70403-6

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No. 70403-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RICHARD BLICK, Appellant;

v.

STATE OF WASHINGTON, ELDON VAIL,
BERNIE WARNER, and DOES 1-20, Respondents.

APPEAL FROM THE SUPERIOR COURT FOR
KING COUNTY

The Honorable Beth Andrus
No. 12-2-35870-2 SEA

REPLY BRIEF OF APPELLANT BLICK

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ORIGINAL

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A. THE DEPARTMENT OF CORRECTIONS COMPLETELY MISSTATES THE QUESTIONS PRESENTED IN THIS CASE.

Right from the start, the Washington Department of Corrections ("the Department") misstates the basic question presented with the intent of misleading this Court. In its introduction, the Department fundamentally misunderstands the nature of early release time earned while in the custody of the King County jail.

It conflates time served under its jurisdiction with time spent by an inmate under the jurisdiction of a county jail pursuant to RCW 9.92.151.[1] It implicitly claims that RCW 9.94A.729 completely supercedes RCW 9.92.151 without once comparing their language and intent. It also makes a specious argument that Mr. Blick argued that he should have been transferred to community custody "on his earliest possible date," again conflating the good time earned in the county jail with the good time earned while under the jurisdiction of the Department. Response, p. 1.

The first question presented continues with this red herring. Response, p. 2, Section II.A. According to the Department, it was Mr.

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[1]Mr. Blick's case is premised on the "separation of powers" between the county jails and the Department to develop policies which grant and take away good time for those inmates under their immediate jurisdiction.

Blick's failure to obtain an approved address which caused him to be incarcerated until his Maximum Expiration Date (MXED).[2] This is not the question presented by Mr. Blick. He previously acknowledged that he needed an approved address but this address approval only applied to that period of time he was required to serve under the jurisdiction of the Department, which was not his maximum sentence length because he is entitled to all the good time he earned while in the custody of the King County jail.

The Department continues this misleading presentation when it completely ignores RCW 9.92.151 in its presentation of the address approval statute.[3] Not once during its discussion does it acknowledge the jail good time statute when discussing the transfer of offenders to community custody. Not once does it discuss critical language establishing when the Department has jurisdiction over an individual giving it the power to grant and take away good time pursuant to its policies.

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[2]This date is calculated by the Department to include all straight time not already served in jail. All good time earned in jail is not included in this calculation. All possible good time to be earned in prison is also not included in this calculation.

[3]The Department mentioned RCW 9.92.151 once for it being cited in the complaint. It did not cite the jail good time statute anywhere else in the brief and even forgot to include it in the Table of Authorities.

The Department chooses to read RCW 9.94A.729(5) in a statutory vacuum, claiming that since the statute does not mention jail good time, it is not required to acknowledge it does not have the power to alter it. Response, p. 4. The only sub rosa acknowledgment the Department makes of the jail good time statute is when it states that the jail good time is only good for establishing an earlier release date.

B. THE DEPARTMENT IS USING INFLAMMATORY AND IRRELEVANT MATERIALS TO ATTEMPT TO COLOR THIS CASE AND ITS USE MUST BE IGNORED.

Mr. Blick has never challenged that the Department could deny him a release address up to his MXED minus his jail good time. He has always claimed that the 52 days of good time he earned in jail should have been credited to decreasing his MXED. And yet, the Department has included a section on this particular issue including documentation on Mr. Blick's criminal history solely to say that Mr. Blick has been a bad citizen and to try to influence this Court against him. Mr. Blick mentioned not having an approved address solely so that the trial court would understand why he was not released on his ERD. It has absolutely no relevance to the jail good time issue otherwise.

Furthermore, any issue regarding notification was not argued during the motion to dismiss or partial summary judgment motion so the mention of notification in the complaint is irrelevant to the issues being argued before the

trial court and this Court. Notification was only mentioned so that the trial court had a full understanding of the process by which the release of individuals in prison happens if they happened to have their release address approved. Clearly, that did not happen for Mr. Blick so it is not relevant to the jail good time issue.

C. THE DEPARTMENT OF CORRECTIONS COMPLETELY MISSTATES THE HOLDING OF OUR COURTS WHEN CLAIMING IT HAS THE POWER TO TAKE AWAY JAIL AWARDED GOOD TIME.

