NO. 100137-1

SUPREME COURT OF THE STATE OF WASHINGTON

ANTHONY SMITH and JULIE SMITH, a marital community, and ANTHONY SMITH as personal representative of the ESTATE OF MEAGAN SMITH,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS and AMERICAN BEHAVIORAL HEALTH SYSTEM, INC., a Washington Corporation,

Respondents.

STATE RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

After he was sentenced, Zachary Craven failed to report for in-patient drug treatment and days later tragically murdered Meagan Smith. The Court of Appeals correctly found that the Department of Corrections did not have a "definite, established, and continuing relationship" with Craven establishing a duty to prevent him from injuring third parties in that DOC had not yet had the opportunity to assign a community corrections officer. And even if such a duty existed, the Court of Appeals correctly determined that the Smiths had not submitted evidence showing that any breach of duty proximately caused Ms. Smith's death, or that she was a foreseeable victim of Craven. *Smith v. Dep't of Corr.*, No. 81246-7-I, 2021 WL 3145720 (Wash. Ct. App. July 26, 2021) (unpublished). Review in this unique and fact-intensive case is not warranted.

The Court of Appeals followed precedent to hold that there was no relationship between DOC and Craven sufficient to impose a duty. In all previous cases examining the relationship

between DOC and the offenders it supervises, DOC had assigned a community corrections officer (CCO), which is how DOC establishes a relationship with an offender. *Smith*, slip op. at *7. Here, DOC did not have the opportunity to assign a CCO before the criminal conduct at issue here occurred.

Craven was sentenced on Friday, June 26, 2015, and murdered Ms. Smith on July 7, 2015, before a CCO was assigned. This was not a delayed assignment, but adhered to DOC policy requiring assignment within five days of receipt of the offender's judgment and sentence. Nor does this case present an issue of substantial public interest. DOC supervises more than 20,000 offenders across the state and yet, this issue has never arisen in any other case, showing that this case is limited to its singular facts. Additionally, DOC staff worked on legislation so sentencing judges can now incarcerate offenders sentenced to a residential Drug Offender Sentencing Alternative (DOSA), like Craven was here, between their sentencing date and treatment

date, alleviating the public safety concerns the Smiths raise. *See* Laws of 2020, ch. 252, §§ 3, 5 (revising RCW 9.94A.664).

Because the Court of Appeal's unpublished opinion in this fact-intensive case does not involve an issue of substantial public interest and does not conflict with precedent, review should be denied. *See* RAP 13.4(b)(1), (4).

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the Court of Appeals correct in affirming summary judgment when the Smiths provided no evidence of a definite, established, and continuing relationship between Offender Craven and DOC and when existing precedent requires contact with a CCO before a relationship is found?

2. Was the Court of Appeals correct in affirming summary judgment when the Smiths provided no authority imposing a special relationship between DOC and an offender after the offender's supervision period has ended?

3. Was the Court of Appeals correct in affirming summary judgment when the Smiths offered no evidence to show that, but for some gross negligence by DOC, Offender Craven would have been incarcerated on the date in question when the available facts show that DOC would not have been able to apprehend Craven?

III. COUNTERSTATEMENT OF THE CASE

Zachary Craven had previously been supervised by DOC for one year following his 2013 conviction for theft and harassment. CP 331. That supervision ended on December 26, 2014. CP 331.

On Friday, June 26, 2015, Craven was sentenced to a residential DOSA following a conviction for felony harassment. CP 361-75. DOC did not have notice that Craven would be sentenced and is not involved in sentencing hearings. CP 331-32. DOSA sentences are only available for nonviolent offenders, as defined by statute. RCW 9.94A.660. As a DOSA offender, Craven remained under the sentencing court's jurisdiction,

meaning that even once supervision began, the assigned CCO would need to report any violations to the court, rather than pursuing an internal compliance hearing, and would need to seek a bench warrant from the DOSA Court if Craven failed to report or absconded from supervision. CP 109, 333; RCW 9.94A.660(7)(a), .664(4).

Craven was scheduled to enter treatment at American Behavioral Health Systems, Inc. (ABHS) on July 1, 2015, but he did not. CP 547. ABHS sent an email to the DOC Treatment Utilization Provider, within the Substance Abuse Recovery Unit, that included listing Craven as a "no show" on July 2, 2015. CP 326, 456-57. The "no show" designation could mean a number of things, including that the person's sentencing date had changed with no notice to DOC, as had happened twice previously with Craven. CP 247, 327. The Substance Abuse Recovery Unit has no role in attempting to bring offenders into compliance with their judgment and sentence—that role is

performed by the assigned CCO. CP 327. A CCO had not yet been assigned following Craven's sentencing.

