

No. 49340-3

COURT OF APPEALS, DIVISION II
FOR THE STATE OF WASHINGTON

JEREMY GIBSON,

Appellant,

v.

AMERICAN CONSTRUCTION COMPANY, INC.,
a Washington corporation,

Respondents.

BRIEF OF APPELLANT GIBSON

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A. INTRODUCTION

The question of whether an injured worker's injury is subject to state worker compensation laws, the federal compensation system for longshore and harbor workers, or federal maritime law, both common law and statutory, is not one in which the lines can always be drawn with razor-sharp precision. Rather, the important goal for this Court is to enable an injured worker under any of these compensation regimes to obtain appropriate redress in accordance with the common imperative that such regimes should be liberally construed to afford injured workers and their families necessary relief.

This case allows the Court to apply the teachings of the United States Supreme Court to the case of a dual status maritime worker. That worker may initially avail himself of the remedies of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. ("LHWCA") without prejudice to his later ability to elect to pursue a Jones Act, 46 U.S.C. § 30104, claim for negligence against his maritime employer.

Jeremy Gibson was seriously injured in a fall onboard the I/V GUARDIAN, a vessel owned by American Construction Company ("American"). Gibson received LHWCA benefits, benefits that are akin to industrial insurance benefits available to state workers. The trial court failed to apply United States Supreme Court and Ninth Circuit precedent in

dismissing Gibson's Jones Act claim on the mistaken belief that Gibson's initial receipt of LHWCA benefits precluded a Jones Act claim. Jurisdiction under the LHWCA or Jones Act was never adjudicated in connection with Gibson's receipt of LHWCA benefits.

Under United States Supreme Court and Ninth Circuit precedent, Gibson should be permitted to proceed with his Jones Act claim. This Court should reverse the trial court's erroneous decision.

B. ASSIGNMENT OF ERROR

(1) Assignment of Error

The trial court erred in granting reconsideration of its earlier order denying American's CR 12(b)(6) motion and then dismissing Gibson's Jones Act claim by its order entered on July 29, 2016.

(2) Issues Pertaining to Assignment of Error

1. Did the trial court err in light of the United States Supreme Court's *Gizoni*¹ and the Ninth Circuit's *Figueroa*² decisions, in dismissing Gibson's Jones Act claim because it erroneously concluded that Gibson had accepted LHWCA jurisdiction merely by receiving LHWCA benefits and settling his LHWCA claims when there was no formal adjudication of jurisdiction over Gibson's injuries in the LHWCA process? (Assignment of Error Number 1).

2. Does the fact that a dual status maritime employee accepts LHWCA benefits and settlement of his LHWCA claim without the USDOL expressly resolving jurisdiction estop that employee from

¹ *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S. Ct. 486, 116 L. Ed. 2d 405 (1991).

² *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995).

making a later claim under the Jones Act against a negligent vessel owner for personal injuries after *Gizoni*? (Assignment of Error Number 1).

C. STATEMENT OF THE CASE

Jeremy Gibson is a decorated combat veteran, having served our country in active combat roles in Iraq, East Timor, and Somalia. CP 103. American employed him for construction work. CP 2. On August 8, 2013, while performing work on the I/V GUARDIAN in the Hylebos Waterway in Tacoma, Gibson fell more than 10 feet down a hatch cover that had been left open on the vessel. CP 3, 48. He landed on a steel beam in the hull of the vessel causing him to suffer severe and disabling injuries to his knee, neck, and hip that may be life threatening. CP 4, 103-04. He also sustained permanent damage to his spinal cord. *Id.* Gibson's life has been permanently changed by this fall. *Id.*³

Gibson made a LHWCA claim with the United States Department of Labor ("USDOL") in 2014 and began receiving benefits under that statute. CP 26. In those proceedings, American never raised the issue of

³ American argued below that Gibson's injuries were merely "soft tissue" injuries, hoping to downplay the severity of his injuries. CP 101. American's argument is unsupported. Gibson had several surgical procedures and incurred over \$100,000 in medical bills. CP 104, and he will likely spend tens of thousands of dollars on future surgeries and care. His serious trauma-related conditions include myelomalacia (a permanent degenerative softening of the spinal cord caused by hemorrhagic bleeding into the spinal cord), serious hip injuries (requiring surgery), and neck (requiring future surgery) and knee injuries. Gibson has not worked since the spring of 2014. Previously, he was supporting his then wife and two children, earning over \$80,000 per year. *Id.*

jurisdiction nor was it ever addressed or adjudicated by a judge or tribunal; at no time did Gibson ever admit that his injury claims fell within the LHWCA. Instead, he merely accepted benefits under the LHWCA and eventually settled his claim on December 22, 2015. CP 28-39. The settlement was finalized by a District Director, a non-lawyer claims administrator at the Office of Workers' Compensation Programs of the USDOL ("OWCP"), who signed an agreed order memorializing the resolution of Gibson's LHWCA claim. CP 41-43.⁴ That order did not purport to resolve jurisdiction over Gibson nor did it make any factual or legal determination concerning jurisdiction; it merely formalized Gibson's settlement of his LHWCA claim. CP 41.⁵ Gibson did not settle his Jones

⁴ The order was essentially identical to the order entered in *Figueroa*.