The Department has continually argued that the Washington Supreme Court has rejected the claim that it must release an offender before his MXED. *In re Pers. Restraint of Mattson*, 166 Wn.2d 730, 214 P.3d 141 (2009). In support, it cites the federal court's decision in *Carver v. Lehman*, 558 F.3d 869 (9th Cir. 2009), which was cited with approval in *Mattson*. Examination of both holdings shows that neither case is on point.

Carver was an inmate who was required to have an approved address before he could be released on community custody. *Id.* at 871. His address was rejected pursuant to a policy developed and implemented by the Department because he apparently met the definition of a sexually violent predator and had been referred for possible civil commitment pursuant to RCW 71.09. *Id.* He filed a civil rights claim based upon violations of his due process rights. The Department filed for summary judgment based on a

lack of due process and qualified immunity. The trial court ruled that Washington law did not create a liberty interest in early release and as such, Carver had no due process right pursuant to the Fourteenth Amendment. It then ruled "that even if such a right existed, Lehman was entitle to qualified immunity." *Id.* These ruling were confirmed.

The holding of *Carver* is simply irrelevant to the issues before this Court. Mr. Blick has argued that his right to jail good time is statutory in nature and is based on sound public policy reasons, reasons that were ratified and continually approved by Washington courts. *See e.g. In re Pers. Restraint of Williams*, 121 Wn.2d 655, 853 P.2d 444 (1993); *State v. Donery*, 131 Wn. App. 667, 128 P.3d 1263 (2006); *In re Pers. Restraint of Erickson*, 146 Wn. App. 576, 191 P.3d 917 (2008); *In re Pers. Restraint of Talley*, 172 Wn.2d 642, 260 P.3d 868 (2011). He did not and has not argued he had a liberty interest in his jail good time.

Mattson has the same inherent problems as *Carver*. Based on the same type of policy imposed by the Department, the corrections officer did not examine the sixth plan submitted for investigation of Mattson's release plan. *Mattson*, 166 Wn.2d at 735. The *Mattson* Court, following the argument in *Carver*, ruled on whether or not the former RCW 9.94A.728(2) established a protected liberty interest giving rise to a due process claim. After examining liberty interests in Washington and the reasoning in *Carver,*

the *Mattson* Court overturned the Court of Appeals and held there was no liberty interest established. It held that "RCW 9.94A.728(2) grants sex offenders only the right to have DOC follow its own *legitimately* established policies regarding early release into community custody." *Id.* at 741 (emphasis added). It then proceeded to rule that the legislature granted the Department authority to determine the criteria for the release of sex offenders in the community prior to the expiration of their sentence. *Id.* at 743. What it never discusses is what it means by legitimately established policies.

Mr. Blick agrees that the Department has the right to follow its legitimately established policies. This is the crux of the matter – what is a legitimate policy. Relying on the proper statutory scheme creates legitimacy. However, the Department's failure to give full faith and credit to jail good time in its policies violates the separate but equal statutory scheme set forth by the legislature. The Department has failed to rely on the proper interpretation of the statutory scheme so its policies are illegitimate.

The Department is basically arguing that a sentence in this context is defined by the maximum sentence length, minus all possible good time whether earned in jail or in prison. But this is not what the legislature meant when it created two separate and equal good time statutes granting each agency having jurisdiction the authority to separately develop polices which

determine how good time is earned and taken away from individuals under their separate jurisdiction.

The Department has presented no evidence that the legislature was even considering jail good time when it imposed the approved address requirement of RCW 9.94A.729(5).

D. THE DEPARTMENT'S ARGUMENT THAT JAIL GOOD TIME IS ONLY TO PROVIDE AN EARLIER POTENTIAL RELEASE DATE IS NOT SUPPORTED BY STATUTORY INTERPRETATION.

In his opening brief, Mr. Blick addressed the statutory scheme in which this statute resides. He pointed out that statutes are not read in a vacuum and that any statute has to be read in conjunction with other statutes that address the same subject. In response, the Department has argued that there is no statutory exemption to the language of RCW 9.94A.729(5). Response, p. 4. The Department has failed to acknowledge that other statutes may have an offer on the interpretation of one statute if all the statutes address an issue common to all. Instead, it puts forth not a single complete statute but merely part of one to justify its argument. Not once in its response did the Department address the jurisdictional language in RCW 9.94A.729(1), ignoring the limitation on the powers of the agency. Not once in its response did the Department address the same jurisdictional language in RCW 9.92.151.

