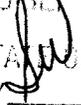


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

**NO. 37401-3-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

**ROBIN and SUSAN BENSKIN, individually and ROBIN BENSKIN
as the Personal Representative for the ESTATE OF HEATHER
BENSKIN, JOSH MIHOK, TINA MARIE GOODFELLOW and
ROBERTA EVANS,**

Appellants,

vs.

**CITY OF FIFE, FIFE MUNICIPAL COURT, FIFE PROBATION
DEPARTMENT,**

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Apparently both trial and appellate counsel have low confidence in the trial court. On appeal, Plaintiffs claim the trial court was “badly misled.” Opening brief, p. 1. Below, counsel urged that “the court should not be fooled.” CP 102.

Accusing Defendant of trying to mislead and fool the court is an ad homonym distraction. Judge Serko presided over the case for months. She gave the plaintiffs three opportunities to produce competent evidence to show that Fife was the cause of a non-party’s criminal acts. Yet despite the three opportunities and clear guidance from this court in the Hungerford decision, about the type and quantity of evidence needed to meet the plaintiffs’ burden of proof on this critical element, plaintiffs utterly failed. Judge Serko’s carefully chosen words show all:

I have now had the opportunity to review all briefing and declarations submitted in support of and in response to plaintiffs’ motion [to reconsider]...I re-reviewed the unpublished opinion of Division II...Plaintiffs’ failed at summary judgment and again on reconsideration to establish an issue of fact as to whether action by the City of Fife Probation employee(s) would have prevented Defendant Jong Kim’s criminal activity and violation of his DUI sentence on March 9, 2003. To suggest otherwise is speculation.

CP 3051.

Judge Serko's effort to find a fact question took over two months. She reviewed the 3,000+ pages of briefing and evidence. She considered Plaintiffs' motion for reconsideration and their "new" evidence. She reviewed and re-reviewed the first appellate decision. She concluded based on this exhaustive effort that the Plaintiffs failed to raise an issue of fact. She concluded that Fife did not cause the criminal to act. She labeled Plaintiffs' proof as "speculative."

Plaintiffs could not produce evidence that Kim would have been jailed on the day of the accident. Plaintiffs could not produce evidence that Kim was personally deterred by probation. Indeed, all the scientific evidence established that for high risk offenders like Kim, probation supervision had no effect on recidivism.

Judge Serko was right to label Plaintiffs' evidence as speculation. Her order should be affirmed.

II. STATEMENT OF THE CASE

Plaintiffs made three separate proximate cause arguments in the trial court below. Plaintiffs agree that these motions focused "on highly factual causation arguments" (Opening brief, p. 3), and they will be addressed individually by Defendant.

A. THE PLAINTIFFS CHALLENGE JUDGE RINGUS' DECISION ON SENTENCING.

In Plaintiffs' first proximate cause argument, they argued that "Fife Judge Ringus should have jailed Kim for the entire sentence..." CP 128.

Plaintiffs' claim:

"Plaintiffs should be permitted to argue that Judge Ringus knew that sentencing Kim to probation in Fife Probation was meaningless and that Kim should have rather been kept behind bars."

CP 130-131 (emphasis added).

On appeal, Plaintiffs repeat the claim, arguing that Judge Ringus "should not have suspended any of Kim's sentence, and again Kim would have been in jail." Opening brief, p. 7.

Judge Ringus sentenced Kim on July 30, 2002. Judge Ringus decided to suspend 155 days of the sentence. CP 218. Plaintiffs argue that Judge Ringus was wrong and should have given Kim the full 365 day sentence. Plaintiffs then calculate the "good time credit" sentence reduction. Opening brief, p. 23. Thereafter, Plaintiffs speculate that Kim would have been behind bars on the day of the accident.¹

¹ Kim was initially arraigned on January 29, 2002. CP 220. There were numerous pretrial conferences in the next six months. CP 220. If, as Plaintiffs suggest, Kim was to be given a 365 day sentence, why wouldn't he plead at his first pretrial conference on March 5, 2002? Indeed, under this version of Plaintiffs' speculative theory, any full sentence begun June 19, 2002 or earlier would have left Kim loose on the date of the accident. But if we are left to speculate, why not speculate that he would have lost good time credits for jail infractions, or get early release for some other reason? No one,

This first claim addresses Judge Ringus' sentencing decision, and raises questions of the factual basis for Plaintiffs' argument and judicial immunity. *Bishop v. Miche*, 137 Wn.2d 518, 532 n.3 (1999) ("sentencing decisions are absolutely immune").

B. PLAINTIFFS' ARGUE THAT JUDGE ALLEN WOULD HAVE REVOKED KIM'S SENTENCE.

Plaintiffs' second theory is that Judge Allen would have revoked Kim's suspended sentence if the probation violation hearing had been held on February 12, 2003. CP 145. Fife Probation recommended that Kim's probation be revoked on January 13, 2003. CP 145. A violation hearing was then scheduled on February 12, 2003. CP 159. It was cancelled and reset into March.

According to this second theory, if the violation hearing had been held on February 12, 2003, Kim would have been immediately sent to jail, and kept behind bars until the date of the accident. CP 145 (pleadings in the trial court); CP 159 (Declaration of DOC expert Hall); Opening brief p. 18 (citing CP 159); p. 20 (citing same CP); p. 23 (same page); p. 25 (*Id.*); p. 26 (*Id.*).

including Plaintiffs, is constrained by facts or evidence so there is only speculation on this issue.