⁵ The issue of jurisdiction was never adjudicated by an administrative law judge ("ALJ") or the LHWCA Benefits Review Board ("BRB"); no administrative rulings were made as to jurisdiction. 33 U.S.C. § 908(i)(1) confers authority upon the USDOL to approve of a settlement:

Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for a settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

Neither that statute nor its implementing regulations, 20 C.F.R. §§ 702.242-.243, dictate that the parties resolve the question of LHWCA or maritime jurisdiction. Indeed, settlement approval of such so-called "8i settlements" is *automatic*, in the absence of proof

Act claim, as the settlement pertained *solely* to his LHWCA claim. CP 34 (“Employer (Carrier) will also resolve its liability under *this claim*.”) (emphasis added).⁶

American never controverted Gibson’s jurisdictional status, and Gibson never made (or had to make) a formal affirmation or attestation regarding his jurisdictional status (or his entitlement coverage under the LHWCA); that is confirmed by the statement in the settlement agreement of the issues in dispute in the LHWCA proceedings. CP 33.

Gibson then filed the present action against American in the Pierce County Superior Court on March 2, 2016 in which he pleaded claims under the LHWCA and Jones Act, in the alternative. CP 1-8.⁷ The case was assigned to Honorable Philip Sorensen.

American moved under CR 12(b)(6) to dismiss Gibson’s Jones Act claim claiming that he had elected to pursue only his LHWCA claim and he

of duress or inadequacy. *O’Neill v. Bunge Corp.*, 365 F.3d 820, 823 (9th Cir. 2004); *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 777 (5th Cir. 1988).

⁶ American could have sought the resolution of Gibson’s Jones Act claims as part of this settlement, but chose not to do so. Indeed, a release of a Jones Act claim cannot be implied from the filing of a LHWCA claim. *Biggs v. Norfolk Dredging Co.*, 360 F.2d 360, 365 (4th Cir. 1966); *Toland v. Atlantic Gahagen Joint Venture Dredge*, 271 A.2d 2, 3 (N.J. 1970). If a seaman purports to actually release a Jones Act claim in a LHWCA proceeding, “Such releases are subject to careful scrutiny.” under the seaman as a ward of admiralty concept. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 247-48, 252, 87 L. Ed. 239, 245, 63 S. Ct. 246 (1942).

⁷ Such a pleading in the alternative is permissible under CR 8(e)(2) and is recognized in federal law. *Helse v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903, 905 (9th Cir. 1996) (recognizing pleading of LHWCA and Jones Act claims in the alternative).

was estopped to pursue any Jones Act relief. CP 9-21. The trial court denied that motion on June 17, 2016. CP 88-89. American moved for reconsideration. CP 90-102. The trial court granted that motion and dismissed Gibson's Jones Act claim on July 29, 2016. CP 129-32. Gibson voluntarily dismissed his LHWCA claim pursuant to CR 41, CP 133-48, and filed his timely notice of appeal to this Court. CP 149-58.

D. SUMMARY OF ARGUMENT

Because American never raised jurisdiction in the course of Gibson's LHWCA proceedings before the USDOL and that issue was never the subject of a formal adjudicative order addressing jurisdiction, under *Gizoni* and *Figueroa*, Gibson was entitled to subsequently file a Jones Act claim against American so long as American was later reimbursed under 33 U.S.C. § 903(e) from any Jones Act recovery for the LHWCA benefits paid to Gibson.

Gibson's Jones Act claim is not barred by issue or claim preclusion principles under *Gizoni* and *Figueroa*, or state law, particularly where there was never any actual litigation of jurisdiction before the USDOL in his LHWCA claim proceedings and no final judgment on the merits was entered on that jurisdictional issue.

E. ARGUMENT⁸

(1) Background on the Law Applicable to Injured Maritime Workers

The law pertaining to the applicable remedial compensation scheme for injured maritime workers is often overlapping and not easily applied; that law creates what has been charitably described as a “zone of uncertainty” for injured maritime workers. That this area of law has murky, overlapping boundaries was long ago confirmed by the Fifth Circuit Court of Appeals in *Simms v. Valley Line Co.*, 709 F.2d 409, 411-12 (5th Cir. 1983):

Well recognized are the difficulties faced by injured maritime workers arguably both seamen and harbor workers who must choose whether and by what means they will pursue remedies that in substantive theory are perfectly mutually exclusive (the Compensation Act, which for present purposes applies to all *but* seamen, and the Jones

⁸ As this case was filed in state court, state procedural rules control. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 884, 224 P.3d 761, *cert. denied*, 561 U.S. 1008 (2010). American filed a CR 12(b)(6) motion, CP 9-21, although it improperly provided additional evidence by declaration. CP 22-46. Those materials should be disregarded by this Court.

In deciding a CR 12(b)(6) motion, courts take the facts from the plaintiff’s complaint and reasonable inferences from those facts as *true*. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998), *cert. denied*, 525 U.S. 1171 (1999). A court must deny a CR 12(b)(6) motion unless the moving party demonstrates beyond a reasonable doubt that there are *no facts*, including hypothetical facts, upon which a plaintiff may recover. *Id.*; *Halvorson v. Dahl*, 89 Wn.2d 673, 674-75, 574 P.2d 1190 (1978). Here, the Court must assume that Gibson can establish the factual basis for a Jones Act claim. This Court reviews the trial court’s dismissal of Gibson’s Jones Act claim pursuant to CR 12(b)(6) *de novo*. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994), *cert. denied*, 515 U.S. 1169 (1995).

Act, which applies *only* to seamen), but which seem in practice to frequently overlap each other's borders:

Thus, despite our continued insistence that a Jones Act "seaman" and a "crew member" excluded from the Longshoreman's Act are one and the same (in other words that the statutes are mutually exclusive) we recognize that in a practical sense, a "zone of uncertainty" inevitably connects the two Acts.