Our courts have been quite clear that statutes which have the same subject matter must be read and harmonized with each other. *Bour v. Johnson*, 122 Wn.2d 829, 835, 864 P.2d 384 (1993). They must be read as complementary and not conflicting. *Fray v. Spokane County*, 134 Wn.2d 637, 649, 952 P.2d 601 (1998) (citations omitted). Reading the two good time statutes as the Department would have this Court to do so would render the jurisdictional language irrelevant. It would also render any policies developed by the county jails pursuant to RCW 9.92.151 irrelevant.

Another critical point is that the Department's statutory interpretation of only RCW 9.94A.729(5) would render every case which has interpreted the interaction between the two good time statutes irrelevant. This is important because it is presumed that the legislature takes into account any prior judicial interpretations of a statute when passing amendments to that statute. *State v. Whitney*, 78 Wn. App. 506, 512, 897 P.2d 374 (1995). In this case, the failure to provide clear language that the Department need not consider the authority of county jails to control the taking away good time for those individuals who earned it while under their jurisdiction when taking away good time for the failure to obtain an approved address means that *Williams* and progeny are still good law.

One must also ask why the legislature chose to use the word jurisdiction in both statutes. Jurisdiction is a word that holds many means,

but in all cases, it is about the power of the subject to hear and decide matters. In terms of a court, it is the power of that "court to impose its judgment on the parties and subject matter of litigation." *Wimberly v. Caravello*, 136 Wn.App. 327, 336, 149 P.3d 402 (2006) (*citing* Black's Law Dictionary, 855 (7th ed.1999). In each statute, it is clear that by using the word jurisdiction, the legislature was granting sole authority to the agency having jurisdiction to determine how much good time the individual received and how much that individual then can lose. This must be the proper interpretation between the two statutes because to rule otherwise would render the word "jurisdiction" in RCW 9.92.151 superfluous; and such an interpretation is not permitted. If the legislature had intended to permit the Department to take away good time earned in the county jails pursuant to county jail policies, it would have changed the jurisdictional language.

E. THE DEFENDANTS' POSITION THAT MR. BLICK HAS NO STANDING IS WRONG.

The Department claims that since Mr. Blick's release date was not impacted by notification requirements or proposing a release address, he has no standing. This argument again misses the basis of the lawsuit – namely that any approved address or notification requirement had no effect on what date an individual must be released. Granted that Mr. Blick's failure to obtain an approved address kept him incarcerated until the Department had

to release him, when the Department had to release Mr. Blick is the controversy, not how he became subject to this requirement. For this reason, his failure to obtain an approved address or wait for community notification are only facts which explain why he was not release before his MXED. It does not explain why the Department was justified holding him to his MXED as opposed to releasing him on his MNED. Again, the Department is trying to conflate the issues.[4]

F. A NEGLIGENCE ACTION FOR ACTIONS BASED ON THE VIOLATION OF A STATUTORY DUTY CAN GO FORWARD.

The Defendants state that any claim for negligence cannot lie because this is a case, if there is one, of false imprisonment. Mr. Blick replies that because of the statutory duty imposed on the Secretaries of the Department of Corrections, negligence is an acceptable cause of action. Negligence, if alleged, requires four elements.

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[4]The Department cited to *Foster v. Washington*, 2011 WL 2692971 (W.D. Wash.), *affirmed*, 475 Fed. Appx. 241 (9th Cir. 2012) and *Dailey v. Washington*, 2012 WL 380272 (W.D. Wash.1, affirmed, 510 Fed. Appx. 505 (9th Cir. 2013) in support of its arguments. The *Dailey* case was solely about the notification statute and whether the Department was unlawfully holding inmates an extra five days so it is irrelevant. The Ninth Circuit's upholding of the lower court's ruling in *Foster* was based solely on the language of RCW 9.94A.729(5)(b) and did not address the argument presented showing that the two statutory good time schemes are separate and equal, supported by good public policy reasons.

> (1) there is a statutory or common-law rule that imposes a duty upon defendant to refrain from the complained-of conduct and that is designed to protect the plaintiff against harm of the general type; (2) the defendant's conduct violated the duty; and (3) there was a sufficiently close, actual, causal connection between defendant's conduct and [(4)] the actual damage suffered by plaintiff.

Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 932, 653 P.2d 280 (1982). When the Department, through its policies and procedures, promulgated by both Mr. Vail and Warner, caused Mr. Blick to lose his county jail good-time, it breached its duty to keep its "hands off" that good-time. Because of that breach, Mr. Blick spent an extra 52 days in prison.

The Defendants have cited several cases for the proposition that if any action should lie in this case, it should be for false imprisonment. In each of the cases cited, they all involved individuals where the actions taken by individuals were not in a supervisory position. *Housman* v. *Byrne,* 9 Wn.2d 560, 561-62, 115 P.2d 673 (1941) (false imprisonment of Housman); *Kellogg v. State,* 94 Wn. 2d 851, 856, 621 P.2d 133 (1980) (false arrest of *Kellogg*); *Bender v. City of Seattle,* 99 Wn.2d 582, 591, 664 P.2d 492 (1983) (false arrest of Bender); *Stalter v. State*, 151, Wn.2d 148, 153, 155, 86 P.3d 1159 (2004) (false arrest of Stalter); *Scott v. Uljanov*, 140 A.D.2d 830, 528 N.Y.S.2d 435,436 (1988) (unlawful confinement of); *Sell v. Price*, 527 F. Supp. 114, 116 (D. Ohio, 1981) (false confinement of Sell). Not one of these

cases involved the violation of a statutory duty incumbent upon the Secretary of the Department of Correction.

The secretary is under a statutory obligation to run the Department of Corrections, which must include implementation of all statutes which affect it. RCW 72.09.050. That was the duty of Mr. Vail and is now the duty of Mr. Warner. The actions of these two state actors and the employees that they supervise in interpreting RCWs 9.92.151, 9.94A.728 and .729 breached the duty to follow the law as established by the Legislature and the courts of Washington. For this reason, the negligence cause of action must stand.

G. NO INVALIDATION IS NECESSARY BECAUSE THE INJURY DID NOT REQUIRE INVALIDATION OF THE JUDGMENT AND SENTENCE.

Defendants argue that the Supreme Court's ruling in *Heck v. Humphrey* controls and Mr. Blick should have obtained a state court ruling invalidating his confinement before filing this lawsuit. *Heck v. Humphrey*, 512 U.S. 477, 114, S.Ct. 2364, 129 L.Ed.2d 383 (1994). Nothing could be further from the truth. He was not required to obtain a prior state court ruling before filing this lawsuit because there was no opportunity for Mr. Blick to challenge the 52-day confinement in state court.

Mr. Blick had no standing to challenge his restraint in state court either at the trial court level or in the appellate system in a timely fashion. Each requires that the individual be currently restrained of his liberty. State

habeas writs may be prosecuted by "[e]very person restrained of his liberty under any pretense whatever . . ." RCW 7.36.010. The problem is that once Mr. Blick had served the days that he alleges were wrongfully withheld, he was no longer restrained. At that point the case was moot because he was no longer being restrained of his liberty. Washington courts have stated that "[a] case is moot if a court can no longer provide effective relief." *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). An appeal is moot if a court can no longer provide effective relief. *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983).

Mr. Blick also would not be able to challenge using a Personal Restraint Petition because he was no longer under restraint. Before the Washington appellate courts can grant relief, a petitioner must be under restraint.

> A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

RAP 16.4(b). Such restraint ends when none of the requirements are met. Once Mr. Blick had been released from confinement, he no longer met the criteria, was not suffering from some other disability as a result of that confinement, and the case would have been moot.