Plaintiffs' factual record did not include testimony from Judge Allen about her practices at revocation or violation hearings.² There was no testimony from Judge Allen about whether she sometimes or often revoked suspended sentences, and under what circumstances. There was no testimony as to whether she gave second chances. There was no testimony as to how long she sentenced probation violations.³

There were no records or testimony indicating the number of probation violations and frequency of revoked sentences. There was no evidence about the typical or average length of a sentence.

There was evidence that when Kim violated other courts suspended sentences, he was not revoked and immediately returned to jail. CP 349 (1999-Kim admitted to new charges and missing two months of treatment); CP 368 (Kim "continued to drive while license suspended and without insurance"); CP 376 (Kim failed to appear at Pierce County Probation meeting rescheduled with no probation violation); CP 380

² Judge Allen was fully deposed at the trial level on all aspects of her contact with the case. CP 127; CP 723-747.

³ If the case law is any guidance, as the Plaintiffs suggest, it shows that given much worse behavior, courts do not revoke probation. "The judge knew that Miche had violated the court imposed conditions of his probation by driving while his license was suspended. He knew that Miche had an alcohol problem but attended meetings somewhat sporadically. He knew that Miche was scheduled to attend intensive alcohol treatment within 3 days, and thus knew that Miche was not in such treatment and that Miche needed such treatment. Nevertheless, despite Miche's violation of his probation conditions, the obvious severity of his alcohol problem, and the fact that Miche knowingly drove after his license was suspended, the judge did not revoke probation." *Bishop v. Miche*, 137 Wn.2d, 518, 531-532 (1999).

(same). At Pierce County Probation, Kim was subject to numerous violation reports. CP 413. On one occasion, he failed to appear on two appointments with his probation officer, and missed one month of treatment after absconding. CP 419. His probation officer recommended three days in jail. *Id.* There is no record of what the Pierce County District Court did in that case.⁴

Here, the sponsor of this theory for Plaintiffs was the expert Dan Hall. As indicated, Hall did not base his opinions on evidence about Judge Allen's sentencing habits, or on statistics in Municipal Court.

Regrettably Hall could not even base his opinion upon his professional involvement in Municipal Court because he has none. He is a former Department of Corrections probation officer. CP 152. He worked as a felony probation officer. *Id.* He has been a community corrections officer. *Id.* He has only testified as a forensic expert in cases against states and one county, and never any case involving the City or municipal probation department. CP 69. These forensic cases were all felonies similar to the type he worked on at DOC. *Id.*

Hall has not worked as a municipal probation officer. He has not witnessed municipal judges exercising discretion in municipal probation

⁴ On one occasion, the Pierce County District Court issued a warrant when Kim failed to appear. CP 1300. It took a "special warrants project" three weeks to locate and serve the warrant. *Id.* On another occasion, it took the Tacoma Municipal Court seven months to serve a warrant on Kim. CP 1358.

cases. He is a self-proclaimed expert in how a municipal court judge in a revocation hearing would operate. He claims:

Had there been proper notification for the 2/12/03 hearing, it is more probable than not that Kim's sentence would have been revoked and Kim would have been locked up on 3/09/03...

CP 159.

He offers this naked conclusion without the meagerest effort at explaining his analysis or logic. For example, Hall does not explain why Kim would have appeared at the 2/13/03 hearing had he gotten the notice. After all, Kim was being summoned to court for failure to appear. He had a long history of failing to appear at other probation departments and in other courts. CP 376; 380; 419. This speculation is critical, because Hall conjectures that Kim would have appeared on 2/13/03, and been immediately ordered to jail.

Hall has offered no basis for predicting that Judge Allen would have exercised her discretion and found a violation. Judge Allen has previously testified to the discretion involved in her job. CP 3071. At his deposition Hall conceded that a trial judge "can do a variety of things," at a violation hearing. CP 2334. Hall does not explain how he could predict to a "more probable than not basis" how Judge Allen would act.

When it came to the length of a jail sentence, Hall was (finally)

candid:

Q: And do you know how long Judge [Allen] would have ordered Mr. Kim to go back to jail for?

A: No. I don't know specifically. But, my guess is that it would have been a substantial period of time...

CP 2334-2335⁵

Plaintiffs base their causation claim on the testimony of Dan Hall, a felony parole expert, who offers his opinion about what a municipal court judge would do in response to a probation violation notice. He did not explain to Judge Serko how this opinion was formed. He did not explain to the trial court how he knows what Judge Allen or any municipal court judge would do. His conclusory opinion is not burdened with details about when the revocation would occur, how many days Kim would receive, what date he would have started his sentence, or anything else to establish his conclusion that Kim would have been behind bars on March 9, 2003. It's no wonder that Judge Serko labeled Hall's Declaration as a "conclusory opinion." RP 27. Judge Serko ruled it was speculative and failed to raise an issue of fact. CP 3051; RP 27.

⁵ Hall did not establish that he had any information about other pertinent sentencing factors like overcrowding in jails, factors the Court previously found significant in *Bordon v. DOC*, 122 Wn. App. at 241 n.39.

C. PLAINTIFFS' THIRD CLAIM WAS THAT MORE PROBATION EQUALS LESS CRIME.

Plaintiffs' third argument was that "Kim knew Fife Probation was not watching, so he did whatever he pleased." Opening brief, p. 18.

