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.

RESPONSE BRIEF OF RESPONDENTS

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I. INTRODUCTION

Mr. Blick brings state claims, alleging the Department of Corrections ("Department") deprived him of his early release time received from the county jail because the Department did not transfer him to community custody before the end of his prison sentence, even though he admittedly did not obtain an approved release approved release plan, including an approved address. Mr. Blick's lawsuit is premised on his allegation that the Department has ignored or rescinded his early release time from the King County Jail.

But Mr. Blick fundamentally misunderstands the nature of early release time. It is not the same as credit for time served. Early release time or "good conduct time" does not automatically reduce an offender's sentence where that offender is required by law and his sentence to complete a term of community custody. Rather, it makes an offender *eligible* for transfer to community custody on an earlier date. Offenders must still obtain an approved release address before being transferred to community custody *in lieu* of earned early release, even if their earned early release time makes them eligible for an earlier transfer. Here, the Department did not transfer Mr. Blick on his earliest possible date. But it was not the Department's failure to recognize Mr. Blick's earned early release time that caused him to remain confined. Rather, the Department

acknowledged that Mr. Blick was *eligible* for early release based on both his time earned while at the King County Jail and his time earned while in the Department's custody. However, Mr. Blick remained confined because he failed to obtain an approved release plan. Because the premise of Mr. Blick's lawsuit is false, his tort claims must fail.

II. QUESTIONS PRESENTED

A. Mr. Blick did not transfer to community custody because he failed to obtain an address approved by the Department of Corrections on or before his prison maximum expiration date. Does such an allegation fail to state a tort claim under Washington law?

B. Mr. Blick's tort claims are based on his continued custody within the Department past his early release date, in the absence of any successful action taken by him in state court to invalidate his now-alleged unlawful imprisonment. Do such allegations fail to state a claim under state law?

C. Mr. Blick argues that Department officials should have taken a course of action that was precluded under his own judgment and sentence and Department policy based on clearly established case law and statute. Consequently, do judicial immunity and discretionary immunity bar Mr. Blick's claims?

III. STATEMENT OF THE CASE

A. Transfer Of Offenders To Community Custody In Lieu Of Earned Early Release

1. The Address Approval Statute

The statutes governing the transfer of an offender from total confinement to community custody prior to an offender's prison maximum expiration date are set forth in RCW 9.94A.728[1] and RCW 9.94A.729. Section .728 provides that "[n]o person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines or released prior to the expiration of the sentence except" under the terms of the statute. RCW 9.94A.728. One of the terms is through earned release time under RCW 9.94A.729. *See* RCW 9.94A.728(1).

In turn, RCW 9.94A.729(5), the address approval statute, authorizes the Department to transfer *all* offenders (who are sentenced to community custody) from their total confinement to community custody upon the Department's approval of each offender's release plan in the

[1] The Legislature has amended RCW 9.94A.728 several times over the past three years. The Legislature re-codified the provisions regarding jail early release credits and release address approval into a new statute. Sentencing Reform Act, 2010 Wash. Laws ch. 224 §7 (codified as amended at RCW 9.94A.729); 2009 Wash. Laws. ch. 455 § 3 (codified at RCW 9.94A.729). However, the language of those provisions remains virtually the same. *See* RCW 9.94A.729(1)(b) (jail certification); and RCW 9.94A.729(5) (the release address approval statute).

following manner, without distinguishing between offenders who received early release time from their jail incarceration and those who have not:

> (b) The department shall, as a part of its program for release to the community in lieu of earned release, require the offender to propose a release plan that includes an approved residence and living arrangement. *All offenders with community custody terms eligible for release to community custody in lieu of earned release shall provide an approved residence and living arrangement prior to release to the community*;
>
> (c) The department may deny transfer to community custody in lieu of earned release time if the department determines an offender's release plan, including proposed residence location and living arrangements, may violate the conditions of the sentence or conditions of supervision, place the offender at risk to violate the conditions of the sentence, place the offender at risk to reoffend, or present a risk to victim safety or community safety. The department's authority under this section is independent of any court-ordered condition of sentence or statutory provision regarding conditions for community custody;

RCW 9.94A.729(5) (emphasis added); *see* Appendix A (setting forth the full text of this sub-section).

No Washington statute permits the Department to exempt an offender from the requirements of RCW 9.94A.729(5) based on the offender's receipt of early release time from the county jail. No Washington statute directs the Department to release a community custody offender on his "county jail maximum release date" or his "MNED" (as

alleged by Mr. Blick) regardless of whether he has obtained an approved release address. *See* CP at 8-10.

Instead, the Legislature expressly directs the Department to include, as part of its same community custody transfer process, the early release time received by the offender from the county jail, as follows:

> Any program established pursuant to this section shall allow an offender to earn early release credits for presentence incarceration. If an offender is transferred from a county jail to the department, the administrator of a county jail facility shall certify to the department the amount of time spent in custody at the facility and the amount of earned release time. The department may approve a jail certification from a correctional agency that calculates earned release time based on the actual amount of confinement time served by the offender before sentencing when an erroneous calculation of confinement time served by the offender before sentencing appears on the judgment and sentence.

RCW 9.94A.729(b).[2]

The Department provides each prisoner (unless serving a life sentence) an early release date (ERD) soon after his or her arrival to prison. The ERD represents the earliest date in which an offender may transfer to community custody, provided: (1) the Department has approved his proposed release address as part of his release plan; and

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[2] The 2013 Legislature amended this portion of the statute, directing Department officials to adjust the offender's rate of early release so it is consistent "with the rate applicable in the department's facilities." Laws of 2013, ch. 14 § 2. "However, the department is not authorized to adjust the number of presentence early release days that the jail has certified as lost or not earned." *Id.*

(2) notification to victims and law enforcement has taken place under RCW 72.09.712 and Department policy. The ERD is calculated based on the early release time an offender has received both in jail and in prison. A prisoner's ERD is therefore different than his prison maximum expiration date, a date calculating his time of total confinement under his judgment and sentence, minus his credit for time actually served in the jail. A prisoner's maximum expiration date is the end of a prisoner's total confinement portion of his judgment and sentence. A Washington State prisoner receiving early release in jail, before he transfers from jail to prison, will have an earlier ERD than if he had not received early release time for his time in jail. Therefore, the prisoner can transfer on his earlier ERD if the Department has approved his release plan. CP at 174-75, 178.

