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NO. 355101

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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JAMES E. ELLIS,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

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**BRIEF OF RESPONDENT**

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ROBERT W. FERGUSON  
Attorney General

HEIDI S. HOLLAND  
Assistant Attorney General  
WSBA #27264  
1116 W Riverside, Suite 100  
Spokane, WA 99201  
(509) 456-3123

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. COUNTER-STATEMENT OF ISSUES .....2

    A. Whether Mr. Ellis’ appeal may properly be heard when the State’s motion for summary judgment was granted on February 21, 2017, Mr. Ellis’s motion for reconsideration was untimely, and his appeal was not filed until almost six months after the order granting summary judgment. ....2

    B. Whether the trial court properly granted summary judgment and dismissed Mr. Ellis’ suit against the State when Mr. Ellis’ term of confinement was under the jurisdiction of the Indeterminate Sentence Review Board (ISRB), the State properly credited Mr. Ellis’ good-time credits, Mr. Ellis was imprisoned pursuant to a valid legal process, and the ISRB’s decisions are entitled to quasi-judicial immunity.....2

III. STATEMENT OF THE CASE.....3

    A. Substantive Facts. ....3

    B. Procedural Facts.....8

IV. SUMMARY OF ARGUMENT.....10

V. STANDARD OF REVIEW.....11

VI. ARGUMENT .....12

    A. This Court Lacks Jurisdiction to Hear Mr. Ellis’ Untimely Appeal.....12

    B. Whether the trial court properly granted summary judgment and dismissed Mr. Ellis’ suit against the State when Mr. Ellis’ term of confinement was under the jurisdiction of the Indeterminate Sentence Review Board; the State properly credited Mr. Ellis’ good-time credits;

Mr. Ellis remained imprisoned pursuant to a valid legal process; and the ISRB’s decisions are entitled to quasi-judicial immunity.....	15
1. Mr. Ellis failed to make a prima facie showing that he was eligible to earn good time/early release.....	15
a. Mr. Ellis Fails To Meet His Burden In Response To Summary Judgment Regarding His False Imprisonment Claim .....	16
b. The State Properly Credited Mr. Ellis’s Good-Time Credits.....	17
2. The Court Should Affirm Dismissal of Mr. Ellis’ False Imprisonment Claim on the Independent and Unchallenged Basis of Absolute Quasi-Judicial Immunity. ....	22
VII. CONCLUSION .....	24

## TABLE OF AUTHORITIES

### Cases

<i>Buckner, Inc. v. Berkey Irr. Supply</i> 89 Wn. App. 906, 951 P.2d 338 (1998).....	18
<i>Greater Harbor 2000 v. City of Seattle</i> 132 Wn.2d 267, 937 P.2d 1082 (1997).....	13
<i>In re Addleman</i> 151 Wn.2d 769, 92 P.3d 221 (2004).....	1, 25
<i>In re Dyer</i> 175 Wn.2d 186, 283 P.3d 1103 (2012).....	26
<i>Keck v. Collins</i> 181 Wn. App. 67, 325 P.3d 306 (2014).....	13
<i>Lutheran Day Care v. Snohomish Cty.</i> 119 Wn.2d 91, 829 P.2d 746 (1992).....	27
<i>Matter of Cashaw</i> 123 Wn.2d 138, 866 P.2d 8 (1994).....	passim
<i>Pers. Restraint of Powell</i> 117 Wn.2d 175, 814 P.2d 635 (1991).....	26
<i>Plotkin v. State Dep't of Corr.</i> 64 Wn. App. 373, 826 P.2d 221 (1992).....	2, 27
<i>Reddy v. Karr</i> 102 Wn. App. 742, 9 P.3d 927 (2000).....	27
<i>Schaefer, Inc. v. Columbia River Gorge Comm'n</i> 121 Wn.2d 366, 849 P.2d 1225 (1993).....	passim
<i>State v. Winkle</i> 159 Wn. App. 323, 245 P.3d 249 (2011).....	25

<i>Stephens v. State</i>	
186 Wn. App. 553, 345 P.3d 870 (2015).....	20
<i>Taggart v. State</i>	
118 Wn.2d 195, 822 P.2d 243 (1992).....	2, 27, 28
<i>Wendle v. Farrow</i>	
102 Wn.2d 380, 686 P.2d 480 (1984).....	14
<i>Young v. Key Pharm., Inc.</i>	
112 Wn.2d 216, 770 P.2d 182 (1989).....	13

**Statutes**

RCW 9A.44.086(2), 9A.20.021(1)(b).....	5
RCW 9.91.011(1).....	7
RCW 9.94A.507.....	passim
RCW 9.94A.507(3)(a) .....	5
RCW 9.94A.507(3)(b) .....	5
RCW 9.94A.507(3)(c) .....	5
RCW 9.94A.510.....	6
RCW 9.94A.712.....	3, 4, 5
RCW 9.94A.729.....	25
RCW 9.95 .....	19, 20
RCW 9.95.0002 .....	7
RCW 9.95.011 .....	24
RCW 9.95.011(2)(a) .....	2, 8, 22, 23