Below Plaintiffs argued that they produced expert testimony "that any real probation supervision would have had a positive impact on Kim's recidivism." CP 119.

Plaintiffs claim that Kim was previously on probation and when "closely monitored in the past he generally did well and had less likelihood of recidivism." Opening brief, p. 50; citing CP 1956.

Plaintiffs' experts claim a "direct correlation between Kim being closely monitored and maintaining sobriety." CP 171. Plaintiffs' experts claim that "Kim, like most offenders on probation, regulates his behaviors in tune with external constraints imposed by authorities." CP 1956⁶.

Dr. Travis Pratt was the only bona fide criminologist to address this area of science. CP 23. Dr. Pratt is a professor at Washington State University and Director of its Criminal Justice Program. He testified without objection:

⁶ Plaintiffs' brief argues that during these periods Kim "did not re-offend" [Opening brief p. 32], but the testimony is not so concrete or certain. According to Dr. George (an alcoholism expert) "with close monitoring, Kim represents a lesser risk to the community." CP 1956. When closely monitored "Kim behaves differently." CP 1957. No one claims he did not "re-offend."

Both Mr. Stough and Mr. Hall seem to claim that if the City of Fife Probation Department had engaged in proper supervision or “heightened” probation supervision, Jong Kim would have been deterred from committing crimes. This would be because the threats posed by heightened supervision would have instilled sufficient fear in Jong Kim so he would remain law abiding. They argue that the failure of the City of Fife to more closely supervise Mr. Kim was a cause of Kim’s decision to operate a motor vehicle on March 9, 2003.

CP 3045⁷.

Dr. Pratt then addressed whether the opinions of Stough or Hall were supported by any scientific publications or even represent a consensus of scientific opinion. When deposed, Plaintiffs’ chief witness Hall said he was not aware of any publications or books that supported his opinion. CP 83. Stough could only reference a college textbook which did not address his claims. CP 26.

It turns out that there was a consensus in the scientific community. And it was the exact opposite of the claims made by Plaintiffs’ experts:

It is the consensus in the scientific community that additional probation or intense supervised probation is not established as an effective deterrent for reducing criminal recidivism. Accordingly, the claims advanced by Mr. Hall and Mr. Stough cannot be supported by reference to peer reviewed archival or scientific publications. In fact, the peer reviewed and scientific publications showed the exact opposite of the claims they are making.

⁷ When originally filed, the Pratt Declaration (CP 23-25) had an incorrect second page. It was added by Praecipe at CP 3045. The three page Pratt Declaration consists of CP 23, 3045, 25.

CP 26.

Dr. Pratt also analyzed the claims of Plaintiffs' alcoholism expert George (and the late disclosed expert Crutchfield) that the prior history of Kim proves the case for Plaintiffs. Dr. Pratt pointed out that a mere correlation between periods of supervision and benign behavior proves nothing:

Dr. Crutchfield and Dr. George both point to periods where Mr. Kim was under supervision and was not arrested often.⁸ They suggest that this proves that probation was effective.

But this is an overstatement of a weak correlation and it does not prove causation.⁹ There is no proof that Mr. Kim was engaging in law abiding pro-social behavior during these periods, only that he was not caught. And both ignore the longer period between 1999 and 2001 when Mr. Kim was under no supervision and was not arrested, charged or convicted of any crime and did not have any reported accidents or traffic infractions.

CP 3266.

In November 2007, Judge Serko heard the Defendant's motion for summary judgment, which was based upon the declaration of Dr. Pratt, and other evidence. CP 2494. She considered the Plaintiffs' experts

⁸ Dr. George cherry picks a period from April 30, 1998 to March 6, 2000, and claims that Kim had "the least amount of driving infractions and no DUI charges." CP 1958. He ignores the fact that Kim absconded to another state for at least two months, missing all treatment (CP 2032), was jailed in September 1999 (CP 2044), and failed to see his probation officer on at least three occasions. CP 2050; 376; 380; 419.

⁹ *Hungerford v. DOC* recognized the difference between correlational and causation, and noted that correlational evidence is not sufficient in this context. 135 Wn. App. 240, 255 (2006).

declarations. *Id.* She granted the Defendant's motion for summary judgment. *Id.*

Plaintiffs then filed a motion for reconsideration (CP 2498) and a motion to permit a new expert, Dr. Crutchfield. CP 3092. The court permitted the new expert. CP 3053.

Dr. Crutchfield was brought into the case to address Dr. Pratt's Frye standard testimony about the state of scientific consensus on probation and recidivism. CP 3256. While Dr. Crutchfield could have attempted to rebut or refute Dr. Pratt's testimony about the consensus in the scientific community, he did neither. CP 3256. Dr. Crutchfield discussed some research findings. CP 3256, line 10. He discussed some "scientific evidence". CP 3256, line 14. He conceded "There are studies that have reported that supervision does not reduce recidivism." CP 3252. He even quoted one study:

The main objective of intensive supervision parole is a reduction in recidivism for new crimes, but the available evidence suggests that objective has not yet been achieved.

CP 3253.

Significantly, at no time did Dr. Crutchfield attempt to claim there was a consensus in the scientific community (or "general acceptance" or any other equivalent phrase) that probation supervision reduces crime.