McDermott, Inc. v. Boudreaux, 679 F.2d 452, 459 (5th Cir. 1982). The recognition by this Circuit that the Jones Act and the Longshoreman's Act each requires a "liberal application in favor of claimant to effect its purposes," *McDermott, supra*, 679 F.2d at 458, has further contributed to the zone of uncertainty and to the dilemma of injured workers within it. They, in reaping the rewards of such liberality, may find, as Simms asserts is true here, that a formal victory as a harbor worker serves as a practical defeat of what is perceived as the greater seaman's remedy, if prevailing under the Compensation Act indeed effectively precludes a subsequent opportunity for relief under the Jones Act. *See* G. Gilmore & C. Black, *The Law of Admiralty* 434-36 (2d ed. 1975); 4 A. Larson, *Workman's Compensation Law* § 90.51 (1983); 1A Benedict on Admiralty § 23 (1982); 1 M. Morris, *the Law of Maritime Personal Injuries* §§ 8-11 (3d ed. 1975).

See generally, Victoria Holstein, *The Overlap Preclusion Trap Between the Jones Act and the Longshore and Harbor Workers' Compensation Act*, 76 Tulane L. Rev. 783 (2002).

Three distinct remedial compensation schemes conceivably apply when a putative maritime worker is injured – state-based worker compensation statutes, federal statutes compensating longshore and

harbor workers, and federal statutes and common law for injured seamen. Each will be addressed briefly in turn.

(a) Washington's Industrial Insurance Act

Washington industrial insurance law provides the exclusive remedy for injured workers. If a worker is injured, the jurisdiction of the courts over the case is withdrawn. RCW 51.04.010; *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003). Under RCW 51.32.010, the worker takes benefits under the IIA and may not sue her/his employer, unless the employer deliberately inflicted the injuries upon that worker. RCW 51.24.020. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995). However, the worker may sue a third party for such injuries and the Department of Labor & Industries or self-insured employer has a lien against any recovery of benefits paid or payable to the injured worker. RCW 51.24.030; RCW 51.24.060.

Title 51 RCW ("IIA") does not apply to "a master or member of a crew of any vessel, or to employers and workers for whom a right or obligation exists under the maritime laws or federal employees' compensation act for personal injuries or death of such workers." RCW 51.12.100(1). Thus, the IIA does not ordinarily cover workers subject to the LHWCA or Jones Act.

But Washington law also recognizes the difficulty of overlapping

jurisdiction and permits an injured worker to receive IIA benefits and bring claims under federal maritime law, subject to the requirement that any benefits paid pursuant to the IIA be subject to the lien created by RCW 51.24.030. RCW 51.12.100(4); *Rhodes v. Dep't of Labor & Industries*, 103 Wn.2d 895, 700 P.2d 729 (1985); *Chan v. Society Expeditions*, 39 F.3d 1398, 1400 (9th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995).

RCW 51.12.100 also expressly recognizes dual status employees and allows for the segregation of payrolls to reflect Washington/maritime employment, RCW 51.12.100(2), so long as the Department or self-insured employer is reimbursed from any federal recovery. RCW 51.12.100(4). Washington law also generally recognizes duality in a party's status. While an employer is immune from any suit by an employee, if the employer had a dual persona, a status independent from that of employer of the injured worker, that caused the worker's injury, the employer may be sued. *Evans v. Thompson*, 124 Wn.2d 435, 879 P.2d 938 (1994) (suit against corporate shareholders as landowners).

The overarching policy of the IIA is remedial in nature, requiring its liberal construction to effectuate its purpose of providing compensation to injured workers. *Sacred Heart Med. Ctr. v. Dep't of Labor & Indus.*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979). Indeed, an injured worker is entitled to full IIA benefits "regardless of any election or recovery made"

under RCW 51.24. RCW 51.24.040.

Here, Gibson is not claiming an entitlement to benefits under Title 51 RCW and the provisions of the IIA do not apply directly, but the public policy that is the basis for the IIA is instructive.

(b) LHWCA⁹

The LHWCA provides compensation to certain maritime workers described in 33 U.S.C. § 902(3), paying out benefits for injuries to those workers “upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, uploading, repairing, dismantling, or building a vessel).” 33 U.S.C. § 903(a). Excluded from LHWCA’s definition of “employee” are “a master or member of a crew of any vessel...” 33 U.S.C. § 902(3)(G).¹⁰

A LHWCA claim is very much like a worker compensation claim under land-based law. The payments are made to the qualified worker regardless of employer fault in exchange for scheduled benefits for that worker and immunity of the employer from suit. 33 U.S.C. § 905(a). Once

⁹ On the substantive liability issues under maritime law, this Court applies federal law. *Endicott*, 167 Wn.2d at 879.

¹⁰ Thus, if an injured worker is subject to LHWCA jurisdiction, that injured worker cannot meet the necessary factual predicate for bringing a federal maritime or Jones Act claim – they are not a seaman.

a LHWCA claim is filed, it is presumed that such a claim fails within the Act. 33 U.S.C. § 920. The Act pays injured workers subject to the Act a schedule of benefits similar to time loss under the IIA while they are temporarily disabled. 33 U.S.C. § 908(b) and also allows an injured worker to recover for permanent partial disability, 33 U.S.C. § 908(a), permanent total disability, 33 U.S.C. § 908(c), or death, 33 U.S.C. § 909.

Ordinarily, remedies under the LHWCA are exclusive for the worker injured under that statute's regime, 33 U.S.C. § 905(a), but there is an exception. 33 U.S.C. § 905(b) permits third party actions where the vessel owner is negligent. *See* Appendix. More critical to the analysis here, however, is the fact that Congress in 1984 enacted 33 U.S.C. § 903(e) that states:

Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or section 30104 of Title 46 [Jones Act] shall be credited against any liability imposed by this chapter.

Congress obviously contemplated circumstances where persons who received LHWCA benefits could sue under the Jones Act, despite the seemingly contradictory factual bases for recovery under those respective regimes, so long as the employer received a credit for LHWCA benefits paid.