RCW 9.95.100 .....	12, 25
RCW 9.95.420 .....	7
RCW 9.95.420(3)(a) .....	7, 8

**Rules**

CR 56(d).....	13
CR 56(e).....	21
CR 59(b).....	17
RAP 5.2(a) .....	14, 16, 18
RAP 5.2(e) .....	16, 18

## I. INTRODUCTION

The Indeterminate Sentence Review Board (ISRB) found Mr. Ellis posed “too great a risk to return to the community at this time.” CP at 96. The law is clear; the ISRB “*shall not . . .* until his or her maximum term expires, release a prisoner, unless in its opinion his or her rehabilitation has been complete and he or she is a fit subject for release.” *In re Addleman*, 151 Wn.2d 769, 775, 92 P.3d 221, 224 (2004) (emphasis added). The ISRB’s conclusion each time it reviewed his case, was that he was likely to reoffend. Mr. Ellis had sexually assaulted his own children, was imprisoned in New Hampshire, was released, and then sexually assaulted a 10-year-old girl in Washington. While in prison in Washington, he refused a sexual history polygraph and refused to participate in the sexual offender treatment program.

The State credited Mr. Ellis with good-time credits that in turn established the date he was eligible to be considered for release. *See Matter of Cashaw*, 123 Wn.2d 138, 866 P.2d 8 (1994); *see also* RCW 9.94A.507 and RCW 9.95.011(2)(a). The ISRB timely reviewed Mr. Ellis’ case three times during his incarceration. Each time, the ISRB found that Mr. Ellis would more likely than not commit a sex offense if released, and was thus not releasable. Those decisions are entitled to quasi-judicial immunity that acts as an absolute bar to tort liability. *Taggart v. State*, 118 Wn.2d 195, 822

P.2d 243 (1992); *Plotkin v. State Dep't of Corr.*, 64 Wn. App. 373, 377, 826 P.2d 221 (1992).

Accordingly, the trial court granted the State's motion for summary judgment. Mr. Ellis then filed an untimely motion for reconsideration. Thereafter, he filed an untimely notice of appeal. As a result, this Court does not have appellate jurisdiction to hear Mr. Ellis' appeal.

However, even if it did, the trial court properly dismissed Mr. Ellis' false imprisonment suit because Mr. Ellis failed to make a prima facie showing that he was entitled to early release, and the State and ISRB are entitled to absolute immunity from tort liability related to release decisions. The State respectfully requests this Court either dismiss Mr. Ellis' untimely appeal or in the alternative, on *de novo* review, dismiss Mr. Ellis' claim as a matter of law on the grounds identified in this response.

## II. COUNTER-STATEMENT OF ISSUES

- A. **Whether Mr. Ellis' appeal may properly be heard when the State's motion for summary judgment was granted on February 21, 2017, Mr. Ellis's motion for reconsideration was untimely, and his appeal was not filed until almost six months after the order granting summary judgment.**
- B. **Whether the trial court properly granted summary judgment and dismissed Mr. Ellis' suit against the State when Mr. Ellis' term of confinement was under the jurisdiction of the Indeterminate Sentence Review Board (ISRB), the State properly credited Mr. Ellis' good-time credits, Mr. Ellis was**

**imprisoned pursuant to a valid legal process, and the ISRB's decisions are entitled to quasi-judicial immunity.**

### **III. STATEMENT OF THE CASE**

Appellant, James Ellis, is a convicted serial child molester who received an indeterminate sentence with a minimum of 60 months and maximum of 10 years. Mr. Ellis' Judgment and Sentence states, "The court finds that the defendant is subject to sentencing under RCW 9.94A.712."<sup>1</sup> CP at 55. As such, he was under the jurisdiction of the Indeterminate Sentence Review Board (ISRB), which timely conducted all the required hearings. Each time, the ISRB found Mr. Ellis not releasable and reset his minimum term, as required by statute. During the last hearing, Mr. Ellis advised the ISRB that he continued to have no interest in treatment and preferred to spend the remainder of his sentence incarcerated so he could save money for his release. Upon release, Mr. Ellis sued for false imprisonment.

#### **A. Substantive Facts.**

Mr. Ellis is a serial child molester. In 1987, he was convicted in New Hampshire of three felony sexual assaults against his minor children. CP at 56. In 2005, he was a long-haul truck driver. A friend allowed Mr. Ellis to

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<sup>1</sup> RCW 9.94A.712 was recodified as RCW 9.94A.507 effective August 1, 2009. See Laws of 2008, ch. 231, § 56.

stay at her home when he was in town, and in return, he molested her 10-year-old granddaughter while she was at work. CP at 76-78.