Dr. Pratt explained that criminal justice researchers have begun to identify what factors do influence criminality and recidivism. Probation is not one of those factors. CP 3264; 3269. As he put it, “There is no science and no publication which says that the hardcore DUI offenders risk will be materially reduced by municipal probation.” CP 3270. What seems to work are factors beyond the control of probation and courts:

Parole supervision appears to reduce recidivism rates for parolees who are comparatively low risk (e.g., women and parolees with shorter criminal records) but has little effect on the recidivism rates of high risk parolees.

Informal social controls such as marriage and work are more effective than formal social controls such as parole supervision and re-arrest in increasing desistance from crime.

CP 3266 (quoting Dr. Crutchfield’s 2007 report at p. 7).

At this point in the proceeding before Judge Serko, Plaintiffs have been given three opportunities with three experts to claim there is a consensus or general agreement in the scientific community that more probation would keep Kim from committing crime. Plaintiffs had three opportunities with three experts to claim that Dr. Pratt had misstated the consensus in the scientific community.¹⁰ Despite these many

¹⁰ At this point, Defendant’s arguments about the opinions of Stough, Hall and Crutchfield do not go to weight. In *Re Detention of Thorell*, 149 Wn. 2d, 724, 756 (2003). The proponent of opinion testimony has to establish that the theory is generally accepted. *Id.* at 754. If there is a debate between experts as to what is generally

opportunities, Plaintiffs did not present such evidence. It was undisputed in the trial court that the accepted general consensus in the scientific community is that probation supervision does not reduce recidivism. And it was undisputed that the conclusory opinions of Stough, Hall, George and Crutchfield about the effects of probation supervision on Mr. Kim, lacked any support in science.

III. LAW AND ARGUMENT

The case law has identified many ways that a Plaintiff (willing and able to find the evidence) can easily address the proximate cause element of this type of case. These cases establish that it is not the impossible burden claimed by Benskins on appeal, but rather is a normal process used routinely in these cases. At the end of the day, as Plaintiffs concede, it is a factual inquiry. Opening brief, p. 3. Many plaintiffs muster the proof and present it to courts and juries alike. A few, like the Plaintiffs here, could not and did not. But the road map to develop and present the proof is clear and easily set forth in the law. A few examples set forth below will illustrate.

A. PLAINTIFFS' COULD PRESENT TESTIMONY FROM MR. KIM ABOUT THE EFFECT OF PROBATION ON HIM.

accepted, then a Frye test hearing can be held to determine admissibility. *Id.* at 754. Here, there was no debate.

One of the many ways Plaintiffs can meet the burden of proof on causation is through testimony of the individual subject to the government's control. In this recognized method, Plaintiffs would obtain testimony from the drunk driver to indicate the effect the government would have had on his decision to drink and drive.

This was the exact situation presented in *Hartley v. State*, 103 Wn.2d 768 (1985). In that case, like here, Plaintiff's decedent was hit by a drunk driver. In that case, like here, Plaintiff claimed the drunk driver should not have been driving. Like Defendant here, Defendant in *Hartley* claim there was no evidence that the actions by the government (failing to revoke the driver's license) was a proximate cause of Mrs. Hartley's death. *Id.* at 772.

In *Hartley*, Plaintiff obtained direct evidence from the drunk driver. The drunk driver there testified that he was given a driver's license by Department of Licensing, despite his status as a habitual traffic offender. *Id.* at 771. The drunk driver testified that if Department of Licensing had revoked or suspended his license, then he would not have driven in general, and would not have been driving on the date of the accident. *Id.* at 771-772. This was direct evidence that supplied sufficient proof to meet Plaintiff's proximate cause burden. *Id.* at 775.

In this case, Plaintiffs took a lengthy deposition of Mr. Kim. He was questioned at length about probation. He did not testify that his decisions about driving were influenced by Fife's actions. Unlike the Plaintiff in *Hartley*, Kim did not testify that his decision to drive drunk was because Fife failed to supervise him or schedule home visits.

Contrary to the Plaintiffs' claims, this is not a case where the trial court set an impossible burden. Rather, it is a case where Plaintiffs did not develop the evidence that has easily supplied the causal nexus in other cases.

**B. PLAINTIFF COULD HAVE PRODUCED
COMPETENT EVIDENCE ABOUT HOW
JUDGES MAKE DECISIONS.**

Another way Plaintiffs can close the causal connection is by competent evidence about how judges make decisions. *Tyner v. DSHS*, 141 Wn.2d 68 (2000). In *Tyner*, a DSHS caseworker was accused of failing to inform a family court judge about certain investigative findings. *Id.* at 87. Plaintiff claimed the judge was influenced by the caseworker and that is why Plaintiff's parental rights were temporarily terminated. The court examined whether the caseworker's "conduct may be the proximate cause of injury..." *Id.* at 87.

In analyzing the proximate cause evidence, the Supreme Court noted the existence of expert testimony about how trial courts respond to

caseworker reports and recommendations. “There was expert testimony given at trial that courts ‘always follow’ the recommendation of social workers independency hearings.” *Id.* at 87, n.7. This was sufficient expert testimony and evidence to meet the Plaintiff’s proximate cause burden. *Id.* at 87-88.

**C. PLAINTIFFS COULD HAVE PRESENTED
COMPETENT TESTIMONY FROM A JUDGE
ABOUT PROBATION REVOCATION.**

Still another way Plaintiffs can satisfy the normal and routine proximate cause burden is to present competent testimony from a judge about court processes. That was the technique used by the Plaintiff in *Peterson v. State*, 100 Wn.2nd, 421, 442 (1983).