2. Notification

Our Legislature, through RCW 72.09.712, directs correctional officials to give sufficient notification of an offender's transfer to community custody for offenders who were convicted of a violent offense, a sex offense, a domestic violence court order violation, or a felony harassment offense. RCW 72.09.712(1) and (2). This statute directs the Department of Corrections to release offenders not less than 30 days prior to having given notification of the impending release to the local

authorities and, when requested by them, to victims and witnesses. The statute directs the Department to notify law enforcement, victims, witnesses and others to provide notification of an offender's release "[a]t the earliest possible date, *and in no event later than thirty days before release* . . ., the department of corrections shall send written notice of parole, release, *community custody*, work release placement, furlough, or escape about a specific inmate convicted of a violent offense, a sex offense as defined by RCW 9.94A.030, . . . " RCW 72.09.712 (emphasis added); *see* Appendix B (setting forth the full text from this section).[3]

B. Mr. Blick Transferred To Community Custody On His Prison Maximum Expiration Date Because He Did Not Obtain An Approved Release Address

The police arrested Mr. Blick on June 1, 2000, prior to his felony sentencing by the King County Superior Court on April 6, 2001. Shortly after sentencing, he transferred to the Department of Corrections. He received credit for the time he served and the King County Jail certified his receipt of early release time while in the jail. Mr. Blick transferred from prison to community custody on his prison maximum expiration date. CP at 8-9.

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[3] The Legislature has amended this statute since January 1, 2008. However, the emphasized portions above (with one exception) have not been amended. *See* Wash. Laws of 2009, ch. 521 § 166; Wash. Laws of 2009, ch. 400 § 1; Wash. Laws of 2008, ch. 231 § 27 (changing "community placement" to "community custody"). Prior to 2008, the citation for this statute was RCW 9.94A.612.

Mr. Blick's judgment and sentence specifically required that he receive "prior approval for living arrangements and residence location." CP at 81. Mr. Blick is a Level 3 sex offender (CP at 153) convicted of two counts of second degree rape of a child (CP at 73). Mr. Blick's Department records, including his treatment and other records, document his extensive history of voyeurism, exhibitionism, masturbation in public, and repeated acts in which he forced himself on young females by his actions. He has maintained his sexual preoccupation for decades. Mr. Blick has a history of sexually offending dating back to the 1970s when was reported to have exposed or engaged in voyeurism on thousands of occasions. Mr. Blick self-reported that he would peek through windows. He also reported taking pictures of his penis and leaving it on car windows in grocery store parking lots. He also made hundreds of lewd telephone calls, randomly dialing numbers. He would also drive his car with the dome light on and expose himself while on the freeway. He also engaged in sex acts in public places. Mr. Blick spoke about being misogynistic and controlling, using his sexual exposure as a way to force himself on victims and overriding their rejection. CP at 153-54, 165, 170-71.

Mr. Blick transferred from total confinement to community custody on September 30, 2011. Although Mr. Blick's early release date

made him eligible for transfer to community custody earlier than that date, Mr. Blick failed to obtain an approved release address. CP at 153. The Department did not confine Mr. Blick past his prison term maximum expiration date. CP at 9.

As early as March 2010, in light of Mr. Blick's ERD of March 15, 2010, Mr. Blick's assigned Community Corrections Officer, Iris Peterson, reviewed and rejected Mr. Blick's proposed release addresses. As early as March 2010, Mr. Blick proposed a release plan, including an address to an apartment owned by a landlord who has taken sex offenders in as tenants. However, this landlord informed Ms. Peterson that he was not taking Level 3 sex offenders. Therefore, Ms. Peterson rejected this plan. CP at 153, 174.

Ms. Peterson also rejected a later proposal by Mr. Blick. Ms. Peterson conversed with Mr. Blick's Jewish Chaplain and friend, who suggested he live in the University District in Seattle. Ms. Peterson considered and rejected this suggestion because of: (1) Mr. Blick's sex offense history, including his two counts of rape involving young females; and (2) the number of college-age females residing and going to school in this area. CP at 153-55.

In anticipation of Mr. Blick's approaching prison maximum expiration date of September 30, 2011, and in the absence of release plan

approved by the Department, the Department completed its notification to law enforcement and to victims under its policy, DOC 390.600. CP at 232.

Although Mr. Blick's claims refer to notification requirements prior to release, he was admittedly not impacted by them. Mr. Blick admitted in his own complaint he was not impacted by community notification requirements because he never obtained an approved release address before his prison maximum expiration date. CP at 9 ("In the event his release address was approved, he would have been required to wait for 35 days for notification before release."). Nevertheless, Mr. Blick claimed negligence and false imprisonment relating to community notification, contending Department policy is in conflict with state law. CP at 7-8.

Before this action, Mr. Blick never challenged his custody in a Washington court through a personal restraint petition or other proceeding. CP at 235-236.

Mr. Blick alleged he "earned release credits while under the jurisdiction of a Washington State county jail in accordance with RCW 9.92.151." CP at 10. He also alleged that he is "subject to the requirement that his or her release address be approved by the Department prior to his or her release from custody in accordance with RCW 9.94A.729(5) . . . ." CP at 10. He also alleged he should have been

released on or by a date he refers to as his "county jail maximum release date" or "MNED," a date representing the number of county-earned early release time credits deducted from his prison maximum expiration date, resulting in the earlier date. CP at 8, 10.

Although Mr. Blick brought this matter as a class action, he never moved to certify the class.

IV. ARGUMENT

A. The Department Does Not Have A Duty To Transfer An Offender To Community Custody

A prisoner's receipt of early release time from the county jail does not affect the Department's discretion to approve or reject a release address; they are separate concepts. For example, an inmate can receive early release time from the jail, and then he can miss the opportunity to use that jail good time by failing to provide an approvable address to the Department. The Department's denial of his proposed release address does not equate with taking away his jail early release time. Regardless of where the early release time came from, the early release date provides only the opportunity for the offender to propose a release address as part of a release plan and for the Department, in its discretion, to approve or reject it.

1. Washington Law Gives The Department Discretion To Approve Proposed Release Plans For Community Custody; This Discretion Belies Any Tort Claim By Mr. Blick

Washington courts have rejected claims that the Department has a duty to transfer an offender to community custody before his maximum prison expiration date. *In re Mattson*, 166 Wn.2d 730, 214 P.3d 141 (2009) (citing with approval *Carver v. Lehman*, 558 F.3d 869 (9th Cir. 2009)). The *Mattson* court followed a federal court that rejected a claim that Washington's community custody statutes (as they were codified at the time the action arose) granted an offender a state-created liberty interest in the Department's discretionary approval of his proposed release address on or after his earned release date. The *Mattson* court rejected such claims under both state and federal grounds:

> Noting the statute's "classically permissive language," the Ninth Circuit held that RCW 9.94A.728(2) sets no requirements under which DOC *must* grant an offender's plan and does not create a liberty interest in release to community custody. *Id.* at 875. Citing *Cashaw* with approval, the Ninth Circuit held that the statute merely establishes procedural requirements and in effect "reserves discretion for DOC officials precisely so they may deny release plans of prisoners *like Carver* who remain threats to the community." *Id.* at 876 (emphasis added).
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> * * *
>
> *We hold 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.*

Mattson, 166 Wn.2d at 740 (quoting and citing *Carver*) (emphasis added).