Where entitlement to LHWCA benefits is contested, there may be a trial before an ALJ whose outcome is subject to review by the BRB of the USDOL. 33 U.S.C. § 919(d). Alternatively, the parties may settle under 33 U.S.C. § 908, as will be discussed *infra*.

The LHWCA is remedial in nature and must be construed liberally to reflect its remedial purpose. *Voris v. Eikel*, 346 U.S. 328, 333, 74 S. Ct. 88, 98 L. Ed. 5 (1953) (LHWCA “must be liberally construed [to avoid] harsh incongruous results”).

(c) Jones Act and Federal Maritime Law

Seamen injured on the job generally do not qualify for state or federal worker compensation. *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 76, 272 P.3d 827, *cert. denied*, 133 S. Ct. 199 (2012). Instead, injured seamen have a common law right to obtain maintenance and cure. Maintenance is room and board while the seaman recovers; cure is medical benefits. *Id.* at 76; *Dean v. Fishing Co. of Alaska, Inc.*, 177 Wn.2d 399, 405-06, 300 P.3d 815 (2013). Under the common law, injured seamen may also seek relief against a vessel owner for the vessel’s unseaworthiness, a claim that the vessel owner provided the worker an unsafe workplace. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 93, 66 S. Ct. 872, 90 L. Ed. 2d 1099 (1946); *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 499, 91 S. Ct. 514, 27 L. Ed. 2d 562 (1971). When the United States Supreme Court

concluded in *The Osceola*, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760 (1903), that an injured seaman had no claim in negligence against a vessel owner, Congress enacted the Jones Act to afford injured seamen additional relief by permitting them a cause of action against vessel owners for negligence. 46 U.S.C. § 30104.¹¹ *See* Appendix.

Like the LHWCA, the Jones Act is remedial in nature and must be construed *liberally* in favor of the injured worker. *Urie v. Thompson*, 337 U.S. 163, 180, 69 S. Ct. 1018, 93 L. Ed. 2d 1282 (1949) (Jones Act liberally construed for seaman has a remedial and humanitarian purpose). *See Shoffner v. State*, 172 Wn. App. 866, 873, 294 P.3d 739, *review denied*, 177 Wn.2d 1022 (2013) (this Court recognizes liberal construction of Jones Act to accomplish its remedial purpose).

The tort-based remedies available to an injured seaman under the Jones Act against an employer are generally more extensive than those afforded that same injured seaman under the LHWCA. *E.g.*, *Simms*, 709 F.2d at 410 (acknowledging that Jones Act recovery is likely “larger” than that under LHWCA). An injured Jones Act seaman may recover lost past wages, lost future wage earning capacity, past and future medical costs, and pain and suffering as damages. Thomas M. Schoenbaum, *Admiralty and*

¹¹ It is prejudicial error for an employer in a Jones Act case to offer evidence that the injured worker received LHWCA benefits. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 84 S. Ct. 1, 11 L. Ed. 2d 4 (1963).

Maritime Law § 4-18 (2d ed. 1994).

This case relates specifically to Gibson's Jones Act claim against American, given his receipt of LHWCA benefits.

(2) Federal Law Authorizes Gibson to Pursue His Jones Act Claim

Gibson fully expects that American will argue that his 8i settlement precludes a claim under the Jones Act, as it argued to the trial court. The LHWCA provides compensation to land-based employees and the Jones Act affords sea-based maritime employees a remedy in negligence. In general, the two are mutually exclusive compensation schemes, *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355-56, 115 S. Ct. 2172, 132 L. Ed. 2d 314 (1995), but the determination of whether the employee is "land-based" or "sea-based" is not an easy one where the employee's work has a dual nature. The issue of the injured worker's status is necessarily factually-rich and is not readily resolved on summary judgment. *E.g., Scheuring v. Traylor Bros., Inc.*, 476 F.3d 781 (9th Cir. 2007). In any event, as this case is before this Court on a CR 12(b)(6) motion, the Court must accept Gibson's sea-based status under the Jones Act as true.

(a) Gizoni and Its Progeny

By the nature of his employment with American, Gibson falls

into the zone of overlapping jurisdiction between the Jones Act and the LHWCA previously discussed. He is a “dual-status worker.”¹² As such, he may receive benefits and settle his LHWCA claim, and, if jurisdiction is never litigated or if there is no express adjudication of his seaman status, he may subsequently pursue recovery under the Jones Act and general maritime law.

Gibson’s approach of first receiving benefits under LHWCA (with no explicit adjudication of seaman status) and subsequently pursuing his Jones Act claim is appropriate and commonplace under federal maritime law.¹³ Dual status workers are entitled to (and routinely do) seek and receive LHWCA benefits first and then pursue a Jones Act case in order to protect all of their rights and remedies under the respective statutes.

¹² The United States Supreme Court noted that the 1972 amendments to the LHWCA specifically reflected a Congressional recognition of this dual status employment:

[T]he bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel). *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 266 n. 26 [97 S.Ct. 2348, 2358 n. 26, 53 L.Ed.2d 320]...(1977) quoting S.Rep. No. 92-1125, p. 13 (1972) (emphasis omitted).... By its terms the LHWCA preserves the Jones Act remedy for vessel crewmen, even if they are employed by a shipyard. A maritime worker is limited to LHWCA remedies if no genuine issue of fact exists as to whether the worker was a seaman under the Jones Act.

Gizoni, 502 U.S. at 89.

¹³ Arthur Larson, *Workmen’s Compensation Law*, § 90.51 at 16-507 (1989) (“Larson”), cited with approval by the United States Supreme Court in *Gizoni*, 502 U.S. at 91.