Mr. Ellis was charged with child molestation in the first degree, and pled guilty to child molestation in the second degree on April 19, 2005. CP at 54. The date of his crime was February 10, 2005. CP at 54. On June 13, 2005, the trial court found that Mr. Ellis was subject to sentencing under RCW 9.94A.507, Sentencing of Sex Offenders.<sup>2</sup> CP at 55.

The statute requires the trial court to “impose a maximum term and a minimum term.” RCW 9.94A.507(3)(a). The maximum term must be “the statutory maximum sentence for the offense.” RCW 9.94A.507(3)(b). Child molestation in the second degree is a class B felony, and the statutory maximum sentence is 10 years. RCW 9A.44.086(2), 9A.20.021(1)(b). Accordingly, the trial court set Mr. Ellis’ maximum term at 10 years. CP at 60.

Pursuant to RCW 9.94A.507(3)(c), the minimum term shall be within the standard sentencing range for the offense, except under circumstances not applicable to this case. The standard sentencing range is determined by a grid that matches an offender’s score against the seriousness level of his or her crime. RCW 9.94A.510. The trial court

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<sup>2</sup> RCW 9.94A.712 was recodified as RCW 9.94A.507 effective August 1, 2009. See Laws of 2008, ch. 231, § 56.

found Mr. Ellis' offender score to be six and the seriousness level of his crime to be VII. CP at 56. Mr. Ellis' present victim was a 10-year-old little girl. Additionally, his offender score was, in part, determined based on Mr. Ellis' prior convictions for sexual assault. CP at 56. Mr. Ellis had sexually abused his minor daughter over a two-year period, including anal intercourse. He also sexually abused his minor son. CP at 78. The standard sentence range for an offender score of six and a seriousness level of VII is 57 to 75 months. RCW 9.94A.510. The trial court sentenced Mr. Ellis to a minimum term of 60 months. CP at 60.

Mr. Ellis was booked into the Spokane County Jail on February 10, 2005. CP at 69. He spent 189 days in custody in the Spokane County Jail, of which 94 were eligible days of earned good time, before his release to the custody of the Department of Corrections (Department) on August 18, 2005. CP at 69.

Mr. Ellis's minimum sentence was set to expire on August 18, 2010. The minimum term is simply the date an offender is eligible to be reviewed for parole. RCW 9.91.011(1). Pursuant to RCW 9.95.420, the ISRB<sup>3</sup> is required to conduct a hearing no later than 90 days before the expiration of the minimum term to determine whether it is more likely than not that the

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<sup>3</sup> The ISRB is part of the Department of Corrections. RCW 9.95.0002.

offender will engage in sex offenses if released on conditions that are set by the ISRB. RCW 9.95.420(3)(a). If the ISRB does not release an offender, the law requires it to set a new minimum term not to exceed an additional five years. RCW 9.95.420(3)(a), .011(2)(a).

On April 28, 2008, over two years prior to the expiration of his minimum sentence, the ISRB conducted its first hearing for Mr. Ellis. CP at 70-79. At that point, Mr. Ellis had served 32 months of his 60-month minimum term. CP at 76. The ISRB found that Mr. Ellis was not releasable, and, as required by statute, set a new minimum term. *See* RCW 9.95.420(3)(a), .011(2)(a). Although the law permits the ISRB to add up to an additional five years to the minimum sentence, it added 36 months to Mr. Ellis' minimum term. *See* RCW 9.95.420(3)(a), .011(2)(a). The ISRB noted Mr. Ellis had refused to participate in a sexual history polygraph and declined to participate in the sex offender treatment program in January 2007, but in December 2007, he had reapplied to the program. CP at 78. However, the ISRB was concerned that, although Mr. Ellis acknowledged he was in prison due to his actions, he refused to acknowledge the impact on the little girl that was his victim. CP 78. His new minimum sentence was set to expire on August 18, 2013. CP at 76.

After setting a new minimum term, the ISRB must review the person again not less than 90 days prior to the expiration of the new minimum term.

RCW 9.95.011(2)(a). Mr. Ellis' new minimum term was set to expire on August 18, 2013. The ISRB, however, conducted a second hearing on Mr. Ellis on May 26, 2010, over three years prior to the expiration of his minimum term. CP at 70-71, 81-89. The ISRB again found that Mr. Ellis would more likely than not commit a sex offense if released, and was thus not releasable. Accordingly, it extended his minimum term to coincide with his maximum expiration date of February 10, 2015. CP at 85.

The ISRB's decision that Mr. Ellis was likely to reoffend was in part due to his not being amenable to treatment "due to his negative attitude," "not accept[ing] responsibility for his offending and blam[ing] the [ten-year-old] victim for initiating the sexual contact with him." CP at 87. At Mr. Ellis' hearing, the ISRB witnessed Mr. Ellis' "barely controlled anger" and noted that he "portrayed himself as the victim in this instant offense, as well as his prior sexual offenses." CP at 88. The ISRB was "concerned that without treatment, any significant insight and acknowledgement of his culpability, combined with his negative attitude, Mr. Ellis [would] commit another sexual offense upon release." CP at 88. The ISRB encouraged him to reconsider the sex offender treatment program. CP at 88.