In King County, DOC is required to retrieve judgments and sentences in hard copy from a basket at each court. CP 73, 78. Each week, there are typically 100 to 150 judgments for DOC to collect. CP 73. Administrative staff retrieve the judgment, which is then entered into the Offender Management Network Information Program Manager (OMNI), and then determine which field office will conduct supervision where supervision is ordered. CP 73. The judgment is then sent to that field office by campus mail, where support staff record receipt and assign a CCO for intake. CP 73-74.

In this case, Craven's judgment was retrieved from King County on either June 30 or July 2, 2015. CP 73. It was processed on Thursday, July 2, 2015. CP 74. State offices were closed on Friday, July 3, for observance of Independence Day. The judgment was sent to the Kent field office on Monday, July 6, 2015, by campus mail, and received on Wednesday, July 8, 2015.

CP 74, 332. CCO Wayne Derouin was assigned that same day. CP 332. This assignment was timely under DOC's assignments policy, which requires assignment of a CCO within five working days after receipt of the judgment. CP 78.

Craven was already incarcerated on suspicion for the murder at issue in this case when CCO Derouin was assigned. CP 332. In the 11 days between his sentencing hearing and incarceration, Craven had assaulted his fictive grandfather, Robert Luxton; violated a no contact order protecting his grandmother, Angelika Hayden; and then, tragically, murdered his grandmother and Meagan Smith, who was housesitting for Craven's ex-girlfriend. CP 207, 218, 229, 268-69. Both Luxton and Hayden had reported Craven's crimes against them to local police the day after they occurred, and responding police were unable to locate or apprehend Craven. CP 208, 211, 218.

Even if CCO Derouin had known that Craven failed to report for treatment, had assaulted Luxton, or violated the no contact order protecting Hayden, the soonest he could have

requested a bench warrant from the DOSA Court would have been on July 10, 2015, after the murders occurred, due to the holiday weekend. CP 333. The following calendar illustrates the timing of events.

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
June 2015						
21	22	23	24	24	26 Craven Sentenced	27
28	29	30 Office staff retrieve J&S (or July 2)				
July 2015						
			1 Craven's Scheduled Bed Date at ABHS	2	3 Holiday Observed; DOSA Court Closed	4
5	6	7 Craven murders discovered by law enforcement	8 CCO Derouin assigned; Craven arrested	9	10 DOC's first opportunity to request bench warrant	11

IV. PROCEDURAL HISTORY

The Smiths brought suit against DOC and former Co-Defendant ABHS. CP 1. Defendants thereafter moved for

summary judgment, which was granted at the hearing. CP 44, 401, 940-45. The Smiths timely appealed. CP 937-38.

The Court of Appeals affirmed. The appellate court reviewed the leading Washington cases involving a take charge relationship under the *Restatement (Second) of Torts* § 319 (1965) and found "all involved supervision where a CCO or parole officer had been assigned and had engaged in contact and supervision of the offender." *Smith*, slip op. at *7. "Until a CCO is appointed, there is no one to establish a relationship with the offender." *Id*. No definite supervisory relationship existed between a CCO and Craven on July 7, 2015. *Id*.

The Court of Appeals similarly rejected the Smiths' arguments under § 315. *Id*. at *9. Just as § 319 requires a definite, established and continuing relationship, so does § 315. *Id*. at *9-10. And DOC's previous supervision of Craven had ended, ending any prior relationship, and no new definite, continuing and established relationship had yet begun. *Id*. at *9.

Next, the Court of Appeals determined that the Smiths had failed to provide evidence of proximate cause. *Id*. at *12. Nothing in the record showed that any action by DOC would have resulted in Craven's incarceration before July 7, 2015, thus the jury would be left to speculate on cause in fact. *Id*. at *14-16. Additionally, since DOC had no reason to know that Ms. Smith would be housesitting for the Cunninghams or that Craven would visit that home, Ms. Smith was not a foreseeable victim, thus legal causation was absent. *Id*. at *16-17.