Because the LHWCA requires the filing of any claims within one year of disability or death, 33 U.S.C. § 913(a), and this time period is plainly shorter than the 3-year limitation period on Jones Act claims, 46 U.S.C. § 30106, the pursuit of benefits under the LHWCA first is the natural result. Moreover, as noted *supra*, Congress recognized dual status employees in 1972, and specifically contemplated this approach when it enacted 33 U.S.C. § 903(e) in 1984.

As previously noted, the vessel owner is not prejudiced by this approach. If a court finds that Gibson is a seaman, entitled to pursue damages under the Jones Act, and Gibson prevails in that action, American will be credited for what it paid already under the LHWCA. The LHWCA credits Jones Act damages against the employer's LHWCA exposure, 33 U.S.C. § 903(e), and case law provides for "full compensation credit" when an employer first pays LHWCA benefits and is then held responsible for a Jones Act claim. *Gizoni*, 502 U.S. at 92 n.5; *see also, Figueroa*, 45 F.3d at 315 ("double recovery of any damage element is precluded").¹⁴

Under controlling United States Supreme Court authority, the initial pursuit of LHWCA benefits by dual status workers does not preclude the pursuit of Jones Act relief. In *Gizoni*, Bryon Gizoni was a foreman on a

¹⁴ As previously noted, this is similar to the policy in Washington's IIA reflected in RCW 51.12.100(4) and RCW 51.24.030.

ship repair operation who sought and received voluntary benefits under the LHWCA for injuries sustained on a floating platform owned by his employer. He later filed a Jones Act claim against the employer. The district court granted summary judgment finding that Gizoni was not a seaman and, as an enumerated worker under the LHWCA, he was precluded from bringing his Jones Act action. The Ninth Circuit reversed, holding Gizoni's status as a seaman was an issue of fact that should not have been adjudicated at summary judgment; if a jury found that he was a seaman, he might be eligible for a Jones Act award.

The United States Supreme Court affirmed the Ninth Circuit ruling, holding that a maritime worker is limited to LHWCA remedies *only* if no genuine issue of fact exists as to whether he is a Jones Act seaman. The Court noted “[b]y its terms the LHWCA preserves the Jones Act remedy for vessel crewman, even if they are employed by a shipyard.” *Id.* at 89. The Court further stated: “It is by now universally accepted that an employee who receives voluntary payments under the LHWCA without a *formal award* is not barred from subsequently seeking relief under the Jones Act.” *Id.* at 91 (emphasis added). The Court further noted “[this] is so, quite obviously, because the question of coverage has never been litigated.” *Id.* at 92 (citing G. Gilmore & C. Black, *Law of Admiralty* 435 (2d ed. 1975). [“Gilmore & Black”].

The Supreme Court plainly contemplated that a “formal award” must derive from a formal adjudication at a contested hearing where jurisdiction is directly at issue. In other words, the order had to be such that it carried *preclusive effect*. Professors Gilmore and Black stated:

The courts have shown themselves to be receptive to the argument that the compensation award may have been made without a proper adjudication of the claimant’s status as a harbor workers or a seaman. But the plaintiff who attempts to bring Jones Act action following a compensation award in a contested hearing may find himself barred by a court which takes *res judicata* and collateral estoppel seriously.

Gilmore & Black at 435.

This point is reinforced by the fact that the *Gizoni* court also cited *Simms*, 709 F.2d at 412, a case which provides that a “formal adjudication of seaman’s status” is a necessary prerequisite for any preclusive effect to derive from a claimant’s receipt of LHWCA benefits. The *Simms* court stated that in order for *res judicata* or collateral estoppel to apply to a Jones Act case, there must be a “formal [Benefits Review Board] finding of non-seaman status.” *Id.* The issue of what constitutes a “formal award” by the USDOL arose in *Roberts v. Director, Office of Workers’ Compensation Programs*, 625 F.3d 1204 (9th Cir. 2010), *aff’d, sub nom. Roberts v. Sea-Land Services, Inc.*, ___ U.S. ___, 132 S. Ct. 1350, 182 L. Ed. 2d 341 (2012). The Ninth Circuit noted that the LHWCA uses the term award to mean a formal compensation order issued in the course of administrative

adjudication. 625 F.3d at 1206. That court also highlighted § 933, addressing assignment by the worker of rights against third parties to the employer, that similarly contemplates a formal order issued by the deputy commissioner, an ALJ, or the BRB. *Id.* at 1207. The Supreme Court agreed and rejected the notion offered by the dissent that an award encompassed payments voluntarily made by the employer. 132 S. Ct. at 1357 n.5.

This understanding of *Gizoni* is reinforced by the Ninth Circuit's subsequent decision in *Figueroa*. Joseph Figueroa was a shipyard worker and tugboat operator employed by Campbell Industries when he was injured on a tugboat. 45 F.3d at 313. Figueroa received California worker compensation benefits and also filed a timely claim for LHWCA benefits with the USDOL. His LHWCA claim was settled, and a "Final Compensation Order," like the order issued for Gibson, was issued by the OWCP of the USDOL reflecting the settlement. Immediately after settling his LHWCA claim, Figueroa filed a lawsuit pursuant to the Jones Act and under general maritime law. *Id.* The jury found him to be a Jones Act seaman and awarded him monetary damages well in excess of the LHWCA Act award from the USDOL; the trial court offset the LHWCA award previously received in the judgment. *Id.*

The vessel owner appealed, arguing that Figueroa's recovery under the Jones Act and general maritime law was precluded by his previous

settlement of his LHWCA claim and the USDOL settlement order. It also argued that settlement order of the LHWCA claim represented a formal award and that Figueroa was, therefore, precluded from recovery under the Jones Act. *Id.* at 314. The Ninth Circuit rejected the vessel owner’s positions, holding an ostensible Jones Act seaman who enters into an approved settlement of his LHWCA claim may proceed with a subsequent Jones Act claim because “jurisdictional [issues are] not previously litigated” and in such circumstances a “finding [of non-seaman status] cannot be made. *Id.* at 315. The Ninth Circuit rejected the vessel owner’s contention that the settlement order was a “formal award” under *Gizoni*. It also rejected the argument that by accepting an 8i settlement from the USDOL, the worker implicitly acknowledged LHWCA jurisdiction when a pro forma stipulated settlement order was entered, thereby precluding a later Jones Act claim. Absent a formal order arising out of an adjudication of jurisdiction by an ALJ or the BRB at the USDOL, no “formal award” has been made per *Gizoni*.