The ISRB saw Mr. Ellis for a final time on July 31, 2013. CP at 70-71, 90-97. At that point, Mr. Ellis had served 95 months in prison, plus 189 days of jail time credit. CP at 95. The ISRB noted that it "last met with

Mr. Ellis in May of 2010 . . . and would have reconsidered its decision if Mr. Ellis was found amenable to treatment and completed the Sex Offender Treatment Program. [However, t]hat [had] not happened as of [his July 2013 hearing] date.” CP at 96. Mr. Ellis’ hearing was “brief, in that he indicated he [was] still not interested in participating in sex offender treatment and *would, in fact, like to spend his last two years incarcerated* so he can accumulate more money for his release.” CP at 96 (emphasis added). The ISRB found “Mr. Ellis still presents too great a risk to return to the community at this time.” CP at 96.

**B. Procedural Facts.**

On February 10, 2005, Mr. Ellis sexually assaulted the 10-year-old granddaughter of his friend. He was charged with child molestation in the first degree, and ultimately pled guilty to child molestation in the second degree on April 19, 2005. CP at 54. The court considered Mr. Ellis’ three prior convictions against his minor children: one count of Felonious Sexual Assault and two counts of Aggravated Sexual Assault. CP at 56. On June 13, 2005, the court sentenced Mr. Ellis to a minimum term of confinement of 60 months, and a maximum term of confinement of 10 years. CP at 60. Mr. Ellis was released from prison on February 10, 2015, 10 years to the day after his most recent sexual assault. CP 4, 54. He filed

his complaint on February 26, 2016, alleging false imprisonment. CP at 1-7.

On January 24, 2017, the State filed its motion for summary judgment. CP at 31-33. The motion came on for hearing on February 21, 2017, and the Chelan County Superior Court entered an order granting the State's motion and dismissing Mr. Ellis' case with prejudice. CP at 161-64.

Thirteen days later, on March 6, Mr. Ellis filed a motion for reconsideration. CP at 165-166. Not only did Mr. Ellis fail to file timely his motion, he also failed to serve properly his motion on counsel for the State. CP at 211-12, ¶¶ 5-7.

The court issued a letter opinion on April 4, 2017, denying Mr. Ellis' motion for reconsideration and instructed the State to prepare an order. CP at 228-33. The court signed the order on July 11, 2017. CP at 236-44. The court reiterated that Mr. Ellis was serving an indeterminate sentence and held alternative basis for the grant of summary judgment against Mr. Ellis: “(1) [Mr.] Ellis failed to make a prima facie showing that he was eligible to earn good time/early release; and [as an alternative basis for summary judgment,] (2) the ISRB is protected by quasi-judicial immunity.” CP at

230, 233.<sup>4</sup> The court also specifically found Mr. Ellis failed to file timely his motion for reconsideration. CP at 233, 236-44.

Mr. Ellis filed a Notice of Appeal on August 10, 2017 – 171 days after the entry of the order dismissing his case. CP at 246-56.

#### IV. SUMMARY OF ARGUMENT

Appellant, James Ellis, is an unrehabilitated sex offender, who refused treatment while incarcerated. After he was released from prison, Mr. Ellis sued the State for false imprisonment arguing he was not given credit for time served or good time credits. The trial court dismissed his suit on summary judgment, and he filed an untimely motion for reconsideration. Thereafter, he filed an untimely notice of appeal. This Court should dismiss Mr. Ellis' appeal for lack of appellate jurisdiction. In the alternative, this Court should dismiss this matter as a matter of law after *de novo* review. The trial court granted summary judgment on two alternative bases, each of which is supported by the law and facts.

First, the ISRB conducted all the required hearings and found Mr. Ellis not releasable. The law is clear regarding the State's interest in

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<sup>4</sup> Mr. Ellis asserts as error "Judge Nakata, in her oral opinion indicated that [he] was a 'determinate offender'" and referenced DOC Policy 350.1001.G. Appellant's Brief, pg. 15. However, in her opinion letter, the judge clarified, "The Court in delivering its oral ruling mistakenly included paragraph G.1. when reading DOC Policy 350.100 G in support of its decision granting summary judgment. However, . . . the Court's analysis then and now was based on Ellis receiving an indeterminate sentence." CP at 230, ¶ (1).

rehabilitating sex offenders and their requisite amenability to treatment. Moreover, the law expressly prohibits the ISRB from releasing an offender, before his maximum sentence, “unless in its opinion his . . . rehabilitation has been complete and he . . . is a fit subject for release.” RCW 9.95.100. Second, quasi-judicial immunity acts as an absolute bar to tort liability related to release decisions by the ISRB.

