation Administration on the basis that they had discretionary immunity. Under discretionary immunity, courts refuse to pass judgment on *Palsy* decisions of coordinate branches of government. Discretionary governmental acts are immune from liability, but operation or administerial acts are not. Further, discretionary immunity is narrow and applies only to basic policy decisions made at a high level by a high-level executive. Because discretionary immunity only pertains to the exercise of discretionary acts at a basic policy level, it does not cover the State's supervision of Dodge as alleged by the State. Indeed, discretionary immunity does not cover negligent supervision as a matter of binding precedent."

It is noted that in *Estate of Jones* they refer to the *Taggart* opinion, as being "binding precedent" on the issue of "discretionary immunity". *See Taggart*, 118 Wn.2d at 215. What is at issue in this case is not an "absence of policies", but rather the failure to enforce what policies already existed and a breach of a well-recognized and defiant duty as discussed above. This case is distinguishable from *Avellandea v. State,* 167 Wn.App. 474,

273 P.3d 477 (2012), which under the unique facts of the case found that the claim brought therein was barred by the document of discretionary immunity. In that case, what was at issue was DOT's statutory duty to develop a "priority array" with respect to improvements upon our state's highway. Under such circumstances, what was at issue was a "high level" policy determination as to whether or not highway improvements should occur at all. That is a far different issue, than whether or not once a policy determination has been made if State employees in the carrying out of such policies were negligent in its implementation.

Here, our legislature and the courts long ago made a determination that in lieu of imprisonment criminals can be subject to supervised release. Appellants' claim does not implicate that basic policy decision, but rather plaintiffs are arguing that the government was negligent within its implementation of such policies under long-standing precedent. Here, the issue is the failure to enforce policies, and to comply with a well-recognized statutory and common-law duty. Discretionary immunity simply has no place in such an analysis. There is a question of fact as to whether or not the actions of the State were the "but for" cause of decedent's death.

What is at issue is DOC's concurrent negligence, which, arguably, was a "proximate cause," along with Mr. Goolsby's criminal act in the

death of decedent. Concurrent negligence is defined in WPI 15.04, which under the heading of "negligence defendant concurring with other causes" provides:

> "There may be more than one proximate cause to the same injury/event. If you find that the defendant was negligent and such negligence was a proximate cause of injury or damage to the plaintiff, it is not a defense that some other cause or the act of some other person who is not a party to this lawsuit may have also been a proximate cause. However if you find that the sole proximate cause of injury or damage to the plaintiff was some other cause or the act of some other person who is not a party to this lawsuit your verdict should be for the defendant."

See also Rollins v. King County Metro, 148 Wn.App. 370, 379, 199 P.3d 499 (2009); *Estate of Keck v. Blair,* 71 Wn.App. 105, 856 P.2d 740 (1993).

Cause and fact concerns "but for" consequences of an act, i.e., those events the act produced in a direct and broken sequence and which would not have resulted had the act not occurred. *See Taggart v. State,* 118 Wn.2d at 226. Cause in fact is usually a jury question and only may be determined as a matter of law when reasonable minds cannot differ. *See Joyce v. State,* 155 Wn.2d at 322. In this regard, the *Joyce* case is instructive. In *Joyce,* the Supreme Court found there was an issue of fact with respect to "cause and fact" because of the State's negligence in the supervision of the offender. The fact that DOC had failed to adequately supervise the parolee in *Joyce* to be sufficient to at least raise a triable issue

of fact as to whether or not the parolee would have been restrained or otherwise detained and as a result could not have engaged in the harmful conduct. In *Joyce,* the Supreme Court found persuasive a declaration by the same expert plaintiffs are utilizing in this case, William Stough.

Here, Mr. Goolsby engaged in repeated violations, many of which indicated he was a substantially violent and unrepentant criminal. It is noted that in *Hertog v. City of Seattle,* 138 Wn.2d 265, 979 P.2d 400 (1999) the court found that cause in fact could be based on an argument that had the probation officer adequately performed his job actions would have been taken earlier thus preventing the subsequent criminal offense which was the basis for the lawsuit. As suggested by the *Estate of Jones* case, ultimately but for causation in this context ultimately turns on the question of "foreseeability" which is normally a jury question. *Estate of Jones v. State,* 107 Wn.App. at 524.

With respect to the issue of "foreseeability" typically an act is not "unforeseeable" if it should have been reasonably anticipated or that the act was likely to happen. *See McLeod v. Grant County School District,* 42 Wn.2d 316, 255 P.2d 316 (1953). Generally, if the acts are "within the ambit of hazard covered by the duty imposed upon the defendant, they are foreseeable and do not supersede the defendant's negligence". *Cramer v. Dept. of Highways,* 73 Wn.App. 516, 870 P.2d 999 (1994). It is only

when, and particularly in the criminal act context, when an "occurrence is so highly extraordinary or improbable as to be wholly beyond the range of expectability" that it can be determined as a matter of law that the criminal act was unforeseeable. *See Johnson v. State,* 77 Wn.App. 934, 942, 894 P.2d 1366 (1995).

In this case, the fact that Mr. Goolsby would engage in an extremely violent act was reasonably foreseeable and within the ambit of risk that should have been foreseeable and prevented had the respondent not acted negligently. As stated in WPI 15.05 "It is not necessary that the sequence of events or the particular resultant event be foreseeable. It is only necessary that the resultant event fall within the general field of danger which the respondent should have reasonably anticipated".

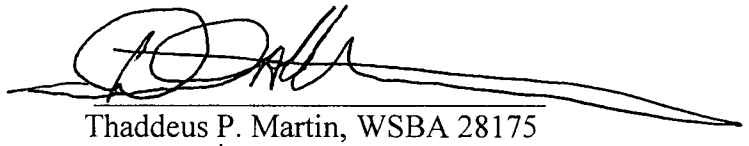
In this case, it is clearly for the jury to determine "but for" causation.

VI. CONCLUSION

The Trial Court erred when it ruled that Goolsby's failure to show up for an appointment terminated DOC's duty to supervise. This court should reverse and remand for trial.

DATED this 7th day of APRIL, 2014.

LAW OFFICE OF THADDEUS P. MARTIN



Thaddeus P. Martin, WSBA 28175
4928 109th St. SW,
Lakewood, WA 98499
(253) 682-3420

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND THAT I PLACED FOR SERVICE OF THE APPELLAN'TS OPENIN BRIEF TO THE COURT OF APPEALS, DIVISION II ON THE FOLLOWING PARTIES IN THE FOLLOWING MANNER(S):

Garth Ahearn
Attorney General's Office
1250 Pacific Ave, Ste 105
Tacoma, WA 98402

[XXX] by causing a full, true, and correct copy thereof to be e-mailed to the party at the above listed addresses, on the date set forth below followed by legal messenger.

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

Executed at Lakewood, Washington on the 8th, day of April, 2014.

Kara Denny, Legal Assistant