American will undoubtedly cite contrary authority from other federal circuits, but the *Gizoni* court’s determinations are controlling here.¹⁵ Indeed, the decisions of those other circuits are not a picture of clarity. For

¹⁵ *W.G. Clark Constr. Co. v. Pac. Nw. Regional Council of Carpenters*, 180 Wn.2d 54, 62, 322 P.3d 1207 (2014) (Supreme Court decisions on issues of federal law are controlling precedent; decisions of the circuit courts are persuasive precedent only).

example, in the Second Circuit, in *Reyes v. Delta Dallas Alpha Corp.*, 199 F.3d 626 (2d Cir. 1999), the court held that a worker's receipt of state worker compensation benefits did not waive his Jones Act claim where he never received a formal worker compensation award settling his claim. Subsequently, in *Mooney v. City of New York*, 219 F.3d 123 (2d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001), the court attempted to define a "formal award" under *Gizoni* and concluded that courts must look to the circumstances of the award, in this instance under New York worker compensation law, to see if it is "clear that a claimant has elected to receive compensation benefits in lieu of all the claims he could pursue (including a Jones Act claim)..." *Id.* at 129.

Similarly, in the Fifth Circuit, in *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992), the court focused on the fact that a compensation order was entered in the USDOL proceedings on the worker's LHWCA claim. But in *Boatel, Inc. v. Delamore*, 379 F.2d 850 (5th Cir. 1967), that same court held that a worker who received LHWCA benefits, petitioned the USDOL for added benefits upon their cessation, and whose request for added benefits was rejected by a USDOL deputy commissioner after a hearing was not foreclosed from pursuing a Jones Act claim. The *Sharp*

and *Boatel* decisions are not readily reconcilable.¹⁶ *See also, Simms, supra* (appeal of BRB dismissal order premature).

The sounder approach to the issue of waiver is that articulated in *Gizoni* and *Figueroa*. There must be an actual, formal adjudication of the issue of jurisdiction as to the injured worker before it can be said definitively that jurisdiction under the LHWCA or Jones Act pertains. Consistent with the reasoning of *Gizoni* and *Figueroa*, and to afford parties clear direction, this Court should determine that there must be a BRB affirmation of an ALJ adjudicatory ruling in which LHWCA jurisdiction is expressly addressed, before a seaman may be deemed to have waived the right to a Jones Act claim by pursuing LHWCA benefits initially.¹⁷

As the record here contains no evidence of such a specific formal adjudication of jurisdiction by the USDOL, and Gibson never definitively asserted that he was subject only to jurisdiction either under the LHWCA

¹⁶ In *Filanova v. United States*, 851 F.2d 1 (1st Cir. 1988), *cert. denied*, 488 U.S. 1016 (1989), the First Circuit indicated that a worker is not estopped from pursuing a tort claim under the Federal Tort Claim Act by receiving LHWCA benefits until coverage is determined administratively or judicially. However, the court determined that the worker's failure to raise jurisdiction prior to a USDOL deputy commissioner's decision approving his LHWCA settlement barred the FTCA claim.

¹⁷ This approach also comports with practical considerations. Counsel for vessel owners like American are fully aware of the gray area of LHWCA/Jones Act jurisdiction as to injured workers. Nothing prevents such parties from negotiating a resolution of an injured worker's various claims simultaneously in the 8i settlement. For example, American here could have negotiated for Gibson's admission that he was subject only to LHWCA jurisdiction; such an admission could have built into the stipulated USDOL order. *See n.6, supra*.

or the Jones Act and general maritime law,¹⁸ he is entitled to have that question resolved in this case.

(b) There Is No Election of Remedies between the Jones Act and the LHWCA

At American's urging, the trial court believed that Gibson was put to an election of remedies between the Jones Act and the LHWCA. RP (7/16/16):27. That was error.

As noted *supra*, parties may plead Jones Act and LHWCA theories in the alternative. Moreover, the remedies of the two statutory systems are overlapping and federal courts have rejected the notion that injured seaman is put to an election. *E.g.*, *Marceau v. Great Lakes Transit Corp.*, 146 F.2d 416, 418 (2d Cir. 1945), *cert. denied*, 324 U.S. 872 (1945); *Mach v. Pennsylvania R.R. Co.*, 198 F. Supp. 471, 472 (W.D. Pa. 1960); *Oliver v. Ocean Drilling & Exploration Co.*, 222 F. Supp. 843 (W.D. La. 1963). The concept of an election of remedies applies only when the remedies are coexistent; when the remedies are, as here, mutually exclusive, the doctrine is inapplicable. *Mach, supra*.¹⁹

¹⁸ In fact, Gibson never had his status determined one way or the other at all.

¹⁹ Should American raise Washington law on election of remedies, that law is similarly unavailing to it. Gibson must have been bound to have chosen a LHWCA or Jones Act remedy. *Birchler v. Castello Land Co., Inc.*, 133 Wn.2d 106, 112, 942 P.2d 968 (1997). *Gizoni* and *Figueroa* clearly indicate that Gibson was not "bound" to such an election.