## V. STANDARD OF REVIEW

On appeal of summary judgment, the standard of review is *de novo*, and the appellate court engages in the same inquiry as the trial court. *Keck v. Collins*, 181 Wn. App. 67, 325 P.3d 306 (2014). The reviewing court will affirm a summary judgment as a matter of law where the record shows no genuine issue of material fact. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 278, 937 P.2d 1082 (1997). In response to a summary judgment motion, a plaintiff cannot rest on mere allegations, but must set forth by affidavit or other evidence, the specific facts that will be taken as true for purposes of summary judgment. CR 56(d); *see also Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225–26, 770 P.2d 182 (1989). The appellate court will sustain the trial court’s judgment upon any theory established in the pleadings and supported by proof. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).

## VI. ARGUMENT

### A. This Court Lacks Jurisdiction to Hear Mr. Ellis' Untimely Appeal.

Mr. Ellis failed to timely perfect his appeal, thereby robbing this Court of jurisdiction. RAP 5.2(a) provides that a party has 30 days to file a notice of appeal. That time limit “can also be prolonged by the filing of ‘certain *timely* posttrial motions’, including a motion for reconsideration.” *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 367, 849 P.2d 1225, 1226 (1993) (emphasis in original).

In *Schaefco, Inc.*, the trial court entered its final order finding against appellant, Schaefco, Inc. Thereafter, Schaefco timely filed its motion for reconsideration, but failed to serve the Commission until four days later. *Id.* The trial court denied the motion for reconsideration, and Schaefco filed a notice of appeal. *Id.* at 367, 849 P.2d at 1225-26. “The Commission argued that Schaefco’s notice of appeal dated back to” the original “order because the motion for reconsideration was untimely, and therefore did not extend the 30-day time period for filing a notice of appeal.” *Id.* at 367, 849 P.2d at 1226. The Washington Supreme Court agreed.

The Court held that while the motion for reconsideration was properly filed, serving it four days late made it untimely and thus “did not extend the 30-day limit for filing notice of appeal.” *Id.* at 368, 849 P.2d at

1226. The Court dismissed the appeal. In so doing, it acknowledged that although Schaefer “raise[d] many important issues, including an equal protection claim . . . it would be improper to consider these questions given the procedural failures of this case.” *Id.* at 368, 849 P.2d at 1226.

On January 24, 2017, the State filed its motion for summary judgment seeking to dismiss Mr. Ellis’ suit. CP at 31-33. The motion was heard on February 21, 2017. On the same day, the Chelan County Superior Court entered an order granting the State’s motion and dismissing Mr. Ellis’ case with prejudice. CP at 161-164.

Pursuant to RAP 5.2(e), a timely motion for reconsideration tolls the time allowed to file a notice of appeal. Otherwise, a party has 30 days “after the entry of the decision of the trial court that the party filing the notice wants reviewed.” RAP 5.2(a). The order dismissing Mr. Ellis’ suit was entered on February 21. Pursuant to court rule, he had 10 days to file a motion for reconsideration. CR 59(b). 13 days after the order dismissing his suit, Mr. Ellis filed a motion for reconsideration. CP at 165-166. Further, Mr. Ellis failed to ever properly serve the motion on counsel for the State. Mr. Ellis’ attorney had the motion and supporting documents emailed to the State’s attorney. There was no agreement to allow electronic service. CP at 211-12, ¶¶ 5-7.

First, similar to the plaintiff/appellant in *Schaeferco, Inc.*, Mr. Ellis failed to timely serve the opposing party. CP at 211-12, ¶¶ 5-7. In *Schaeferco, Inc.*, the Court held that “procedural failure” by itself was fatal to the appeal. *Schaeferco, Inc.*, 121 Wn. 2d at 368. However, unlike the plaintiff/appellant in *Schaeferco, Inc.*, Mr. Ellis did not even timely file his motion for reconsideration. Mr. Ellis’ deadline to file a motion for reconsideration was March 3, 2017, 10 days after entry of the order granting the State’s motion for summary judgment. See CR 59(b); CP at 161-62. Mr. Ellis failed to file his motion for reconsideration until March 6. CP at 165-66. Accordingly, his motion was procedurally defective as recognized by the trial court. CP at 233 (“The Court also agrees with the State that the Plaintiff’s Motion for Reconsideration . . . was not timely . . .”).

Because Mr. Ellis’ motion for reconsideration was untimely, the deadline to file a notice of appeal was not tolled pursuant to RAP 5.2(e); instead, the deadline dated back to the trial court’s February 21, 2017 order. See *Schaeferco, Inc. v. Columbia River Gorge Comm’n*, 121 Wn.2d 366, 367, 849 P.2d 1225, 1226 (1993). “A necessary prerequisite to appellate jurisdiction is the timely filing of the notice of appeal.” *Buckner, Inc. v. Berkey Irr. Supply*, 89 Wn. App. 906, 911, 951 P.2d 338, 341 (1998). RAP 5.2(a)’s 30-day time limit expired March 23, 2017. Mr. Ellis, however, filed his notice of appeal on August 10, 2017, 171 days after the order he is

appealing. CP at 246-56. Accordingly, this Court does not have jurisdiction to hear Mr. Ellis' appeal, and "it would be improper to consider [the appeal] given the procedural failures . . . ." See *Schaefco, Inc.*, 849 P.2d at 1226.