V. WHY REVIEW SHOULD BE DENIED

Review should be denied for four reasons. First, the Smiths have not shown that the Court of Appeals' decision conflicts with Supreme Court precedent. Rather, the Court of Appeals carefully examined precedent and its decision fully comports with this Court's case law. Second, the Smiths have not shown that this case, and the related decision, presents an issue of substantial public importance because the decision is both unpublished and deals with a unique set of facts. Third, there is

no issue of substantial public importance that should be determined by this Court because DOC worked on a statutory amendment that addresses the public safety concerns argued by the Smiths that is now available to sentencing judges. RCW 9.94A.664(1)(b). Finally, the Smiths' arguments regarding proximate cause do not fall within any of the considerations governing discretionary review pursuant to RAP 13.4(b), and regardless, the Court of Appeals did not err in finding that the Smiths could not show proximate cause.

A. The Court of Appeals' Decision Adheres to Precedent

There are two types of common law special relationships that, under the right facts, can create a duty to protect a third person such as Ms. Smith: *Restatement (Second) of Torts* §§ 315 and 319. This Court, in *Taggart*, explained that §§ 316-320 define various special relationships that arise pursuant to § 315 and determined that § 319 is the most relevant to parole supervision cases. *Taggart v. State*, 118 Wn.2d 195, 219, 822 P.2d 243 (1992). Consistent with case law, the Court of Appeals

found that neither § 315, nor the more specific § 319, applies here. *Smith*, slip op. at *8-10. Under either section, the touchstone for finding a duty is the existence of a definite, established, and continuing relationship. There is no such evidence here. *Id*.

1. The unpublished decision follows *Taggart* and *Joyce*

The Court of Appeals carefully examined and followed the leading cases regarding negligent supervision, noting that "all involved supervision where a CCO or parole officer had been assigned and had engaged in contact and supervision of the offender." *Smith,* slip op. at *7. For example, in *Taggart*, parolee Brock had been on active supervision for seven months and saw his parole officer weekly; parolee Geyman reported for supervision the day after his release and had been on active supervision for five months. *Taggart*, 118 Wn.2d at 200-03. In *Joyce*, offender Stewart had been on supervision for almost two years. *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 311, 314, 119

P.3d 825 (2005). In *Estate of Davis*, offender Erickson had been on supervision for approximately six months. *Estate of Davis v. Dep't of Corr*., 127 Wn. App. 844, 837-38, 113 P.3d 487 (2005). And, in *Estate of Bordon*, offender Jones reported to his CCO after his release, who then filed violation reports when Jones failed to return for intake. *Estate of Bordon v. Dep't of Corr.*, 122 Wn. App. 227, 232-34, 95 P.3d 764 (2004). In each of these cases, the offender had made contact with their CCO, supporting the establishment of a special relationship. *Smith*, slip op. at *6-9. The assignment of the CCO or parole officer is critical because it is only through continuing supervision by a CCO that a definite, continuing, and established relationship can be formed. Indeed, the requirement of "definite, continuing, and established" relationship only makes sense in the context of an actual human relationship, as opposed to flowing from an order or statute, as suggested by the Smiths. While an order or statute can be described definite, it makes no sense to describe them as continuing and established.

a. The unpublished decision is consistent with *Taggart*

The Smiths cannot provide any case law showing that a special relationship has been found absent contact between an offender and their CCO. Instead, they argue that the parole statute was sufficient in *Taggart* to create the relationship, therefore the DOSA statute should be sufficient here. *See* Pet. at 8-9. The Smiths ignore the context of the decision in *Taggart*, where supervision contact was occurring weekly, and the difference between the parole system and the current supervision system. The Smiths also ignore the *Taggart* opinion itself, which clearly stated that the duty was connected to the *relationship* with the parole officer.

As already discussed, the parolee in *Taggart* had weekly contacts with his parole officer. In deciding whether a duty would attach pursuant to the *Restatement*, this Court determined that § 319 was most relevant, because it discusses the "take charge" relationship. *Taggart*, 118 Wn.2d at 219. In addition to

the statutory authority relied on by the Smiths in their argument by analogy, the Court went on to discuss the actual control exerted. For example, the State can regulate the parolee's movements, require the parolee to report to a parole officer, impose special conditions such as refraining from alcohol or undergoing treatment, and order the parolee not to possess firearms. *Id*. at 220. But this is only possible through an actual parole officer: "The parole officer is the person through whom the State ensures that the parolee obeys the terms of his or her parole." *Id*. The officer should know the parolee's criminal history and should monitor the parolee's progress during parole. *Id*. "Because of these factors," the *Taggart* Court held, "parole officers have 'taken charge' of the parolees they supervise for purposes of § 319." *Id*. Contrary to the Smiths' arguments otherwise, the special relationship was not based on a statute alone, but on the contact and control an officer had with an offender.