The trial court erred in basing its decision on an election of remedies theory now plainly rejected by the reasoning of *Gizoni* and *Figueroa*.

(c) Public Policy Favors Gibson's Position

In addition to comporting with the controlling precedent of *Gizoni*, Gibson's position here is also entirely consistent with the directive in the LHWCA and the Jones Act to construe those statutes in a liberal fashion consistent with their remedial purpose to benefit injured maritime workers.

Professor Larson, the preeminent authority on worker compensation, (cited with approval by Professors Gilmore and Black) confirms that the remedial purpose of the systems at issue here requires that an injured worker be allowed to obtain a recovery by all lawful means available to him/her:

The community has decided that injured workmen and their families shall have as a minimum the security that goes with nonfault compensation. It is not for the individual, once he is a part of that system, to elect whether its protection is a good idea for him or not. If he accepts or claims its benefits, this is not an election but merely the setting in motion of a protective process ordained by the state. This being so, it would undermine and prejudice the operation of this protective public program if the claimant were in the position of risking the loss of other valuable rights, such as those under the Jones Act, by the mere fact of accepting or invoking this basic system of compensation protection. It is of the nature of compensation, as distinguished from damage actions, that is intended to be both prompt and reliable, in order to perform its function of caring for the immediate economic and medical needs of an injured worker and his family. If, then, he accepts or claims compensation as his

first move, perhaps fully intending to follow this with a Jones Act action, this should not be thought to be sinister, deceitful, or avaricious on his part. He is setting out to ensure that he gets the minimal social insurance protection that he may be entitled to. If it turns out later that he is entitled to a more generous award under a different system, since the compensation award will be credited on the larger award, there has been no serious harm done.

Larson, § 90.51 at 16-366 to 16-367.

Moreover, this position fully squares with the public policy in Washington favoring injured workers' rights. This latter point is also illustrated by the specific examples of RCW 51.12.102. As previously noted, Washington's IIA generally does not apply to injured workers covered by the LHWCA or the Jones Act, RCW 51.12.100(1), but the Legislature enacted RCW 51.12.100 to allow dual status workers to recover. It also enacted RCW 51.12.102 to allow a worker injured by asbestos exposure to take state benefits even if that injured worker "may have a right or claim for benefits under the maritime laws of the United States." RCW 51.12.102(1). As our Supreme Court stated in *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 212, 118 P.3d 311 (2005):

The plain language of section 102 and its legislative history suggests to us that the legislature intended to create a mechanism to provide temporary, interim benefits to cover the needs of maritime workers who develop illness as a result of exposure to asbestos until it is conclusively determined whether the state or federal workers' compensation program is responsible for providing benefits to such a worker.

Accord, Olsen v. Wash. State Dep't of Labor & Indus., 161 Wn. App. 443, 250 P.3d 158, *review denied*, 172 Wn.2d 1012 (2011); *Long v. Wash. State Dep't of Labor & Indus.*, 174 Wn. App. 197, 299 P.3d 657 (2013).

Thus, the Legislature and Washington courts have applied a public policy of ensuring that an injured worker receives appropriate worker compensation benefits, albeit on a temporary basis, even in the face of a general prohibition on the payment of state benefits to that worker, until complex issues of jurisdiction are clarified. The public policy of Washington is to avoid harm to injured workers while they are in a maritime jurisdictional limbo.

.....

Under the public policy of the LHWCA and the Jones Act, as well as Washington law, Gibson should not have been barred from pursuing his Jones Act claim here. Gibson's LHWCA claim was never litigated at the USDOL; the issue of jurisdiction never went before an ALJ, the BRB, and no evidentiary hearings were held nor were rulings made on jurisdiction. American never sought to settle Gibson's Jones Act claim in the 8i settlement; Gibson merely informally accepted benefits under the LHWCA and then resolved his LHWCA claim. Settlement brought no substantive or factual disputes to resolution. Under *Gizoni* and *Figueroa*, as there was no "formal award," he was entitled to proceed with his Jones Act claim. This

position is supported by the applicable treatises, as well as the public policy of Washington and federal law.

(3) Gibson Was Not Estopped to Assert a Jones Act Claim

The trial court on reconsideration applied estoppel principles to bar Gibson's Jones Act claim. RP (7/29/16):25, 27-35. This was error.

The United States Supreme Court in *Gizoni* rejected this very argument advanced by an amicus in that case, stating:

[Because of the offset provisions] [the]equitable estoppel arguments suggested by amicus Shipbuilders Council of America must fail. Where full compensation credit removes the threat of double recovery, the critical element of detrimental reliance does not appear. *See Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984); *Lyng v. Payne*, 476 U.S. 926, 935 (1986). Argument by amicus would force injured maritime workers to an election of remedies we do not believe Congress to have intended.

Id. at 91 n.5 (emphasis added).

Similarly, the *Figueroa* court rejected the application of issue preclusion (collateral estoppel) because the injured worker's status was never actually litigated in connection with his receipt of LHWCA benefits. 45 F.3d at 315 ("The record does not reflect an express finding by anyone that Mr. Figueroa was not a "master or member of a crew for purposes of the LHWCA."). The court then stated:

Courts that have addressed the precise issue of whether the jurisdictional issue must be actually litigated for estoppel to

apply in this situation have found that if the jurisdictional issue was not contested and no finding was made at the administrative level, a plaintiff is not estopped from bringing a Jones Act claim.

Id. at 316.