The requirements to challenge in federal court continued unlawful incarceration comes from the statutory language of 28 U.S.C. § 2254(A):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

The Supreme Court has explicitly examined the "in custody" requirement pertaining to the habeas writ in several cases, defining in part what the jurisdictional requirement is. *See Melang v. Cook*, 490 U.S. 488, 109 S.Ct. 1923 104 L.Ed.2d 540 (1989) (*per curiam*); *Spencer v. Kemna*, 523 U.S. 1, 118 S.Ct. 978, 140 L. Ed. 2d 43 (1998). In *Cook*, the petitioner had not challenged his prior 1958 conviction, which expired in 1978. He was subsequently convicted of further state charges and the prior conviction was used to enhance his sentence. *Cook* filed a writ challenging the use of his 1958 conviction to enhance his "to be served" state sentence. At the time of filing the writ, he was serving time on several federal convictions. *Cook*, 490 U.S. at 489-90. The *Cook* Court stated the following:

> While we ultimately found that requirement satisfied as well, we rested that holding not on the collateral consequences of the conviction, but on the fact that the petitioner had been in physical custody under the challenged conviction at the time the petition was filed. The negative implication of this holding is, of course, that once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient

> to render an individual "in custody" for the purposes of a habeas attack upon it.

Cook, 490 U.S. at 490 (*citing Carafas v. LaVallee*, 391 U. S. 234, 238, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968)). Mr. Blick is not in custody to challenge his loss of good-time, thus the post conviction avenue is unavailable to him and he simply did not have a post-conviction avenue to challenge his loss of good-time when he filed suit.

The Ninth Circuit's jurisprudence supports this conclusion. *See Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002). In *Nonnette*, the plaintiff filed a lawsuit after his release alleging a violation of his constitutional rights because prison officials had "(1) miscalculated] his prison sentence and (2) revok[ed] 360 days of his good-time credits and impos[ed] 100 days of administrative segregation in a disciplinary proceeding without supporting evidence." *Id.* at 873. In response, the defendants filed a motion to dismiss because he had failed to seek invalidation under *Heck v. Humphrey*. *Id.* at 874. In response, *Nonnette* asserted that because he was no longer incarcerated, any requirement to challenge his disciplinary proceeding under Heck would be moot. *Id.* at 873. The *Nonnette* Court agreed.

> We see no relevant distinction between the collateral consequences attending parole revocation and those attending Nonnette's deprivation of good-time credits. We are satisfied, therefore, that if he now filed a petition for habeas corpus attacking the revocation of his good-time credits and the imposition of administrative segregation (as well as the

> administrative calculation of his release date), his petition would have to be dismissed for lack of a case or controversy because he has fully served the period of incarceration that he is attacking.

Id. at 876. Because no further remedy was available to Nonnette as required by *Heck* and its progeny, there was no case and controversy. *Nonnette*, 316 F.3d at 875-56. Because there was no case and controversy, and based upon the Supreme Court's ruling and language in *Spencer v. Kemna*, the *Nonnette* court concluded "*Heck* does not preclude Nonnette's § 1983 action."[5] *Id.* at 877. The *Nonnette* court directly referred to someone in Mr. Blick's situation when it said "[w]e also emphasize that our holding affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters . . ." *Id.* at 878 n.7. This action is governed by *Nonnette*.

The Defendants have argued that the decision in *Guerrero v. Gates* should be followed. 442 F.3d 697 (9th Cir. 2006).[6] *Guerrero*, however, is easily distinguishable. *Guerrero* brought suit based upon the facts of his original conviction. *Id.* at 702. The court made it clear that "Guerrero's

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[5]The *Nonnette* court cited to *Spencer*, 523 U.S. at 18; *quoting Spencer* at 19, 25 n. 8.

[6]*Guerrero* was decided in 2004 and was superceded by a second opinion in 2006, *Guerrero v. Gates*,442 F.3d 697. The relevant holding remains the same.

success on the majority of his § 1983 claims would necessarily imply the invalidity of his two convictions for possession of narcotics." *Id.* at 703. It concluded that "Guerrero's prior convictions have never been invalidated. We therefore hold that, with the exception of his excessive force claim, *Heck* bars Guerrero's § 1983 claims." *Id.* at 704. Here, the challenge to the Department's taking away good-time while holding Mr. Blick to his MXED has absolutely no effect on the original criminal conviction. Therefore, *Guerrero* is irrelevant.