Mr. Ellis did not perfect his appeal and it should be dismissed.

**B. Whether the trial court properly granted summary judgment and dismissed Mr. Ellis' suit against the State when Mr. Ellis' term of confinement was under the jurisdiction of the Indeterminate Sentence Review Board; the State properly credited Mr. Ellis' good-time credits; Mr. Ellis remained imprisoned pursuant to a valid legal process; and the ISRB's decisions are entitled to quasi-judicial immunity.**

The trial court granted the State's motion for summary judgment on two alternative grounds: "(1) Ellis failed to make a prima facie showing that he was eligible to earn good time/early release; and, (2) the ISRB is protected by quasi-judicial immunity." CP at 233. Either of those grounds is independently sufficient to support summary judgment. Accordingly, this Court should affirm summary judgment because the record shows no genuine issue of material fact.

**1. Mr. Ellis failed to make a prima facie showing that he was eligible to earn good time/early release.**

It is undisputed that Mr. Ellis received an indeterminate sentence. CP at 100-01. Thus, his sentence is governed by the indeterminate sentencing provisions of RCW 9.95.

**a. Mr. Ellis Fails To Meet His Burden In Response To Summary Judgment Regarding His False Imprisonment Claim**

Mr. Ellis cannot show that the State acted without lawful authority or that his imprisonment was not enacted pursuant to a valid legal process. Accordingly, he cannot sustain a cause of action for false imprisonment and summary judgment should be affirmed. *See Stephens v. State*, 186 Wn. App. 553, 558, 345 P.3d 870 (2015).

Mr. Ellis' sentence is governed by the indeterminate sentencing provisions of RCW 9.95 and the jurisdiction of the ISRB. In response to the State's motion for summary judgment, Mr. Ellis did not dispute numerous facts, including the following: (1) the ISRB's jurisdiction over him to make release decisions; (2) the ISRB held three hearings to determine his releasability; (3) the result of each hearing was, by a preponderance of the evidence, that he would commit a sex offense if released; (4) he did not participate in the Sex Offender Treatment Program; or (5) he made no attempt to challenge the fact or duration of his confinement through a personal restraint petition or other proceeding. CP at 153. Even on appeal, those facts remain undisputed. *See Appellant's Brief*, pp. 2-3.

In response to the State's argument on summary judgment that he had not stated a cause of action for false imprisonment, Mr. Ellis' response

was simply that he had alleged it in his Complaint. CP at 103:3-11. Mr. Ellis, on appeal, persists in the same assertion – simply that he has “alleged in his Complaint that he was held after the State had a duty to release him, so a cause of action of unlawful imprisonment has been stated.” Appellant’s Brief, pg. 4. However, in response to summary judgment, a party may not rest on the “mere allegations or denials of his pleading.” CR 56(e).

**b. The State Properly Credited Mr. Ellis’s Good-Time Credits.**

Contrary, to Mr. Ellis’ arguments, he was given good-time credits; however, they do not compute to a date that he is entitled to be released. Good-time credits only affect an offender’s minimum sentence, and a minimum sentence only establishes a date when an offender is eligible to be *considered* for release. The law is well settled: “An inmate is not automatically released upon serving the minimum sentence, less good-time credits.” *Matter of Cashaw*, 123 Wn.2d 138, 143, 866 P.2d 8, 11 (1994). On the contrary, “[t]he Board *cannot* release an inmate, regardless of the status of the minimum term, until either the Board determines the inmate has been rehabilitated (and is otherwise fit for release) or the maximum sentence has been served.” *Id.* at 143, 866 P.2d at 11 (emphasis added).

When the offender has been sentenced to an indeterminate sentence, good-time credits only apply to the ISRB's minimum sentence, not to the court's maximum sentence. *Id.* "Accordingly, the minimum term carries with it no guaranty of release; it only establishes a date when the inmate becomes eligible to be *considered* for parole." *Id.* (emphasis in original).