The Washington Supreme Court in *Mattson* held that Washington law does not create any right of the inmate to receive conditional release, as an inmate does not have a right to community custody or to release before the expiration of a valid sentence. *Mattson*, 166 Wn.2d at 737.[4] The Supreme Court explained that "the statute does not create an expectation of release and cannot establish a liberty interest." *Mattson*, 166 Wn.2d at 740. An inmate's only right under the statute is the right to have the Department consider his proposed release plan. *Mattson*, 166 Wn.2d at 741. Nor is it the Department's duty to find an acceptable release plan. It is the inmate's obligation to do so, including proposing an acceptable release plans early enough before his prison maximum expiration date. *See In re Crowder*, 97 Wn. App. 598, 601, 985 P.2d 944 (1999).

Applying *Carver* and *Mattson*, a federal district court has recently rejected allegations similar to those made here (by Mr. Blick's counsel on behalf of another offender): "a prisoner has no constitutionally protected liberty interest in early release. A convicted person has no constitutional

[4] The Court in *Mattson* cited with approval the United States Supreme Court's decision that there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. *Mattson*, 166 Wn.2d at 737 (citing *Greenholtz v. Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979)).

right to be released before the expiration of his valid sentence." *Foster v. State,* 2011 WL 2692971 (W.D. Wash.), *affirmed*, 475 Fed. Appx. 241 (9th Cir. 2012).[5] *See* CP at 50-57. The district court also dismissed offender Todd Foster's state claims of false imprisonment and negligence for being "without merit" for similar reasons. *Foster*, 2011 WL 2692971 at *5; CP at 53 ("Plaintiffs false imprisonment claim requires him to establish that he had the right to be released early, which he has failed to do. . . . Plaintiffs negligence claims require him to show that the Department had a duty to release him early. He has not established that Defendants had this duty."). On appeal, the Ninth Circuit panel summarily affirmed the dismissal of Mr. Foster's claims because of the threshold reason that he had not even alleged (and did not contest the district court's conclusion to the contrary) that he proposed an address for his release, thereby negating any claim of causation supporting either a state or § 1983 claim. *Foster*, 475 Fed. Appx. 241 at **1; CP at 56 ("Plaintiffs failure to submit a valid application—and not any alleged miscalculation by Defendants of Plaintiffs early release date—was the

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[5] *See* Fed. R. App. P. 32.1 (permitting citation of unpublished federal decisions entered after January 1, 2007); GR 14.1 (allowing citation of unpublished decisions from other jurisdictions "if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. The party citing the opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.")

cause of Defendants' alleged failure to provide Plaintiff with release to community custody.") (state and federal citations omitted).

In yet another case (also brought by Mr. Blick's counsel on behalf of another offender), the federal district court also dismissed another similar set of claims under state and federal law seeking damages because an offender was transferred from total confinement to community custody after his early release date following community notification directed under Washington statute and Department policy. *Dailey v. Washington*, 2012 WL 380272 (W.D. Wash.), *affirmed*, 510 Fed. Appx. 505 (9th Cir. 2013). CP at 59-68. Again, the district court followed the holdings in *Carver*, *Mattson*, and also the district court's decision in *Foster*. The district court concluded Mr. Dailey had no federally protected interest in his transfer to community custody occurring on a particular date, especially under a Washington statute requiring that advance notification occur not later than thirty days before an offender's release from prison. *Dailey*, 2012 WL 380272 at *4; CP at 62-63 ("WDOC had the discretion to deny Mr. Daily's early release until such time as it had approved of his planned residence under RCW 9.94A.729(5)(b), and until such time as it had completed its community notice under RCW 72.09.712.") (citation omitted). Again, for similar reasons, the district court also dismissed Mr. Dailey's state claims of false imprisonment and negligence. *Dailey*,

2012 WL 380272 at *4; CP at 63 ("Mr. Dailey's negligence claim requires him to show that WDOC had a duty to release him early. Mr. Dailey has failed to establish any such duty. Likewise, Mr. Dailey's false imprisonment claim also requires that he establish that he had a right to early release. Mr. Dailey has failed to establish any such right.") (citation omitted). The Ninth Circuit summarily affirmed the district court's dismissal order of all claims, including the state claims for lack of a duty to release early. *Dailey*, 510 Fed. Appx. 505 at *1; CP at 67 (citing *Stalter v. State*, 151 Wn.2d 148, 155, 86 P.3d 1159, 1162 (2004)).

Here, Mr. Blick argues that *Mattson* is inapplicable because he is not asserting a constitutionally liberty interest, but merely a statutory one. Mr. Blick misses the central point of *Mattson* and these related decisions. *Mattson* specifically held that the statute does not mandate an offender's transfer to community custody before the maximum expiration date. As argued above, RCW 9.94A.729 does not create a duty enforceable by the inmate, nor does RCW 72.09.712, the statute requiring victim and witness notification. Both statutes aim at protecting the public—community safety and supervisability, as the Washington Supreme Court has described it. *Mattson*, 166 Wn.2d at 741-42 (lawfully sentenced inmates without a liberty interest in early release are not the class for whose special benefit the Department's obligation to approve release plans was intended); *see*

also Stalter, 151 Wn.2d at 160 ("the people of this State are entitled to the exercise of due care in the supervision of those who have been released.") (J. Chambers, concurring).

Here, RCW 9.94A.728 and RCW 9.94A.729 do not grant Mr. Blick a state-created interest in release from prison at any time, much less on any particular day, prior to the end of his sentence. On the contrary, Washington law creates the presumption that Mr. Blick would serve his complete sentence. *See* RCW 9.94A.728. "The statute prohibits early release absent existence of one of the statutory exceptions." *State v. Rogers*, 112 Wn.2d 180, 183, 770 P.2d 180 (1989). Washington law also squarely places the affirmative burden on Mr. Blick, and other offenders, to satisfy prison officials that the criteria for early transfer to community custody have been met. The first sentence of the pertinent statute reads:

> No person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except as follows . . .

RCW 9.94A.728. Currently, RCW 9.94A.728 also states that offenders who have been sentenced to a community custody term "may earn early release time as authorized by RCW 9.94A.729." RCW 9.94A.729(5)(c) states that the Department "may deny" transfer to community custody prior to the expiration of the offender's custody sentence if the

Department determines that the offender's release plan "may" violate the conditions of the sentence or conditions of supervision, place the offender at risk to violate the conditions of the sentence, place the offender at risk to reoffend, or present a risk to victim or community safety. RCW 9.94A.729(5)(c).