Under Washington law, neither issue nor claim preclusion would apply here. In Washington, an administrative tribunal's decision may carry preclusive effect both as to claims generally (*res judicata*) and specific issues (collateral estoppel), *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 745 P.2d 858 (1987) (collateral estoppel); *Reninger v. State, Dep't of Corrections*, 134 Wn.2d 437, 951 P.2d 782 (1998) (same); *In re Personal Restraint Petition of Gronquist*, 138 Wn.2d 388, 978 P.2d 1083 (1999) (*res judicata*). But for these claim and issue preclusion principles to apply, the administrative tribunal must actually litigate the particular issue at stake to a final judgment.

Division III's decision *Ullery v. Fulleton*, 162 Wn. App. 596, 256 P.3d 406, *review denied*, 173 Wn.2d 1003 (2011) is particularly apt on these points. The court there carefully delineated the elements of both issue preclusion (collateral estoppel) and claim preclusion (*res judicata*). It held that the dismissal of a first case on standing grounds failed to meet the final judgment element of either doctrine so as to bar a party's claim in the second action. More particularly, in the case of collateral estoppel, the issue in the

first case must actually have been *raised and litigated* before the collateral estoppel applies. *Id.* at 608-10. Res judicata, an issue that could have been raised in the first action, but was not, could be barred in the second action. However, a final judgment on the merits in the first action was still necessary for res judicata to apply. *Id.* at 611 n.4.

Here, the jurisdictional issue was never *actually litigated* in the LHWCA administrative setting, barring collateral estoppel. Gibson's acceptance of LHWCA benefits, settling *only* such a claim, is not a final judgment on the merits after *Gizoni*. Gibson's acceptance of LHWCA benefits in and of itself did not carry preclusive effect for his Jones Act claim since the issue was never adjudicated. Under *Gizoni* and under Washington law, claim or issue preclusion do not apply.

This Court should reverse the trial court's erroneous estoppel ruling.

F. CONCLUSION

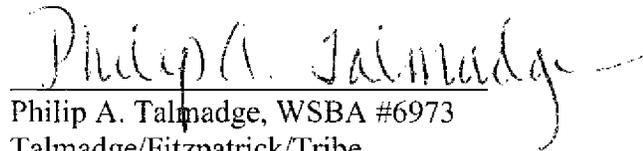
The trial court here got it right the first time. Gibson was entitled to pursue his Jones Act claim under *Gizoni*. He neither had to elect his remedies between the LHWCA and the Jones Act, nor was he estopped to pursue his Jones Act remedy. American's motion for reconsideration should have been denied.

This Court should reverse the trial court's dismissal of Gibson's Jones Act claim and allow him to pursue that claim on its merits. Costs on

appeal should be awarded to Gibson.

DATED this 21st day of November, 2016.

Respectfully submitted,

A handwritten signature in cursive script that reads "Philip A. Talmadge". The signature is written in black ink and is positioned above the printed name and contact information.

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APPENDIX

RCW 51.12.100:

(1) Except as otherwise provided in this section, the provisions of this title shall not apply to a master or member of a crew of any vessel, or to employers and workers for whom a right or obligation exists under the maritime laws or federal employees' compensation act for personal injuries or death of such workers.

(2) If an accurate segregation of payrolls of workers for whom such a right or obligation exists under the maritime laws cannot be made by the employer, the director is hereby authorized and directed to fix from time to time a basis for the approximate segregation of the payrolls of employees to cover the part of their work for which no right or obligation exists under the maritime laws for injuries or death occurring in such work, and the employer, if not a self-insurer, shall pay premiums on that basis for the time such workers are engaged in their work.

(3) Where two or more employers are simultaneously engaged in a common enterprise at one and the same site or place in maritime occupations under circumstances in which no right or obligation exists under the maritime laws for personal injuries or death of such workers, such site or place shall be deemed for the purposes of this title to be the common plant of such employers.

(4) In the event payments are made both under this title and under the maritime laws or federal employees' compensation act, such benefits paid under this title shall be repaid by the worker or beneficiary. For any claims made under the Jones Act, the employer is deemed a third party, and the injured worker's cause of action is subject to RCW 51.24.030 through 51.24.120.

(5) Commercial divers harvesting geoduck clams under an agreement made pursuant to RCW 79.135.210 and the employers of such divers shall be subject to the provisions of this title whether or not such work is performed from a vessel.

RCW 51.24.030:

(1) If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

(2) In every action brought under this section, the plaintiff shall give notice to the department or self-insurer when the action is filed. The department or self-insurer may file a notice of statutory interest in recovery. When such notice has been filed by the department or self-insurer, the parties shall thereafter serve copies of all notices, motions, pleadings, and other process on the department or self-insurer. The department or self-insurer may then intervene as a party in the action to protect its statutory interest in recovery.

(3) For the purposes of this chapter, "injury" shall include any physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.

(4) Damages recoverable by a worker or beneficiary pursuant to the underinsured motorist coverage of an insurance policy shall be subject to this chapter only if the owner of the policy is the employer of the injured worker.

(5) For the purposes of this chapter, "recovery" includes all damages except loss of consortium.

33 U.S.C. § 905(b):

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this

title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

46 U.S.C. § 30104:

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Brief of Appellant Gibson in Court of Appeals, Division II Cause No. 49340-3-II to the following parties:

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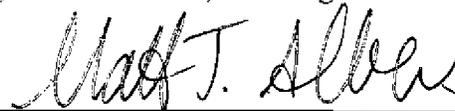
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Original E-filed with:

Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402

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

DATED: November 21, 2016 at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE FITZPATRICK LAW

November 21, 2016 - 3:12 PM

Transmittal Letter

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Case Name:

Court of Appeals Case Number: 49340-3

Is this a Personal Restraint Petition? Yes No

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Motion: _____

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Statement of Additional Authorities

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Affidavit

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Personal Restraint Petition (PRP)

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Comments:

Brief of Appellant Gibson

Sender Name: Christine Jones - Email: matt@tal-fitzlaw.com

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