When an inmate is eligible to be considered for release is set out in detail by statute.<sup>5</sup> "[N]ot less than ninety days prior to the expiration of the minimum term of a person sentenced under RCW 9.94A.507, for a sex offense committed on or after September 1, 2001, *less any time credits permitted by statute*, the [B]oard shall review the person for conditional release to community custody." RCW 9.95.011(2)(a) (emphasis added). If the ISRB does not find the person releasable, "it shall set a new minimum term not to exceed an additional five years." *Matter of Cashaw*, 123 Wn.2d 138, 866 P.2d 8 (1994) The ISRB is then required to review the person again not less than 90 days prior to the expiration of the new minimum term. *Id.* In addition, where the ISRB extends the minimum term to coincide with the offender's maximum term, the offender is entitled to one more release

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<sup>5</sup> The trial court's letter opinion includes additional reasoning that Mr. Ellis never became eligible to earn good conduct time. That line of reasoning was not asserted by the State. Nor did the State cite to the DOC policies the court referenced. *See* CP at 230-232. The State does not request that this Court conduct a *de novo* review of that analysis.

hearing prior to the expiration of the maximum term. *Cashaw*, 123 Wn.2d at 150, 866 P.2d at 15.

Here, the ISRB conducted hearings at times that accounted for Mr. Ellis' good-time credits. The trial court sentenced Mr. Ellis to a minimum term of 60 months and a maximum term of 10 years. CP at 60. Mr. Ellis contends he was entitled to good-time credits at a rate of one-third of his sentence. CP at 101. His first review hearing was conducted on April 28, 2008. CP at 76. At that point, he had served 32 months of his 60-month minimum sentence. *Id.* At 32 months, Mr. Ellis had served just over half of this minimum sentence. Consequently, Mr. Ellis was given his first review hearing long before he served two-thirds of his minimum sentence. Even assuming he was entitled to one-third total good-time credit, the ISRB's timing of his first review hearing accounted for that time.

Keeping in mind that good-time credits affect only the minimum term and the minimum term only establishes when an offender is eligible to be considered for release, Mr. Ellis was likewise given his good-time credits at his second review hearing. *See Matter of Cashaw*, 123 Wn.2d 138, 143, 866 P.2d 8, 11 (1994). At his first review hearing, as provided by RCW 9.95.011(2)(a), the ISRB set a new minimum sentence and added 36 months to his minimum term. The ISRB's decision provided that Mr. Ellis' next hearing would be scheduled "120 days prior to his ERD [early release date]

or upon successful completion of SOTP [sex offender treatment program].” CP at 80. The ISRB conducted a second review hearing on May 26, 2010. CP at 85. Mr. Ellis had served 57 months of his revised 96-month minimum sentence “and received 189 days of jail time credit.” CP at 86. At 57 months, Mr. Ellis had served approximately 60 percent of his minimum sentence. Consequently, Mr. Ellis was given his second review hearing long before he served two-thirds of his minimum sentence. Again assuming he was entitled to one-third total good-time credit, the ISRB’s timing of his second review hearing also accounted for that time.

Mr. Ellis was also given a third review hearing between when his minimum sentence was set to coincide with his maximum sentence. The ISRB is required to review the offender again not less than 90 days prior to the expiration of the new minimum term. RCW 9.95.011. In addition, where the ISRB extends the minimum term to coincide with the offender’s maximum term, the offender is entitled to one more release hearing prior to the expiration of the maximum term. *See Cashaw*, 123 Wn.2d at 150, 866 P.2d at 14. At his second review hearing, the ISRB extended Mr. Ellis’ minimum sentence to coincide with his maximum sentence. CP at 85. It determined the next action was to “[s]chedule a *Cashaw* like hearing in July 2013.” CP at 86. The third hearing was held on July 31, 2013. CP at

94. At that hearing, the ISRB reaffirmed its prior decision to extend Mr. Ellis' minimum term to coincide with the maximum term. CP at 94.

There is no dispute Mr. Ellis was given two review hearings prior to having served two-thirds of his minimum sentence. There is no dispute Mr. Ellis was given a third review hearing after his minimum term was adjusted to coincide with his maximum term. Mr. Ellis' good-time credits adjusted the dates upon which he was eligible to be *considered* for parole. *See Cashaw*, 123 Wn.2d at 143, 866 P.2d at 11. Contrary to Mr. Ellis' assertion to the contrary, he was not entitled to be released on those days. *See id.* The ISRB "has no duty to parole an unrehabilitated prisoner." *In re Addleman*, 151 Wn.2d 769, 775, 92 P.3d 221, 224 (2004). On the contrary, RCW 9.95.100 mandates that the ISRB "shall not, however, until his or her maximum term expires, release a prisoner, unless in its opinion his or her rehabilitation has been complete and he or she is a fit subject for release."

Citing *State v. Winkle*, 159 Wn. App. 323, 245 P.3d 249 (2011), Mr. Ellis argues that RCW 9.94A.729 required the Department to automatically release him to community custody after he had served just over seven years. Appellant's Brief, pg. 9. However, unlike Mr. Ellis, the appellant/defendant in *Winkle* was not sentenced to an indeterminate sentence under RCW 9.94A.507. Where a sentence is indeterminate, the Board maintains broad discretion over early release, with public safety as

its paramount concern. *In re Dyer*, 175 Wn.2d 186, 197, 283 P.3d 1103 (2012). In that regard, the Board found Mr. Ellis “present[ed] too great a risk to return to the community . . . .” CP at 96. Further, the Board may base its discretion to deny parole, in part, upon the fact that the offender refuses to participate in sex offender treatment. *Id.* at 198. Indeed, the offender is “subject entirely to the discretion of the [Board], *which may parole him now or never.*” *Id.* at 197 (emphasis in original) (quoting *In re Pers. Restraint of Powell*, 117 Wn.2d 175, 196, 814 P.2d 635 (1991)).