Because "may" is permissive, the Department is not compelled to accept a proposed release plan under the discretionary criteria of RCW 9.94A.729(5)(c). The Ninth Circuit in *Carver* took careful note of the highly discretionary nature of the former codification of the release address approval statute, commenting:

> Pursuant to that procedural mandate, the DOC has no discretion to decide *whether* or *when* to consider an offender for transfer to community custody, But Washington law places no substantive limitation on *how* the DOC is to make that determination. As noted above, section 9.94A.728(2)(d) enumerates four criteria for evaluating the transfer plan. The statute instructs that the DOC "may *deny* transfer to community custody if" one or more of those criteria are met. *Id.* (emphasis added). Far from setting forth "substantive predicates" under which the DOC *must* grant transfer, the statute is silent regarding even *precatory* criteria for granting transfer to community custody, specifying only when the DOC "may"-but need not -"deny."

Carver, 558 F.3d at 875 (citations, footnote, inner quotations omitted) (emphasis in original).

RCW 9.94A.729 provides guidance to the Department for determining the validity of an offender's release plan. When read in conjunction with the other statutes cited above, it is clear that RCW 9.94A.729 does not create a legitimate expectation that offenders will be released on their early release date, and therefore, this statute does not create a protected liberty interest in such release. *Mattson*, 166 Wn.2d at 740 (quoting and citing *Carver*).[6] RCW 9.94A.729(1)(b) expressly includes early release credits received from the county jails. RCW 9.94A.729(1)(b) requires the Department to develop a program to receive and certify both jail-earned time credits and actual time served by offenders in the jails. This section clearly distinguished time credits from actual time served. But nothing in this section compels or even allows the Department to formulate a mandatory release date (including a fictional "MNED") based on jail time credits for offenders who must transfer to community custody when those offenders have not obtained an approved

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[6] Also, our Supreme Court and the Ninth Circuit made clear that the statutes governing transfer to community custody provide full discretionary authority to the Department regarding its determination of *how* to make decisions concerning proposed release plans. *Carver,* 558 F.3d at 875; *Mattson*, 166 Wn. 2d at 740. Also, the statute does not prevent the Department from using other criteria, in conjunction with those enumerated in the statute, when determining whether or not to deny a proposed release plan. RCW 9.94A.729(5)(c). Nothing in the statute indicates that it contains a full and complete list of the criteria upon which the DOC may deny a transfer to community custody in lieu of early release. *Id.* Furthermore, due to the statute's broad language of release plan denial being based on "risk to victim safety or community safety," the statute contemplates that the Department will use its knowledge of the timing of victim and witness notifications in setting release dates. *Id.*

release address. Nothing excuses offenders from the address approval requirement because of the early release time earned from the county jail, as opposed to the prison.

Mr. Blick's Brief does not set forth any authority exempting him from the plain and unambiguous requirement of RCW 9.94A.728 that he must serve his complete sentence. Nor does he come forward with any statutory language or other authority exempting him from the clear and unambiguous statutory requirement of RCW 9.94A.729 that he obtain approval for his release plan for transfer to community custody occurring prior to his prison maximum expiration date.

The clear and unambiguous language of section .729 contradicts and defeats Mr. Blick's arguments under statutes and cases relating to early release time received from the jail. *See* RCW 72.09.729(5)(b) ("The department *shall*, as a part of its program for release to the community in lieu of earned release, *require the offender* to propose a release plan that includes an approved residence and living arrangement. *All offenders with community custody terms eligible for release to community custody in lieu of earned release shall* provide an approved residence and living arrangement prior to release to the community.") (emphasis added). A statute's clear and unambiguous language controls. *See Bowie v. Dept. of Revenue*, 171 Wn.2d 1, 10, 248 P.3d 504 (2011). A court need not

consider the legislative history of an unambiguous statute. *Carlsen v. Global Client Solutions*, 171 Wn.2d 486, 495, 256 P.3d 321 (2011).

Mr. Blick's arguments are also defeated by the laws governing sex offenders and offenders generally. Mr. Blick is a convicted sex offender; his own judgment and sentence specifically requires that he receive "prior approval for living arrangements and residence location." CP at 81. The pre-approved address requirement applies to all offenders whose offense date is on or after June 11, 1992. Also, it applies to sex offenders whose offense date is on or after July 1, 1988, but prior to June 11, 1992 if their judgment and sentence imposes the pre-approved address requirement. The pre-approved address requirement has been a mandatory condition of supervision for all offenders since June 11, 1992. *See* Laws of 1992, ch. 75, § 2; *see also* former RCW 9.94A.715(2)(a) (2000); former RCW 9.94A.120(9)(b) (1998); former RCW 9.94A.700(4)(e) (2000). Specifically, it was mandatory for the court to impose this condition at sentencing, unless the court affirmatively waived the condition. For sex offenders in particular, before the 1992 amendment, it had been an optional condition that courts could impose at sentencing since July 1, 1988. *See* Laws of 1988, ch. 153, § 2. The 1988 law with respect to sex offenders, and the 1992 law with respect to all offenders, gave the Department the authority to deny an offender's release address proposal if

the offender's crime was committed on or after the effective dates of those 1988 and 1992 amendments, as long as the condition was in their judgment and sentence.

Mr. Blick repeatedly references Washington law authorizing counties to award good time to inmates in their jails before they serve prison time in Department facilities, as many felon offenders in Washington State do. *See generally* Appellant Br. at 10-17 (discussing *State v. Donery*, 131 Wn. App. 667, 128 P.3d 1263 (2006); *In re Matter of Williams*, 121 Wn.2d 655, 853 P.2d 444 (1993); and other cases). But those cases address only the county's authority to grant or deny jail good time. None of those cases address the issue central in this case: the Department's discretion to reject a proposed release address when an offender is to be transferred from prison to community custody prior to his prison maximum expiration date. As discussed above, the prisoner's receipt of county early release time does not affect the Department's discretion to approve or reject a release address. As *Carver* and *Mattson* clearly explain, regardless of where the early release time came from, the early release date (made sooner because of early release time received by the offender) provides the opportunity for the offender to propose a release address as part of a release plan and for the Department, in its discretion, to approve or reject it. The early release date does not provide an

entitlement to release on any date prior to the end of a prisoner's sentence. *Carver*, 558 F.3d at 875; *Mattson*, 166 Wn.2d at 741.