There, Plaintiff called the trial judge who presided over a probation violation hearing. “At trial, Plaintiff called Judge Soule as a witness to help show that Knox would have been confined on the day of the accident if Western State Hospital had contacted his probation officer.” *Id.* at 442. Plaintiff in *Peterson* was allowed to ask the judge hypothetical questions as to whether a violation hearing would have been ordered or not.¹¹ In this case, both Judge Allen and Judge Ringus were deposed at length. Both provided testimony by declaration. Plaintiffs did not develop evidence

¹¹ To be sure, the judge was not asked whether probation would have been revoked. *Id.* at 443. But the Defendant did not challenge any other potential problems in Plaintiff’s proximate cause proof. Defendant only claimed error in allowing the judge to testify.

based on opinion testimony or hypothetical facts from Judge Allen or Judge Ringus as to whether Kim's probation would have been revoked, whether he would have been in jail, or whether he would have been behind bars on the day of the accident.

D. THE PLAINTIFFS COULD USE DEFENDANT'S PRIOR HISTORICAL EVIDENCE AND PRACTICES

Another way Plaintiffs could make the proximate cause case is by use of prior history at the Fife Court about its operations. That was the method used by the Plaintiff in *Estate of Jones v. State*, 107 Wn. App. 510, 521 (2000), *review denied*, 145 Wn.2d 1025 (2002). In that case, DOC released an offender into community placement and he killed Plaintiff's decedent. Plaintiff produced evidence that DOC had routinely used a scoring system to determine offender placement. *Id.* at 521. Plaintiff had evidence that this system determined whether an offender would be released into the community or not. Plaintiff produced evidence that DOC used the wrong scoring calculation for the murderer, and if the right score had been calculated, this offender, like others before him, would have been kept behind bars. *Id.*

E. PLAINTIFFS COULD USE STATISTICS ABOUT FIFE COURT PROBATION REVOCATIONS

Yet another way these Plaintiffs, like others before, can prove a case is by use of appropriate statistical evidence. *Detention of Thorell*,

149 Wn.2d 724, 753 (2000). Statistical evidence is routinely used to predict actions and it is routinely admissible in the right circumstances. *Id.* at 755. And while the courts exercise careful control over the use of such statistical evidence, it can be admissible where the requirements of ER 403, ER 702 and ER 703 are met. *Id.* at 758.

While no court has addressed the use of statistical evidence in a probation case, there is nothing to prevent a Plaintiff properly inclined from developing such a case to meet the proximate cause test. *Estate of Bordon v. DOC*, 122 Wn. App. 227, 744 (2004) (“Causation evidence could also include statistical evidence about what judges do in similar cases.”) Here, for example, the Fife Court had sentenced thousands of prior criminal cases and a definable percentage had been assigned probation. Plaintiffs were free to examine the number of time revocation hearings were held, to examine the percentage of time suspended sentences were revoked, and to calculate the average length of jail sentences imposed. If such evidence were developed in a manner to satisfy the evidence rules and case law, it may have shed light on the likelihood (or more likely the improbability) that Kim would have been put behind bars. The fact that the Plaintiffs here chose to forego this accepted method of proof is of no consequence. See, *Estate of Bordon*, *supra* (noting Plaintiff could use statistics to prove causation). But where

the Plaintiffs are claiming the burden of proof set by Judge Serko is “impossible”, that argument is specious when examined against this method, and the many others that can be used to prove proximate cause.

**F. CLEAR PRECEDENT INFORMED PLAINTIFFS
WHAT ARGUMENTS AND WHICH EXPERTS
COULD NOT SUPPORT CAUSATION.**

There is ample authority clearly identifying which proximate cause theories and arguments are insufficient. Surprisingly, the two on point decisions involve testimony from the same expert relied upon by the Plaintiffs here - William Stough. Both cases rejected Plaintiffs efforts to prove that lack of supervision caused the crime by using the testimony of Stough. For reasons that are unexplained, Plaintiffs here used the exact same arguments and expert which the case law rejected as insufficient, and not surprisingly, were rejected again by Judge Serko as they should be rejected yet again by this Court. Parole experts are not competent to speculate about sentencing decisions by trial judges, and Plaintiffs otherwise have no competent evidence that lack of supervision caused Kim to commit murder.

1. In 2004, Estate of Bordon v. DOC Held That Corrections Expert Stough’s Testimony on Identical Points Was Deemed Speculative and Insufficient.

A unanimous Division I Court addressed a very similar case in *Estate of Bordon v. DOC*, 122 Wn. App. 227 (2004); review denied 154

Wn. 2d 1003 (2005). There, a parolee, Jones, was a much more serious felon and criminal than Mr. Kim. He had recent convictions for six felonies, including forgery, possession of stolen property, and burglary. *Id.* at 227-28. He was also a menace on the road with five DUI's, dozens of speeding arrests, a felony eluding conviction, and other driving offenses. *Id.* at 238. As the court put it,

This history suggests that Jones has shown complete disregard for laws governing drivers, including refraining from driving under the influence. Based on Jones' criminal history and court imposed driving convictions, Jones was a foreseeable risk to the public when he was driving.

Id. at 238.

Driving felon Jones was also grossly out of compliance with his conditions of probation. He had four prior failures to report to his probation officer. *Id.* at 233. He had been arrested for a criminal traffic violation which violated the conditions of his supervision. *Id.* at 234.