Mr. Ellis was by all accounts unrehabilitated, was repeatedly found not fit for release, and served until his maximum term expired. The State is entitled to summary judgment, and the trial court’s order should be affirmed.

**2. The Court Should Affirm Dismissal of Mr. Ellis’ False Imprisonment Claim on the Independent and Unchallenged Basis of Absolute Quasi-Judicial Immunity.**

The State and ISRB are entitled to quasi-judicial immunity for release decisions and enjoy absolute immunity from tort liability. Despite it being brought to his attention multiple times, Mr. Ellis never addressed the State’s argument that it was immune from liability. *See* CP at 46-47 (summary judgment argument related to quasi-judicial immunity), CP at 57 (summary judgment reply brief pointing out failure to address issue), CP at

223 (response to motion for reconsideration). *See also* CP at 233 (court's ruling noting, "Ellis has failed to address the Court's second ground for granting summary judgment which was that the State and ISRB are entitled to quasi-judicial immunity and enjoy absolute immunity from release decisions.").

The common law doctrine of judicial immunity removes the adjudicative function from tort liability. *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992). The protections of judicial immunity have also been extended to others who perform functions closely associated with the judicial process under the doctrine of quasi-judicial immunity. *Id.* at 204, 822 P.2d at 247. Like judicial immunity, quasi-judicial immunity exists to enable those who perform judicial-like functions to carry out their duties without fear of personal consequences. *Lutheran Day Care v. Snohomish Cty.*, 119 Wn.2d 91, 99, 829 P.2d 746 (1992), *cert. denied*, 506 U.S. 1079, 113 S. Ct. 1044, 122 L. Ed. 2d 353 (1993)). Thus, quasi-judicial immunity forms an absolute bar to liability. *Lutheran Day Care*, 119 Wn.2d at 99; *Reddy v. Karr*, 102 Wn. App. 742, 748, 9 P.3d 927 (2000).

Our Supreme Court has held that challenges to ISRB decisions to release offenders are protected under quasi-judicial immunity. *Taggart*, 118 Wn. 2d at 203-09. *See also Plotkin v. State Dep't of Corr.*, 64 Wn. App. 373, 377, 826 P.2d 221 (1992) (ISRB's quasi-judicial immunity for

release decisions extends to the State). In *Taggart*, the court held that decisions by the ISRB regarding whether, and under what conditions, to allow parole were quasi-judicial in nature, distinguishing such decisions from the actual supervision of parolees by community corrections officers once released. *Taggart*, 118 Wn.2d at 206-08. Therefore, the court held that such decisions were entitled to absolute immunity. *Id.* at 209 (“Since we have determined the Board’s decision was quasi-judicial, we hold that the Board is absolutely immune for its release decision.”).

Here, Mr. Ellis has sued the State for the actions of the ISRB in carrying out the prison sentence ordered by the trial court judge. Pursuant to carrying out that sentence, the State, through the ISRB in a series of decisions, extended Mr. Ellis’s confinement because he “present[ed] too great a risk to return to the community . . . .” CP at 96. These decisions are protected under quasi-judicial immunity. This Court should affirm the trial court’s grant of summary judgment on this independent and unchallenged basis.

## VII. CONCLUSION

This Court does not have appellate jurisdiction to hear Mr. Ellis’ untimely appeal. However, even if it did, the trial court properly dismissed Mr. Ellis’ false imprisonment suit because Mr. Ellis failed to make a prima facie showing that he was eligible to earn good time/early release, and the

State and ISRB are entitled to absolute immunity from tort liability related to release decisions. The State respectfully requests this Court either dismiss Mr. Ellis' untimely appeal or in the alternative, on *de novo* review, dismiss Mr. Ellis' claim as a matter of law on the grounds identified in this response.

RESPECTFULLY SUBMITTED this 22 day of January, 2018.

ROBERT W. FERGUSON  
Attorney General



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HEIDI S. HOLLAND, WSBA  
#27264

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be electronically filed the Brief of Respondent with the Clerk of the Court using the Washington State Appellate Court's E-Filing Portal system which will send a copy of such filing to counsel of record for the other parties to this case, including the following:

Julie A. Anderson  
[reception@jaallaw.net](mailto:reception@jaallaw.net)

DATED this 22 day of January, 2018, at Spokane, Washington.

  
\_\_\_\_\_  
NIKKI GAMON  
Legal Assistant

**WASHINGTON ATTORNEY GENERAL SPOKANE TORTS**

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