Here, Mr. Blick cannot cite any statute or case law compelling the Department to approve proposed release addresses and complete the notification process so that an offender may be transferred to community custody on his early release date. Similarly, Mr. Blick provides no statute or case compelling the Department to approve proposed release addresses and complete the notification process on what Mr. Blick refers to as his "MNED." Here, Mr. Blick cannot point to anything under RCW 72.09.712, 9.94A.728, or 9.94A.729 that changes this legal landscape where notification to the community and to victims must occur **at least** before a certain period prior to such transfer. RCW 72.09.712(1). Instead, the statute simply states "no later than thirty days before release," creating a minimum period of time before which notice must be given. *Id.* There is no language in the statute that bars the Department from giving notification before a longer period of time. Thus, the Department's alleged policy of requiring at least 35 days for notification is within its statutory authority; Mr. Blick can complain of no violation of Washington law.

2. Mr. Blick Lacks Standing To Bring His Claims Because He Was Not Impacted By Notification Requirements And He Never Obtained An Approved Address

The standing doctrine prohibits a litigant from raising another's legal rights. *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 744 P.2d 1032 (1987) *amended* 109 Wn.2d 107, 750 P.2d 254 (1988), *appeal dismissed* 488 U.S. 805, 109 S. Ct. 35, 102 L. Ed. 2d 15 (1988). The Washington Supreme Court has established a two-part test to determine standing. The first part of the test asks "whether the interest sought to be protected is 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). The second part of the test considers whether the challenged action has caused "injury in fact," economic or otherwise, to the party seeking standing. *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d. 862, 866, 89 P.2d 401 (1978). Both tests must be met by the party seeking standing. *Grant Cnty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 802.

Here, Mr. Blick lacks standing to bring these claims in two clear respects. First his own complaint admitted he was not impacted by notification requirements. He alleges that "*[i]n the event his release address was approved,* he would have been required to wait for 35 days

for notification before release." CP at 9 (emphasis added). That allegation alleges neither injury nor anything within the zone of a legally-protected interest. Likewise, Mr. Blick was not convicted of a drug offense. Therefore, he could not have been injured by any statutory or policy requirement for 15 days notification. Nor did he allege that he was.

Second, Mr. Blick admitted, at the beginning of his own suit, his own inability to obtain a proposed release address, alleging he "was not able to obtain an approved address and was released to the community on his [maximum release date], September 30, 2011." CP at 9. Mr. Blick did not allege that the Department of Corrections ever approved his proposed address for release prior to his prison term maximum expiration date. But he proposed a release address as early as March 2010 under an ERD made earlier because of his jail early release time. CP at 153, 174-75. Nor did he allege that he was held past his prison term maximum expiration date. CP at 9. In short, he alleged that no individual did anything to him causing him a longer stay in prison. In *Foster*, the Ninth Circuit summarily dismissed the offender's claims for the same reasons where the same allegation had been made. *Foster*, 475 Fed. Appx. 241 at **1 ("Plaintiff's failure to submit a valid application—and not any alleged miscalculation by Defendants of Plaintiff's early release date—was the

cause of Defendants' alleged failure to provide Plaintiff with release to community custody.") (state and federal citations omitted).

3. Washington Law Precludes Mr. Blick's Claims Of Negligence And False Imprisonment

In order to establish a cause of action for negligence, the plaintiff must prove that a defendant (1) has a legal duty, (2) breached that duty, and (3) that breach proximately caused (4) and injury. *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991). The existence of duty is question of law for the court. *Stenger v. State*, 104 Wn. App. 393, 399, 16 P.3d 655 (2001).

Washington courts have treated claims relating to the intentional holding of inmates beyond their lawful release dates as lawful imprisonment claims, not as negligence claims.[7] For example, a jail is liable for false imprisonment if it holds an individual an unreasonable time after it is under a duty to release the individual. *See Stalter*, 151 Wn.2d at 155; *see also Housman v. Byrne*, 9 Wn.2d 560, 561-62, 115 P.2d 673 (1941) (holding that a person detained without authority has a cause of

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[7] A number of decisions distinguishing false imprisonment claims from negligence claims have arisen from disputes over the applicable statute of limitations. For false imprisonment claims in Washington State, the statute of limitations is two years. RCW 4.16.100(1). For negligence claims in Washington State, the statute of limitations is three years. RCW 4.16.080(2). Other courts have repeatedly rejected negligence claims regarding jail or prison detention that are really false imprisonment claims alleged to avoid the shorter limitations period. *See, e.g.*, *Sell v. Price*, 527 F. Supp. 114, 116 (D. Ohio, 1981); *Scott v. Uljanov*, 140 A.D.2d 830, 528 N.Y.S.2d 435, 436 (N.Y. App. Div. 3 1988).

action for false imprisonment against the detaining officer). "Unlawful imprisonment is the intentional confinement of another's person, unjustified under the circumstances." *Kellogg v. State*, 94 Wn.2d 851, 856, 621 P.2d 133 (1980). The "gist" of an action for this intentional tort "is the unlawful violation of a person's right of personal liberty or the restraint of that person without legal authority." *Bender v. City of Seattle*, 99 Wn.2d 582, 591, 664 P.2d 492 (1983). Mr. Blick's claims are for false imprisonment, not negligence. Consequently, under Washington law, his negligence claim should be dismissed.

If an imprisonment is enacted pursuant to a valid legal process and court sentence, it is not false imprisonment. *See e.g., Mundt v. United States*, 611 F.2d 1257, 1259 (9th Cir. 1980).

Here, the early release statute does not impose a duty on the Department or any of its employees to transfer a lawfully sentenced inmate to community custody – prior to his maximum prison expiration date – who has not obtained a Department-approved release address. That the Department transferred Mr. Blick to community custody on his maximum prison release date, in the absence of an approved release address, fails to state a claim for negligence or false imprisonment for lack of a duty. *See* CP at 9. As argued below, the Washington statutes do not compel the Department to transfer an offender to community custody as

alleged in this case. Consequently, Mr. Blick fails to state a claim for false imprisonment; the claim should be dismissed.

B. Mr. Blick Cannot Sue In Tort *Post Hoc* Alleging Invalid Confinement Without Invalidating His Confinement In State Court

These claims pertain to Mr. Blick's fact or duration of his confinement. In cases brought under 42 U.S.C. § 1983, courts apply the tort rule of "favorable termination" to a claim which relates to the validity of state confinement. *Heck v. Humphrey*, 512 U.S. 477, 479, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). Because a Washington court has not invalidated Mr. Blick's confinement, his claims would not be cognizable if they were brought under 42 U.S.C. § 1983. Here, the rule of favorable termination and *Heck* should apply with equal force to Mr. Blick's state claims.