DOC filed violation reports with the court, which issued a bench warrant. *Id.* at 233. At the violation hearing, DOC only told the court about Jones' failure to report and pay fine violations. *Id.* at 233-234. DOC failed to tell the court that, in addition, Jones failed to report for intake at the Everett Management Unit, failed to report Jones' criminal traffic arrest, and failed to tell the court that Jones was in violation of this felony eluding conviction suspension conditions. *Id.* at 234.

There was testimony from a DOC employee that violation of supervision conditions were punishable by up to 15 days in jail. *Id.* at 241, n.37. However, because of the incomplete report, the trial court only found a violation of the failure to pay fines and report for intake, and ordered a single 15 day sentence. *Id.* at 234. Jones was released from jail, and four days later killed Bordon in a car accident. *Id.*

The DOC claimed there was “no evidence that Jones would have been in jail on the day of the accident if DOC had filed a report on the driving violation.” *Id.* at 240. DOC claimed the court should have directed a verdict under CR 50. *Id.*

While *Bordon* was an appeal from a jury verdict, this issue was decided under CR 50, which the appeals court reviewed de novo. *Id.* The standard for CR 50 and CR 56 is identical. 14(a) Tegland, Wash. Practice §24.18. Thus, the court in *Bordon* was in the same position as this court.

The *Bordon* court said that this type of case, like all others, requires proof of proximate cause. “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.” *Id.* at 244. It also pointed out the numerous ways a Plaintiff could provide the direct link, including the use of a qualified expert, appropriate factual

evidence, statistical evidence and testimony from the sentencing judge.

Id. at 244.

Like Plaintiff here, Bordon claimed she produced evidence about the causal link. But,

Bordon did not present evidence about when a violation report would have been filed or when it would have been heard. She offered no testimony about whether the violation would have been pursued or proved. Nor did she present testimony, expert or otherwise, suggesting that the court would have sentenced Jones to additional jail time had DOC reported that Jones violated the driving conditions on January 5, 1998, or the jail time would have encompassed the date of the accident.

Id. at 241.

The court noted that there were many factors which affect a court's "discretionary decision" to impose jail time. *Id.* at 241, n.39. This judicial discretion includes the time an offender has already served and even "overcrowded jails." *Id.*

The Plaintiffs argued that some of the factors *Bordon* said were speculative are present in this case. Opening brief, p. 25. But *Bordon* did not suggest its long list in the causation chain could be finished by providing one or two links. The chain must be complete, and at a minimum would include competent non-speculative proof of

- When a violation report would be filed.
- When it would be heard.
- Whether the violation would be pursued.

- Whether the violation would be proved.
- That a court would impose jail time.
- That the court’s jail time would have “encompassed the date of the accident.”

Id. at 241.

Contrary to the claims of Plaintiffs, the *Bordon* court did not endorse the appeals court decision in *Joyce* as the standard for causation.

Its comment about *Joyce* is much more cautious and enlightening

We note that in *Joyce*, William Stough, the same expert witness who testified here, presented the testimony that established causation. Division II concluded that the trial court did not abuse its discretion by admitting Stough’s testimony about how courts treat violation reports. We do not know the circumstances under which the testimony was admitted in *Joyce*...

Id. at 244, n.50.

A review of *Joyce* will establish that Division II was not facing the same issues presented here, or in *Bordon*, or in *Hungerford*. DOC claimed that proximate cause “requires the testimony of the sentencing judge onto what he or she would have sentenced the absconder.” *Joyce v. DOC*, 116 Wn. App. 569, 593 (2003). The court rejected that strict requirement. In *Joyce*, there was undisputed evidence that the court had previously sentenced the criminal to 39 days in jail for a probation violation. That evidence, combined with Stough’s testimony about DOC operations, was apparently sufficient to make a jury question. *Id.* at 594.

The dissent challenged this reasoning, labeling Stough's testimony as "purely speculative." *Id.* at 611 (Quinn-Brintnall, A.C.J., dissenting). The dissent would have reversed on this issue alone. *Id.* at 614. As it was, the Supreme Court reversed *Joyce* in a holding limited by its facts.¹²

And here Fife did not make the limited attack on the causation evidence made by DOC in *Joyce*. Fife has not argued, below or now, that testimony from the sentencing judges is required. That was the argument of DOC. Indeed, Fife has pointed out, like the *Bordon* court did, the number of ways that a Plaintiff can produce the direct link evidence. *Supra* pp. 14-20. While testimony from the sentencing judges is one available method, it is not required, as argued by DOC.

Plaintiffs' recitals of the *Joyce* case omit a key fact. Opening brief, p. 16. In *Joyce* there had been a previous violation and a previous 39 day sentence. The jury had some evidence about how a judge would rule when faced with a violation of parole. That evidence, combined with the testimony of Stough, combined with the limited challenge to the evidence by DOC, left a question of fact. No such evidence exists here, a fact regrettably ignored by Plaintiff when touting *Joyce*. It is no wonder that

¹² In the Supreme Court, the DOC's narrow objection to the Plaintiff's causation case was made with the same briefs and the same record. 155 Wn.2d 306 (2005). There is nothing to suggest that DOC challenged Stough's ability to predict a judge's decision at a revocation hearing or the length of time a DOC offender would be sentenced. The issue just was not addressed.

the court in *Bordon* concluded that *Joyce* did not rescue Plaintiff there, as it should not rescue the Plaintiffs here.