Moreover, even if the *Taggart* Court based the special relationship there on the statutory authority and nothing more, as argued by the Smiths, Pet. at 8-9, the statutory scheme has changed. When *Taggart* was decided, prisoners were released from DOC's custody directly to DOC's parole officers who supervised parole. Under the current statutory scheme, DOC must now first confirm that an offender, who may never have been in its custody, is subject to supervision pursuant to RCW 9.94A.501. To do so, DOC must receive and analyze the offender's judgment and sentence to determine if the offender is statutorily subject to supervision. Finally, RCW 9.94A.704(1), passed in 2008, requires that the person sentenced to community custody "*report to* and be placed under the supervision of the department, subject to RCW 9.94A.501." Laws of 2008, ch. 231, § 10 (emphasis added).

The Smiths argue that DOC must supervise anyone sentenced to a residential DOSA pursuant to RCW 9.94A.501(4)(e)(f), and that this is similar to the parole

statute at issue in *Taggart*, RCW 72.04A.080, such that a special relationship should be *automatically* applied. Pet. at 9. But unlike the parole system, where parolees are released from DOC custody into DOC supervision, DOC is not notified in advance that an offender has been sentenced to community supervision before receipt of the judgment and sentence. CP 331-32.

b. The unpublished decision is consistent with *Joyce*

The Court of Appeals' unpublished decision does not conflict with this Court's decision in *Joyce*. A special relationship and the corresponding duty is not triggered by entry of a judgment and sentence, but rather arises "once the State has taken charge of an offender." *Joyce*, 155 Wn.2d at 310. The judgment and sentence is necessary to create the relationship, the *Joyce* Court explained, because not all judgments translate into a take charge duty—some, like legal financial obligations, do not involve a take charge relationship at all. *Joyce*, 155 Wn.2d at 319. After reviewing prior case law regarding supervision, the

Court held that a duty existed because "[t]he Department maintained a definite, established, and continuing relationship *by assigning a community corrections officer* to monitor and to notify the judge if Stewart failed to substantially comply with the court's conditions of release." *Id*. at 320 (emphasis added).

The Court of Appeals correctly followed this case law in holding that DOC must have contact through a CCO to establish a special relationship with an offender sentenced to community supervision. It was not deciding an issue of first impression, even though no decision had addressed analogous facts, but merely applying established case law, from which this conclusion logically follows. DOC cannot "take charge" of an offender without contact with that offender.

2. The unpublished decision adheres to *Volk v. DeMeerleer*

Evidence of a definite, established, and continuing relationship is necessary to show a special relationship under § 315, just as it is required under § 319. *Volk v. DeMeerleer*, 187 Wn.2d 241, 256, 386 P.3d 254 (2016). The Court of Appeals

correctly determined that DOC did not have an ongoing relationship with Offender Craven. *Smith*, slip op. at *10. The previous supervision had ended, and the newly ordered supervision had not yet commenced. *Id*. The Smiths make two arguments that allege the Court of Appeals got this analysis wrong, both of which lack merit.

The Smiths first argue that *Taggart* held that a statute alone can be sufficient to establish the relationship, that the DOSA statute is similar to the parole statute discussed in *Taggart*, and that this is sufficient to create a relationship under § 315. Pet. at 12-13. The decision in *Taggart*, however, based a § 319 "take charge" relationship on DOC's ability to exert control over an offender through contact with a parole officer. Moreover, the *Taggart* Court determined that § 319 is the appropriate section under which DOC's supervision of offenders should be analyzed, and did not find a separate § 315 relationship.

The Smiths next argue that the analysis in *Volk* did not focus on the length of the relationship or frequency of contact, but instead focused on the psychiatrist's insight into the potential dangerousness of his patient. Pet. at 17. But as the Court of Appeals rightly noted, the parties in *Volk* agreed the relationship was special. *Smith*, slip op. at *10 (citing *Volk*, 187 Wn.2d at 274). As a matter of law, any special relationship between DOC and Craven based on the previous supervision ended when that supervision ended. *See Hungerford v. Dep't of Corr.*, 135 Wn. App. 240, 258, 139 P.3d 1131 (2006) (holding that "DOC owes a duty to those who are injured during an offender's active supervision, not after it ends"); *see also Couch v. Dep't of Corr.,* 113 Wn. App. 556, 571, 54 P.3d 197 (2002) (holding that the duty of care ends when direct supervision ends and finding no duty to prevent future crimes).[1]

[1] This Court also rejected an argument that sought to expand the take charge duty into one that "could include all reasonably foreseeable dangers, even those that might occur long

While the Smiths argue that there are disputes of fact from which a jury could determine DOC had unique insight into Craven's history giving rise to a § 315 duty, the only material fact related to this argument is when Craven's previous supervision ended. *See* Pet. at 13. It is undisputed that Craven's previous supervision ended on December 26, 2014. CP 331.