In *Heck*, a prisoner in Indiana alleged that the defendants engaged in an unlawful, unreasonable and arbitrary investigation leading to his arrest, knowingly destroyed exculpatory evidence, and caused the use of an unlawful voice identification procedure at his trial. *Heck*, 512 U.S. at 479. Heck sought compensatory and punitive damages, but did not seek release from custody. *Id.* Although Heck did not directly seek release from confinement, the Supreme Court held that the complaint was not cognizable

under 42 U.S.C. § 1983, without a prior determination that the confinement was in fact invalid, concluding:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Heck, 512 U.S. at 487. Regardless of whether a plaintiff is directly seeking release from confinement, under *Heck*, if an injunctive or monetary judgment in favor of the plaintiff would necessarily imply that the confinement is invalid, the action is not cognizable absent a prior determination of invalidity of the confinement. *Id.*

Here, *Heck* and the favorable termination doctrine should apply to Mr. Blick's state claims. These claims are analogous to claims that have been brought under the Due Process clause, or even under the Eighth Amendment. *See, e.g.*, *Foster*, 2011 WL 2692971 at *1-2; CP at 50-52. Other state courts have applied *Heck* to state claims analogous to their § 1983 counterparts. *See Yount v. City of Sacramento*, 43 Cal. 4th 885, 902, 183 P.3d 471, 484, 76 Cal. Rptr. 3d 787, 801-02 (2008) (applying

Heck favorable termination to state battery cause of action) ("But we cannot think of a reason to distinguish between section 1983 and a state tort claim arising from the same alleged misconduct and, as stated above, the parties offer none."); *see also Scruggs v. Fort Wayne*, 829 N.E.2d 1049, 1051 (Ct. App. Ind. 2005) (rejecting prisoner's state claim for false imprisonment where the court had not invalidated his conviction) (quoting *Heck*); *Lieberman v. Liberty Healthcare Corp.*, 948 N.E.2d 1100, 1111 (Ct. App. Ill. 2007) (applying *Heck* to dismiss detainees' state malpractice claims against psychologists supporting civil sexually violent predator petitions) ("The *Heck* rule avoids parallel litigation—specifically, a collateral attack on an otherwise unchallenged judgment—and precludes the possibility of a successful tort action that would contravene strong judicial policy against the creation of two conflicting resolutions.") (citing *Yount* and *Scruggs*).

This Court should apply *Heck* to Mr. Blick's state claims because Mr. Blick has taken no action to invalidate the fact or duration of his confinement. Nor has he obtained any order granting him relief for the reasons that Mr. Blick contends. Consequently, this court should apply *Heck's* favorable termination principle and dismiss his state claims.

That Mr. Blick is no longer in Department custody does not change the analysis under *Heck*. Washington courts have repeatedly considered

restraint claims where inmates had been released but the court still decided to rule on the merits of their claims.[8] Because Mr. Blick could have made the same challenge in a personal restraint petition that he is making here but he made absolutely no effort to do so, this Court should not allow this matter to proceed as a claim for money damages under *Heck* and its progeny.

Favorable termination applies equally to those who could have challenged their confinement, but did not. In *Guerrero v. Gates*, 442 F.3d 697, 704 (9th Cir. 2004), the Ninth Circuit observed that the fact that Guerrero was no longer in custody and therefore could not overturn his convictions by means of habeas corpus did not impact the *Heck* bar to his action. *Id.* The court noted that although exceptions to *Heck's* bar may exist, as suggested by concurring members of the Supreme Court in *Spencer v. Kemna*, 523 U.S. 1, 19, 21, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998) (Souter, J., concurring), and in the Ninth Circuit's decision of

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[8] *See, e.g.*, *In re Personal Restraint Petition of Silas*, 135 Wn. App. 564, 145 P.3d 1219 (2006) (court considered inmate's challenge to denial of his request for 50 percent earned early release time despite that he had already finished serving his time and had been released from custody when he filed his personal restraint petition); *In re Bovan*, 157 Wn. App. 588, 238 P.3d 528 (2010) (court considered claim that inmate was entitled to credit toward unexpired term of his sentence following revocation of release to community custody, even though issue was technically moot because inmate was released); *In re Mattson*, 166 Wn.2d 730 (court considered inmate's address approval claim even though expiration of his maximum term technically rendered claim moot); *In re Knippling*, 144 Wn. App. 639, 183 P.3d 365 (2008) (after being resentenced to shorter sentence, which required immediate release, defendant filed personal restraint petition requesting credit against his term of community custody for extra 24 months of confinement he served before being resentenced; court granted his petition).

Nonnette v. Small, 316 F.3d 872, 876-77 (9th Cir. 2002), such exceptions were not applicable in *Guerrero*, 442 F.3d at 704 (emphasizing the timely pursuit of collateral relief where available).

C. The Department's Actions Are Protected By Immunity

1. The Department is Entitled To Judicial Immunity For Enforcing the Judgment and Sentence

The Department is entitled to quasi-judicial immunity for setting, monitoring, and enforcing supervision conditions on an offender's transfer to community custody because the Legislature has directed that the Department is performing a quasi-judicial function in doing so. *See* RCW 9.94A.704(11) ("In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.").

The common law doctrine of judicial immunity[9] removes the adjudicative function from liability in tort, thereby assuring that citizens have meaningful access to the courts and due process of law. *See*

[9] Courts have routinely held that immunity defenses are properly resolved at the earliest stage of the proceedings possible in order to avoid unnecessary litigation, including discovery. *See, e.g., Behrens v. Pelletier*, 516 U.S. 299, 308, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996); *Harlow v. Fitzgerald*, 457 U.S. 800, 817, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Whether the immunity asserted is sovereign immunity, legislative immunity, or governmental immunity, dismissal on the pleadings is appropriate if the issue can be decided as a matter of law. *See Siegert v. Gilley*, 500 U.S. 226, 231-33, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991) (noting that immunity is a threshold issue); *Mitchell v. Forsyth*, 472 U.S. 511, 528-29, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (noting that the applicability of immunity under the speech and debate clause is a question of law, even though its resolution entails consideration of the factual allegations that make up a plaintiff's claim for relief).

generally, Savage v. State, 127 Wn.2d 434, 899 P.2d 1270 (1995). Judicial immunity provides an absolute bar to liability under actions brought under 42 U.S.C. § 1983 and also to state law causes of action. *See Dennis v. Sparks,* 449 U.S. 24, 27, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980); *Adkins v. Clark Co.*, 105 Wn.2d 675, 717 P.2d 275 (1986).