The court in *Bordon* addressed a second issue, whether there was evidence that “Jones would not have been driving on the day of the accident had he been more closely supervised.” *Id.* at 245. Plaintiff argued that

Had the Department timely and effectively responded to Jones’s violations when he absconded, then it is more likely than not that Jones would have recognized the need to comply with supervision and done so. That is the whole point of supervision. Offenders who see that the Department will monitor and enforce the conditions that supervision tend to comply with those conditions.

Id. at 245, n.53.

This argument was analyzed in connection with the trial court’s ruling that Stough’s testimony was inadmissible on these issues. *Id.* at 245. And while the court applied the abuse of discretion standard, there is nothing to indicate the court’s decision would be any different had it been argued under CR 50 or CR 56. The court pointed out there was nothing to suggest that Stough’s testimony was more than “merely speculative.” *Id.* at 247. It said

Stough had never spoken with Jones, so he had no factual basis to form an opinion on the issue [of whether Jones would have responded to more supervision]. Nor were there any studies or reports offered supporting the theory that increased supervision leads to lower recidivism.

Id. at 247.

While abuse of discretion was the standard, the court's analysis indicates that Stough's testimony, under any standard, would not be sufficient. He had "no factual basis for an opinion on the issue." *Id.* at 247. He produced no studies to support his opinion. There were no publications to support his opinion. It was just speculation.¹³

Bordon is one several excellent cases to address the testimony which is insufficient in this type of case. And it shows that the approach by the Plaintiffs here, including the use of Stough's testimony, is not correct.

2. *Hungerford v. DOC Shows (again) That Corrections Expert Stough Cannot Establish Proximate Cause.*

The next decision which should have clearly alerted Plaintiffs that their case was deficient was *Hungerford v. DOC*, 135 Wn. App. 240 (2006). Davis was a serial murderer and accused rapist under supervision by DOC. *Id.* at 248. In February 1995, Davis violated terms of his DOC supervision and an arrest warrant was issued. *Id.* at 248. Five months later Davis was arrested for domestic violence on June 4, 1995, and also for the outstanding warrant. *Id.*

¹³ Because of the testimony from Dr. Pratt, we now know why Stough had no studies or publications to support this particular opinion testimony. It is opinion testimony that is contrary to the science. *Supra* p. 10.

This delay of five months between the issuance of the arrest warrant and service (which only occurred because of a domestic violence call) shows how utterly speculative the Plaintiffs argument is here. If Fife issued a bench warrant on February 12, 2003, Plaintiffs have no evidence when it would be served and when Kim would have been put into jail.

In *Hungerford*, at the June 1995 bench warrant hearing, the court declined to order Davis to jail, and instead reduced his probation from active to LFO monitoring only. *Id.* at 248. Unlike the Plaintiff in Joyce, who had evidence about other revocation sentencing decisions putting the criminal in jail, Plaintiff here had the opposite. The trial court did not put Davis in jail and actually ordered a reduction in supervision. *Id.* at 248.

Even then, Davis had more violations and two new bench warrants were issued, on December 8, 1995 and February 13, 1996. *Couch v. DOC*, 113 Wn. App. 556, 560 (2002) (the *Hungerford* court said that it drew directly from this opinion for facts about Davis. 135 Wn. App. At 247, n.1). If either of these warrants had been served on or before April 14, 1996, Davis would have been in jail and Mrs. Hungerford would not have been murdered. *Hungerford*, 135 Wn. App. at 257.

The Plaintiff argued two proximate cause theories. First, Plaintiff argued that if DOC reported Davis' probation violation at the June 5, 1995 hearing, the trial court would have imposed the rest of the sentence. *Id.* at

251. Alternatively, the Plaintiff argued that better supervision by DOC would have kept Davis from reoffending. *Id.* at 255.

The Court of Appeals characterized this second argument as “whether Davis would have been rehabilitated.” *Id.* at 251. And Plaintiffs here seized upon that characterization to try and distinguish *Hungerford*. Opening brief, p. 29. But a quick look at *Hungerford* shows that the claims made by Stough there, and here, are identical.

Hungerford relies upon William Stough’s assertion that failure to supervise Davis was a ‘direct cause of Davis’ recidivism.’ Stough reasons that ‘Experience and studies have shown that recidivism rates for closely supervised releasees is much less than for those who learn that their supervision is lax or sporadic.’

Id. at 255.

Stough and Hall make identical claims here. CP 80; 83.

The *Hungerford* court and Judge Serko rejected such claims:

But Stough does not include any studies or facts to suggest a causal relationship between supervision and recidivism. At most, Stough asserts that there is a correlation between recidivism and supervision.

Id. at 255. The court labeled Stough’s testimony as “vague,” “without source material,” “speculative at best,” and it failed to create an issue of fact. *Id.*

3. The Specious Arguments By Plaintiffs’ Experts Have Constitutional Implications.

There are foreseeable consequences if this court were to adopt the specious claims of the Plaintiffs' experts, and they have constitutional implications. Plaintiffs' experts claim that "close supervision...cuts down on recidivism." CP 80. Supervision prevents criminals from reoffending, "Otherwise probation wouldn't exist." CP 83.

Plaintiffs' experts are, in part, suggesting that one legitimate governmental interest in probation supervision is crime reduction. A similar argument was made by the L.A. County Sheriff's Department to justify a suspicion less and warrantless search of a Hispanic man on the streets. *Moreno v. Baca*, 400 F.3d 1152 (9th Cir. 2005). There, Moreno and a companion were walking on a public sidewalk when they were stopped by police. When the police learned Moreno was parole, they subjected him to a warrantless and suspicion less search.