Any knowledge of Craven's potential to reoffend after his previous supervision ended and before his new supervision began is insufficient to trigger any duty of DOC. To hold otherwise would render DOC strictly liable for any crime committed by a former supervisee simply based on DOC's prior supervision, in the absence of any ability to control the offender's conduct. Such a result is not contemplated by prior case law, which instead requires showing a definite, established, and *continuing* relationship, as the Court of Appeals correctly held here. *Smith*, slip op. at *10.

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after the take charge duty has ended" in *Binschus v. State*, 186 Wn.2d 573, 579, 380 P.3d 468 (2016).

B. Given the Singular Nature of This Case, This is Not an Issue of Public Importance

As provided above, the Smiths have not shown that the Court of Appeals' decision here conflicts with precedent, as would merit review under RAP 13.4(b)(1). Likewise, they have not shown that their petition presents an issue of substantial public importance that should be determined by this Court because it does not involve an issue of first impression and the legislature has already acted to eliminate the safety risk.

1. This case does not present an issue of first impression

As an initial matter, the Court of Appeals' decision is unpublished. Pursuant to GR 14.1, it has no precedential value and is not binding on any court. Consistent with the appellate court's decision not to publish, this case involves singular facts that are unlikely to be repeated, thus it does not present an issue of substantial public importance under RAP 13.4(b)(4). At the time of summary judgment, January 2020, DOC supervised 21,364 offenders. CP 76. There is no evidence that any other

offender sentenced to and eligible for supervision under RCW 9.94A.501 committed a string of crimes as Craven did here before DOC was able to assign a CCO under its five-day assignments policy. While the Smiths allege this case addresses a matter of first impression, its rarity is in its unique set of facts. *See* Pet. at 19. Just because this particular factual situation has not been addressed, however, does *not* mean that the law that applies to it is unclear.

To constitute an "issue of first impression," the issue must be one of unsettled law. In this Court's most recent "first impression" case, the question was whether the brother of the deceased had standing to sue for tortious interference with a corpse. *Fox v. City of Bellingham*, 197 Wn.2d 379, 383, 482 P.3d 897 (2021). To decide the case, this Court reviewed the origins and historical development of the tort itself, examined relevant authority, and queried how neighboring jurisdictions had treated the issue. *Id*. at 384-88. Similarly, in *State v. Blake*, 197 Wn.2d 170, 173, 481 P.3d 521 (2021), the "issue of first impression"

was whether the strict liability drug possession statute that penalized passive conduct exceeded the legislature's police power. The result depended on a careful and searching analysis of constitutional principles, extensive review of state and federal case law, and reference to secondary sources. *Id*. at 197-95.

Here, however, the law is clear. In every special relationship case, there must be evidence of "a definite, established, and continuing relationship" for a duty to attach. *E.g., Taggart*, 118 Wn.2d at 219; *Joyce,* 155 Wn.2d at 320. In *every* case finding such a relationship between DOC and an offender, there has been contact between the offender and an officer assigned to supervise their release in the community. *E.g., Taggart*, 118 Wn.2d at 200-03; *Joyce,* 155 Wn.2d at 311, 314. Here, there was no such evidence. The Court of Appeals examined this Court's prior holdings and its holding is consistent with that case law.

2. A statutory amendment address any public safety concerns

Finally, any safety concerns that the Smiths raise regarding future, similar factual situations have already been addressed by the legislature. Sentencing courts used to hold offenders in custody between sentencing and treatment. CP 327. That practice ended when the Court of Appeals determined there was no authority to do so in *State v. Bergen*, 186 Wn. App. 21, 344 P.3d 1251 (2015). DOC and other stakeholders, including superior court judges, were concerned that the *Bergen* decision did not account for the time delay between sentencing, DOC's actual receipt of a judgment and sentence and ability to assign a CCO, and the offender's treatment date. CP 327. DOC was actively involved in workgroups that introduced legislation to amend the DOSA statute to provide sentencing judges with the authority to incarcerate offenders following sentencing to facilitate the direct transfer to a treatment facility. CP 328. Now, RCW 9.94A.664(1)(b), effective January 1, 2021, provides this authority. Laws of 2020, ch. 252 § 3.