It is those functions "closely associated with the judicial process" that are entitled to absolute immunity. *Cleavinger v. Saxner*, 474 U.S. 193, 200, 106 S. Ct. 496, 500, 88 L. Ed. 2d 507 (1985). In determining whether a governmental official is entitled to absolute immunity, courts apply a functional approach. *Buckley v. Fitzsimmons,* 509 U.S. 259, 269, 113 S. Ct. 2606, 2613, 125 L. Ed. 2d 209 (1993). That is, courts must look to "the nature of the function performed, not the identity of the actor who performed it." *Id.*

Our Supreme Court held that challenges to the decisions to release or regarding which conditions to set regarding offenders were protected under quasi-judicial immunity in *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992). In *Taggart*, the court held that decisions by the Indeterminate Sentence Review Board (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, the Department was enforcing a superior court judgment and sentence specifically requiring that Mr. Blick receive "prior approval for living arrangements and residence location." CP at 81. In such capacity, the Department was an arm of the sentencing court, just like the ISRB was in *Taggart*. Mr. Blick is suing the Department and its personnel for carrying out the prison sentence ordered by the sentencing judge. The Department was obligated by law to enforce the superior court sentence entered against him under RCW 72.09.728 where no legal authority permitted the Department to transfer Mr. Blick at an earlier time. *Id.* ("[n]o person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines or released prior to the expiration of the sentence except" under the terms of the statute).

Under RCW 9.94A.704(11) and *Taggart*, the decision to transfer an offender to community custody and under what conditions is a quasi-judicial function. The Department's decision to transfer an offender to community custody under RCW 9.94A.728 and .729 is the functional

equivalent of the Board's decision to parole, at issue in *Taggart*. Therefore, absolute quasi-judicial immunity bars Mr. Blick's claims because his claims are related to whether and under what circumstances an offender like himself could be transferred to community custody.

2. The Department Is Entitled To Discretionary Immunity Because Mr. Blick's Allegedly Required Actions Would Be Barred By Statute And Department Policy

Courts have long recognized that "it is not a tort for government to govern," so when the government is sued, "it is necessary to determine where, in the area of governmental processes, orthodox tort liability stops and the act of governing begins." *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 253, 407 P.2d 440 (1965).

A four-part test is used to determine whether acts or decisions fall within the scope of discretionary executive functions that are not subject to liability in tort:

> (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 or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
> . . .
> (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and

duty to do or make the challenged act, omission, or decision?

Evangelical, 67 Wn.2d at 255. In addition, "the action or decision at issue must actually have been considered and reasoned in order to be entitled to immunity." *McCluskey v. Handorff-Sherman*, 125 Wn.2d 1, 12, 882 P.2d 157 (1994). Application of this test ordinarily is a question of law. *Evangelical*, 67 Wn.2d at 253.

In *Evangelical*, the challenged decision was the choice of placing a juvenile delinquent in the "open program" at Green Hill School, rather than placing him in a more secure environment. *Evangelical,* 67 Wn.2d at 257. The court concluded that this individual placement decision "necessarily require[d] that a proper balance be struck between therapy and security" and called for "the exercise of executive expertise, evaluation and judgment in an area involving many variable human, emotional and psychological factors and about which widely divergent opinions can and do exist." *Id.* at 258. Therefore, the court held that the discretionary individual placement decision crossed the line where orthodox tort liability stops and was "within the framework of necessary executive and administrative processes of government" that precludes tort liability. *Id.* at 259.

Washington courts have extended discretionary immunity to many contexts. *See Eldredge v. Kamp Kachess*, 90 Wn.2d 402, 407-08, 583 P.2d 626 (1978) (DSHS decision to place three dependent children in a group care facility); *Cougar Business Owners Ass'n v. State*, 97 Wn.2d 466, 472, 647 P.2d 481 (1982) (executive branch decisions regarding restricted zones around Mount St. Helens before its eruption); *Bergh v. State*, 21 Wn. App. 393, 585 P.2d 805 (1978) (fisheries decisions about when and to what extent to set harvest limits on salmon fishing); *Stewart v. State*, 92 Wn.2d 285, 294, 597 P.2d 101 (1979); *Jenson v. Scribner*, 57 Wn. App. 478, 481-82, 789 P.2d 306 (1990) (transportation decisions about whether and where to build roads, including budgetary decisions regarding priorities for highway improvements); *Loger v. Washington Timber Prods., Inc.,* 8 Wn. App. 921, 928-31, 509 P.2d 1009 (1973) (labor and industries safety inspections for workplace hazards).

Washington cases rejecting the defense of discretionary immunity pertained to decisions generally deemed to be operational at the field level, not the executive level. *See Chambers-Castanes v. King Cnty.*, 100 Wn.2d 275, 282-83, 669 P.2d 451 (1983) (building permits); *Petersen v. State*, 100 Wn.2d 421, 434-35, 671 P.2d 230 (1983) (release of psychiatric patients from state mental hospitals); and *Emsley v. Army Nat'l Guard*,

106 Wn.2d 474, 480-81, 722 P.2d 1299 (1986) (how National Guardsmen safely and effectively fire artillery).

Parole board decisions to release a prisoner and put him or her on parole also are discretionary governmental decisions exempt from liability. *Noonan v. State*, 53 Wn. App. 558, 562-65, 769 P.2d 313, *review denied*, 112 Wn.2d 1027 (1989), *implicit overruling on other grounds recognized in Joyce v. State*, 155 Wn.2d 306, 317 n. 2, 119 P.3d 825 (2005). *See also Taggart*, 118 Wn.2d at 203-07 (parole board decisions are also entitled to quasi-judicial immunity).

Here, Defendants are entitled to discretionary immunity. The Department's decisions and actions in this case relied on years of policy and practice, confirmed by a number of recent federal and state decisions. No Department official had the authority to transfer Mr. Blick to community custody, without an approved release address, before his prison maximum expiration date. Plaintiff bases his claims for damages on a requested major sea change to existing Department policy. Such policy is based on the Department's sound reliance on the same statutory language argued above. Therefore, if this Court accepted Mr. Blick's arguments, the Department is still entitled to discretionary immunity against Mr. Blick's claims for damages. This includes the Department's non-recognition of what Mr. Blick refers to as his MNED, much less a

recognized date in which the prisoner must be transferred to community custody prior to his prison maximum expiration date. Instead, Department policy and rules require that prisoners serve their entire sentence in the absence of: (1) Department approval of a prisoner's proposed release plan; and (2) compliance with notification requirements before transfer to community custody. CP at 153, 155, 174-75, 178-79, 232-33.

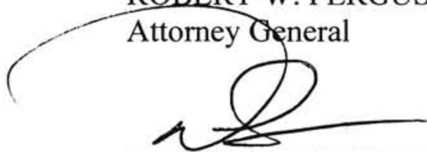
The Department's decision at issue in this case is the functional equivalent of the decision at issue in *Noonan*. The Department's non-recognition of Mr. Blick's fictional MNED is not unique to Mr. Blick. Neither the statutes nor the rules in WAC 137-20 regarding transfer to community custody recognize a date by which the Department must transfer a prisoner to community custody other than the prison maximum expiration date. There is no MNED, in statute, rule, or in policy. An offender receiving early release time from jail as well as from prison is given an earlier opportunity to propose a release plan for approval by the Department. No Washington case has held differently. No statute, rule or policy compels a different result. The Department and its officials have committed itself to these certainties as a matter of policy, entitling them to protection under discretionary immunity.