Guerrero also acknowledged that, under certain circumstances, a plaintiff will not have the opportunity to challenge unlawful confinement due to the shortness of his prison sentence. *Id.* at 705 (*citing Nonnette*, 316 F.3d at 878, n. 6). In doing so, it acknowledged that the exception for timeliness in *Nonnette*.[7] There simply was not enough time for Mr. Blick or any other individual to bring a timely challenge to this issue in court before they would be released. Therefore, the holding of *Guerrero* can only be interpreted in

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[7]The *Guerrero* court also claimed that the *Nonnette* ruling was based on the timeliness of challenging, citing footnote 6. *Id.* at 705 (*citing Nonnette*, 316 F.3d at 877 n. 6). However, this interpretation is incorrect because the *Nonnette* court focused on the nature of the challenge (the disciplinary proceeding) and his standing (released) and not once mentioned timeliness as a contributing factor to its ruling. However, given the short time period for Mr. Blick or any class member to challenge their loss of good-time, this small point is not controlling.

favor of Mr. Blick – insufficient time to litigate negates the requirement of a post-conviction challenge.

The Defendants have cited several Washington cases for the proposition that Mr. Blick should have filed a challenge within the 52 days he was wrongfully held even though the it is virtually impossible to obtain redress in such a short time period. Three of the cases cited by the Defendants were mooted by the amount of time it takes to challenge wrongful imprisonment using a personal restraint petition ("PRP"). *See e.g. In re Pers. Restraint of Silas*, 135 Wn. App. 564, 145, P.3d 1219 (2006) (Silas was apparently released from prison approximately two years after filing the PRP); *In re Pers. Restraint of Bovan*, 157 Wn. App. 588, 238 P.3d 528 (2010) (Bovan was released from confinement six months after filing his PRP); and *Mattson*, 166 Wn.2d 730 (Mattson was released 22 months after initially filing his PRP). In all these cases, the individual was released months after filing the PRP and the cases still hadn't been heard. The final case involved filing a PRP after release in order to ask that the time already spent in custody before release be credited to his community custody. *In re Pers. Restraint of Knippling*, 144 Wn.App. 639, 183 P.3d 365 (2008). It was not a challenge to his incarceration like the prior three cases. For these reasons, this Court should find that Mr. Blick's lack of filing a post conviction challenge is not a barrier to this lawsuit.

H. THE DEFENDANTS ARE NOT ENTITLED TO IMMUNITY FOR THEIR ACTIONS.

1. The Defendants Are Not Entitled to Quasi-Judicial Immunity for Violating Their Statutory Authority Because There Was No Quasi-Judicial Act.

The Defendants finally paint this case as requiring quasi-judicial immunity for their setting, monitoring and enforcing supervision conditions of community custody, citing RCW 9.94A.704(11). This argument is a straw man because this case has nothing to do with supervision conditions of community custody, it has to do with taking away jail good time.[8] If the Department wrongly holds a prisoner past their ERD when the prisoner does not need to have an approved address, the Department can be liable for that action under tort.

It also has nothing to do with any function even approaching a judicial process. Either the Department must release individuals under their jurisdiction on their MNED (Mr. Blick's position) or they can be held until their MXED (the Defendants' position). Either way, there is no independent judgment call – it is strictly a matter of statutory interpretation that applies equally to all inmates under the Departments' jurisdiction.

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[8]The Defendants must bear the burden of showing their entitlement to absolute immunity. *Swift v. California*, 384 F.3d 1184 (9th Cir. 2004) (*citing Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432, 113 S.Ct. 2167, 124 L.Ed.2d 391 (1993)). However, they have failed to factually show they are entitled to it either through quasi-judicial or executive immunity.

The Defendants have tried to analogize this case to one where release determinations are made, hence the claim of quasi-judicial immunity. Appellee's Response, p. 17 (*citing Taggart v. State,* 118 Wn.2d 195, 206-208, 822 P.2d 243 (1992)). This analogy fails. It fails because there was no quasi-judicial action taken. Once the decision was made not to release Mr. Blick until he maxed out, there were no decisions to be made. The Department had previously decided that individuals like Mr. Blick would lose their jail good time and that was that.[9]

Taggart involved the issue of whether or not the Indeterminate Sentence Review Board was entitled to judicial immunity from suit by individuals who were injured by prisoners the Board had released. *Id.* at 198. In examining whether or not the Board had immunity, the *Taggart* Court focused on whether or not its actions were functionally comparable to a judicial action. *Id.* at 205-206. The critical factual difference between *Taggart* and this case is that here, there is no individualized decision-making governing release that is relevant to this case. Once the decision was made to deny Mr. Blick a release address, the rest of the events followed without

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[9]Because of Mr. Blick's status as a possible civil committee pursuant to RCW 71.09, no release addresses would be approved by the Department before his final release date. It is the proper final release date which is at issue before this Court, not the decision to deny Mr. Blick the approval of any release address.

any decision making. The Department is required to release inmates under its jurisdiction when their sentence has expired. RCW 9.94A.728. There simply was no quasi-judicial act which affected Mr. Blick's release date.