Contrary to the Smiths allegations that the Court of Appeals' decision below "creates a perverse incentive for the DOC to delay assigning a CCO," and that it encourages DOC to "maximize the amount of time between when it collects a J&S" and assigns a CCO, Pet. at 19-20, DOC has demonstrated its commitment to its statutory obligation to supervise offenders. To this end, DOC administrators have had numerous (unsuccessful) conversations with King County Superior Court asking it to provide timely, electronic versions of judgment and sentences. CP 78. DOC has extensive policies that govern how it supervises offenders, and requires assignment to a CCO five working days after receipt of the judgment and sentence. CP 76. These policies are regularly reviewed and updated as needed to fulfill DOC's mission to improve public safety. CP 78. Those policies were followed here.

C. The Court of Appeals Did Not Weigh Competing Evidence in Finding that the Smiths Could Not Satisfy Proximate Cause

There is no evidence to support the Smiths' argument that, but for DOC's negligence, Craven would have been incarcerated on July 7, 2015, and unable to commit murder. This was their burden to prove, and the Court of Appeals did not err in determining that in offering only speculation they had failed to do so.

CR 56(e) provides that when responding to a motion for summary judgment the non-movant "may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Supposition, opinion, and conclusory allegations are insufficient to overcome summary judgment. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988), *abrogated on other grounds by Mikkelsen v. Pub. Util. Dist. 1 of Kittitas Cnty.*,

189 Wn.2d 516, 404 P.3d 464 (2017). Yet, the Smiths offered only speculation and argument on proximate cause.

They contend that Craven had violated the conditions of his release, and that if she had known, the sentencing judge would have issued a bench warrant. Pet. at 15-16. The Smiths' own standard of care expert agreed that even if DOC had immediate notice that Craven had failed to report to ABHS for treatment, everything that followed would be pure speculation. CP 323. That includes speculation that he would have been picked up on a bench warrant.

The evidence presented to the trial court and Court of Appeals showed that local law enforcement was unable to locate and apprehend Craven after his grandfather and grandmother reported contact with him. There is no evidence that DOC would have been able to locate Craven even if it had notice of his sentence and knowledge of his violations. CP 206-59. As the Court of Appeals noted, "evidence gathered in the murder investigation included the contacts and sources that were

available in the DOC file. None of the information they had, or could have had based on the investigation, provided a location for Craven." *Smith*, slip op. at *16. In fact, Craven had been staying with a man he had only recently met and of whom DOC had no knowledge. CP 276, 284. The Court of Appeals did not weigh competing evidence, but reached the only conclusion available based on the evidence provided: "the jury would be left to speculate on causation in fact." *Smith*, slip op. at *16.

Nor did the Court of Appeals err in determining that Ms. Smith was not a foreseeable victim, thus the Smiths could not show legal cause. *See* Pet. at 17-18; *Smith*, slip op. at *16-17. Curiously, the Smiths argue that Craven's violence was foreseeable based on the string of criminal conduct that followed his sentencing hearing on June 26, 2015, that DOC did not know of until *after* Craven's arrest. *See* Pet. at 18.

Craven was sentenced to a residential DOSA which, by statute, is only available to offenders classified as nonviolent. RCW 9.94A.660(1). No one knew, besides Craven's ex-

girlfriend, Theresa Cunningham, that he had become abusive toward her. CP 264-65, 269-73, 279. No one knew, besides Ms. Cunningham, that Craven had threatened her or her family. CP 270. And DOC could not have known, as the Court of Appeals found, that Ms. Smith would be housesitting for the Cunninghams or that Craven would go to the home while she was there. *Smith*, slip op. at *16. The Smiths did not produce any evidence to show that DOC should have known, if a duty had attached, that Ms. Smith might be a foreseeable victim of Craven's. The Court of Appeals did not err in this determination.

VI. CONCLUSION

This case does not present an issue of substantial public importance, nor does the Court of Appeal's decision conflict with prior case law. Review should be denied.

This document contains 4,871 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 20th day of September, 2021.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the state of Washington that the preceding STATE RESPONDENT'S ANSWER TO PETITION FOR REVIEW was electronically filed via the Washington State Appellate Courts' Portal on the date below and electronically served on the following parties, according to the Court's protocols for electronic filing and service.

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s/ *Annya Ritchie*
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