In part, the federal courts examined the extent to which the State of California had a legitimate interest in supervising parolees. The deputies argued that a suspicionless search of a parolee advanced legitimate state interests because close supervision reduced recidivism.

But the federal court rejected that claim as baseless and contrary to the science. "More recent studies suggest that close supervision of offenders has relatively little effect on recidivism rates." *Id.* at 1157. The same specious and baseless syllogism advanced by Stough and Hall were

used as cover by L.A. Sheriffs to justify a warrantless and suspicionless search. Those specious and baseless syllogisms should not be used to support the proximate cause argument here.

**G. THE “MASSIVE AMOUNT OF PRECEDENT”
TOUTED BY PLAINTIFFS PRIMARILY
ADDRESSED DUTY, NOT FACTUAL CAUSATION
ARGUMENTS.**

Plaintiffs cite several cases which they claim are “controlling”, and not mentioned by either side in the trial court below. The cases are not controlling, and indeed barely relevant to the issue of whether Stough and Hall have testimony that is sufficient to create a fact issue. A review will show why these cases were ignored by Plaintiffs trial counsel, by Defendant, and by the trial court.

Taggart, only addressed legal cause. 118 Wn.2d 195, 226 (1992). The companion case, *Sandau*, did address factual causation, but in circumstances not remotely similar. There, Montana police officers called and told the DOC they were standing by ready to arrest the absconded felon on local charges. 118 Wn.2d at 202. The Montana authorities said they “would prefer” to make the arrest based upon a DOC issued parole warrant. *Id.* See RCW 9.95.120. (Allowing DOC to issue its own warrants and making them subject to execution by all law enforcement). Montana authorities sent a teletype to the Board of Parole, indicating their

reliance upon a DOC employee's promise that the DOC warrant would be forthcoming. *Id.* at 202. But DOC (which had two warrants), sent no warrant that day, the next, or the next. Montana police made no arrest, and the absconder was free to commit a rape. *Id.* at 202-203.

This case did not deal with expert testimony and the effects of probation on recidivism. It did not address speculation about what decisions judges make at probation violation hearings. It did not look at speculation about when a parolee might be arrested. After all, the Montana police were standing by, ready to arrest, waiting for the promised warrant to materialize. *Id.* at 227.

The next so-called "controlling authority", *Hertog*, was another legal cause case. *Hertog v. Seattle*, 138 Wn.2d 265, 283-84 (1999). There is no mention of factual cause issues. And certainly no mention of Stough, Hall, speculative opinions about judges and the like. *Bishop v. Miche*, 137 Wn.2d 518 (1999), is even less "controlling." It never had to address the Plaintiff's proximate cause arguments, holding that there was an intervening cause. *Id.* at 532. *Tyner v. DSHS*, one of the controlling cases which defendant's counsel allegedly hid from Judge Serko, is discussed at length in *Bordon v. DOC*, 122 Wn. App. at 227. And *Tyner* did not rule that all causation cases go to the jury. Opening brief, p. 14. It supports Defendant's position.

H. JUDGE RINGUS' SENTENCING DECISION IS ENTITLED TO JUDICIAL IMMUNITY.

In the trial court below, the Plaintiffs claimed “Fife Judge Ringus should have jailed Kim for the entire sentence...” CP 128. Plaintiffs repeat that claim in the appellate brief. Opening brief, p. 35. But “sentencing decisions are absolutely immune.” *Bishop v. Miche, supra*, 137 Wn.2d at 532.

Recognizing the treacherous nature of this argument, Plaintiffs on appeal attempted to tart it up, calling it a “truism,” (opening brief p. 33), and claiming that Judge Ringus is not a defendant (opening brief p. 34), but that Fife is liable for fraud (opening brief p. 35).

None of these arguments changed the holding in *Bishop*, that sentencing decisions are “shielded by judicial immunity,” which is an absolute immunity. *Id.* Judge Serko’s decision to dismiss Plaintiffs’ claim that Judge Ringus should have sentenced Kim to the full 365 days (or any variation on that argument), should be affirmed.

IV. CONCLUSION

The trial court should be affirmed. Plaintiffs’ did not develop and provide evidence that Fife was the cause of Kim’s drunk driving.

How little we know of what there is to know.

– Hemingway

Law stands mute in the midst of arms.

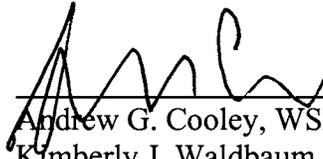
– Cicero, Pro Milone

A lie told often enough becomes the truth.

– Lenin

The trial court should be affirmed.

Respectfully submitted this ~~16th~~ day of September, 2008.



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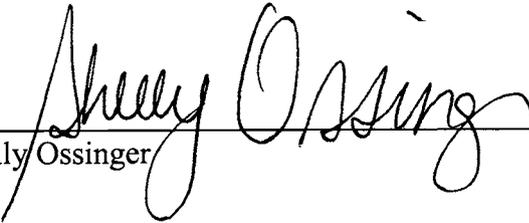
I certify that I mailed, or caused to be mailed, a copy of the foregoing Brief of Respondents, postage prepaid, via U.S. mail on the 18th day of September, 2008, to the following counsel of record at the following addresses:

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