2. The Defendants Are Not Entitled to Discretionary Immunity Because There Was No Discretion Exercised.

The Defendants also argue that they are entitled to discretionary immunity based on the plain reading of Washington Statutes and the policy that implements them. As previously explained, once the decision to deny Mr. Blick a release address was made, there were no discretionary decisions on whether or not to credit his jail good time toward the maximum sentence length he would serve with the Department. But even if there had been such a decision, the Defendants would still not be entitled to discretionary immunity. *See McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 882 P.2d 157 (1994). In *McCluskey*, it was held that a governmental entity is immune from liability under the following conditions:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective?
>
> (2) Is the questioned act, omission, or decision essential to the realization of that policy . . . . as opposed to one which would not change the course or direction of the policy, program, or objective?
>
> (3) Does the act . . . require the exercise of basic policy evaluation, judgment and expertise on the part of the government agency involved?

(4) Does the governmental agency involved possess the requisite . . . authority . . .?

Id. at 12 (*citing King v. Seattle*, 84 Wn.2d 239, 245, 525 P.2d 228 (1974); *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 255, 407 P.2d 440 (1974)).[10] Under this four-part test, the Defendants are not entitled to discretionary immunity.

First, the act in question does not involve a basic governmental policy, program or objective. It involves statutory interpretation that does not provide executive discretion. RCW 9.92.151 provides no discretion to the Department, only to the county agency having jurisdiction, to develop procedures for reducing an inmate's sentence for good behavior and good performance. Second, because there is no justifiable policy, program or objective, the Department fails again. Third, there can be no evaluation. It is clearly established that when Washington courts have determined the proper interpretation of a statute, such an interpretation is binding not only on all the parties but on all individuals affected by the statute as either previously or subsequently interpreted. *In re Pers. Restraint of Smith*, 139 Wn.2d 199, 293, 986 P.2d 131 (1999). The Washington courts did so with

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[10]The multitude of cases cited by the Defendants need not be addressed because as discussed, there was no discretion involved in a situation involving statutory interpretation, especially after and the courts have interpreted the statute in question.

Williams and its progeny, and the Department must listen to this fundamental rule.[11] This then clearly establishes the forth prong as again failing. The Defendants never had the statutory authority to take away jail good-time for any reason. Therefore, they are not entitled to judicial or discretionary immunity for their failure to subtract Mr. Blick's good time earned while under the jurisdiction of the King County Jail.

IV. CONCLUSION

For the reasons stated above, Mr. Blick respectfully requests that this Court reverse the trial court's order dismissing his partial summary judgment motion. He would further request this Court grant his partial summary judgment motion and deny Respondent's summary judgment motion, and remand to the trial court for further proceedings.

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[11]The Supreme Court stated the following about the Department of Corrections:

> At the time DOC refused to apply *Mahrle* 's holding to the present petitioners, no published Washington appellate court decision other than *Mahrle* had addressed the issue there presented. *Mahrle*, therefore, was authoritative precedent and binding on DOC as a party thereto. Given these circumstances, we find DOC's actions here troubling. We have repeatedly stated it offends the rule of law when agencies of the state willfully ignore the decisions of our courts. Once again, we find it necessary to reiterate this fundamental point. *Id.* at 203 (*citing In re Pers. Restraint of Mahrle*, 88 Wn.App. 410, 945 P.2d 1142 (1997) (emphasis added, citations removed)).

DATED this 12th day of November, 2013.

Respectfully submitted,

MICHAEL C. KAHRS, WSBA #27085
Attorney for Appellant Richard Blick

CERTIFICATE OF SERVICE

I certify under the penalty of perjury under the laws of the State of Washington that on August 26, 2013, in Seattle, County of King, State of Washington, I deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

1. APPELLANT'S REPLY BRIEF

Daniel Judge, Rhonda Larson
Attorney General's Office
P.O. Box 40126
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By: _____ Date: 11/12/13
MICHAEL C. KAHRS