V. CONCLUSION

For all of the foregoing reasons, the Department respectfully requests that this Court affirm the superior court's dismissal of this action, including under RAP 18.14.

RESPECTFULLY SUBMITTED this 14th day of October, 2013.

ROBERT W. FERGUSON
Attorney General



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Appendix A -- RCW 9.94A.729(5)

RCW 9.94A.729(5) governs the Department's transfer of an offender in lieu of earned early release as follows:

> (a) A person who is eligible for earned early release as provided in this section and who will be supervised by the department pursuant to RCW 9.94A.501 or 9.94A.5011, shall be transferred to community custody in lieu of earned release time;
>
> *(b) The department shall, as a part of its program for release to the community in lieu of earned release, require the offender to propose a release plan that includes an approved residence and living arrangement. All offenders with community custody terms eligible for release to community custody in lieu of earned release shall provide an approved residence and living arrangement prior to release to the community;*
>
> *(c) The department may deny transfer to community custody in lieu of earned release time if the department determines an offender's release plan, including proposed residence location and living arrangements, may violate the conditions of the sentence or conditions of supervision, place the offender at risk to violate the conditions of the sentence, place the offender at risk to reoffend, or present a risk to victim safety or community safety. The department's authority under this section is independent of any court-ordered condition of sentence or statutory provision regarding conditions for community custody;*
>
> (d) If the department is unable to approve the offender's release plan, the department **may** do one or more of the following:
>
> (i) Transfer an offender to partial confinement in lieu of earned early release for a period not to exceed three months. The three months in partial confinement is in addition to that portion of the offender's term of confinement that may be served in partial confinement as provided in RCW 9.94A.728(5);
>
> (ii) Provide rental vouchers to the offender for a period not to exceed three months if rental assistance will result in an approved release plan. The voucher must be provided in conjunction with additional transition support programming or services that enable an offender to participate in services including, but not

limited to, substance abuse treatment, mental health treatment, sex offender treatment, educational programming, or employment programming;

RCW 9.94A.729(5) (emphasis added).

Appendix B – RCW 72.09.712

RCW 72.09.712 directs the Department to provide notification to local law enforcement, victims, witnesses, and others as follows:

(1) At the earliest possible date, *and in no event later than thirty days before release except in the event of escape or emergency furloughs* as defined in RCW 72.66.010, the department of corrections shall send written notice of parole, release, *community custody*, work release placement, furlough, or escape about a specific inmate convicted of a violent offense, a sex offense as defined by RCW 9.94A.030, a domestic violence court order violation pursuant to RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.50.110, 26.52.070, or 74.34.145, or a felony harassment offense as defined by RCW 9A.46.060 or 9A.46.110, to the following:

(a) The chief of police of the city, if any, in which the inmate will reside or in which placement will be made in a work release program; and

(b) The sheriff of the county in which the inmate will reside or in which placement will be made in a work release program.

The sheriff of the county where the offender was convicted shall be notified if the department does not know where the offender will reside. The department shall notify the state patrol of the release of all sex offenders, and that information shall be placed in the Washington crime information center for dissemination to all law enforcement.

(2) The same notice as required by subsection (1) of this section shall be sent to the following if such notice has been requested in writing about a specific inmate convicted of a violent offense, a sex offense as defined by RCW 9.94A.030, a domestic violence court order violation pursuant to RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.50.110, 26.52.070, or 74.34.145, or a felony harassment offense as defined by RCW 9A.46.060 or 9A.46.110:

(a) The victim of the crime for which the inmate was convicted or the victim's next of kin if the crime was a homicide;

(b) Any witnesses who testified against the inmate in any court proceedings involving the violent offense;

(c) Any person specified in writing by the prosecuting attorney; and

(d) Any person who requests such notice about a specific inmate convicted of a sex offense as defined by RCW 9.94A.030 from the department of corrections at least sixty days prior to the expected release date of the offender.

Information regarding victims, next of kin, or witnesses requesting the notice, information regarding any other person specified in writing by the prosecuting attorney to receive the notice, and the notice are confidential and shall not be available to the inmate. Whenever the department of corrections mails notice pursuant to this subsection and the notice is returned as undeliverable, the department shall attempt alternative methods of notification, including a telephone call to the person's last known telephone number.

(3) The existence of the notice requirements contained in subsections (1) and (2) of this section shall not require an extension of the release date in the event that the release plan changes after notification.

(4) If an inmate convicted of a violent offense, a sex offense as defined by RCW 9.94A.030, a domestic violence court order violation pursuant to RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.50.110, 26.52.070, or 74.34.145, or a felony harassment offense as defined by RCW 9A.46.060 or 9A.46.110, escapes from a correctional facility, the department of corrections shall immediately notify, by the most reasonable and expedient means available, the chief of police of the city and the sheriff of the county in which the inmate resided immediately before the inmate's arrest and conviction. If previously requested, the department shall also notify the witnesses and the victim of the crime for which the inmate was convicted or the victim's next of kin if the crime was a homicide. If the inmate is recaptured, the department shall send notice to the persons designated in this subsection as soon as possible but in no event later than two working days after the department learns of such recapture.

(5) If the victim, the victim's next of kin, or any witness is under the age of sixteen, the notice required by this section shall be sent to the parents or legal guardian of the child.

(6) The department of corrections shall send the notices required by this chapter to the last address provided to the department by the requesting party. The requesting party shall furnish the department with a current address.

(7) The department of corrections shall keep, for a minimum of two years following the release of an inmate, the following:

(a) A document signed by an individual as proof that that person is registered in the victim or witness notification program; and

(b) A receipt showing that an individual registered in the victim or witness notification program was mailed a notice, at the individual's last known address, upon the release or movement of an inmate.

(8) For purposes of this section the following terms have the following meanings:

(a) "Violent offense" means a violent offense under RCW 9.94A.030;

(b) "Next of kin" means a person's spouse, state registered domestic partner, parents, siblings and children.

RCW 72.09.712 (emphasis added).

PROOF OF SERVICE

I certify that I filed with the Court of Appeals, Division I, and served a copy of this document on all parties or their counsel of record on the date below as follows:

☒US Mail Postage Prepaid via Consolidated Mail Service

Michael C. Kahrs, Attorney
5215 Ballard Ave., NW, Suite #2
Seattle, WA 98107

☐ABC/Legal Messenger

☐State Campus Delivery

☐Hand delivered by ____________________

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 14th day of October, 2013, at Tumwater, WA.

Linda K. Harrison
____