NO. 951543

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES D. MOCK, DANELLE BAME, on behalf of minor child J.B. (DOB 06/09/01) and LINDA and TOM RYAN, a married couple,

Appellants,

v.

THE STATE OF WASHINGTON, by and through its DEPARTMENT OF CORRECTIONS, STATE OF WASHINGTON,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW AND CONTINGENT CROSS PETITION

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I. INTRODUCTION

This case does not involve a decision of the Court of Appeals that conflicts with either a decision of this Court or with a published decision of the Court of Appeals. RAP 13.4(b)(1) and (2). It also does not present a significant question of constitutional law or an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(3) and (4). The trial court granted summary judgment to Respondent Department of Corrections (DOC) based on settled law holding that a "probation officer's responsibility is to carry out the orders of the court after a defendant has been sentenced. It is not to second-guess a court's sentence." *Bishop v. Miche*, 88 Wn. App. 70, 80-81, 943 P.2d 706 (1997), *rev'd on other grounds*, 137 Wn.2d 518, 973 P.2d 465 (1999). "[A supervising agency] may not be sued because of a mistake in sentencing." *Id.*

The theory of negligent supervision does not apply to claims that a sentencing court erred in granting a sentencing alternative. Rather, it applies to DOC's administrative duty to enforce the court's conditions of supervision. As this Court stated in reviewing *Bishop*, "any claimed negligence resulting from the probation officer's failure to do anything about [an offender's] fraudulent representations to the sentencing court is protected by quasi-judicial immunity." *Bishop*, 137 Wn.2d at 532 n.3.

While DOC does not support review, if this Court accepts review it should also review and correct the Court of Appeals' flawed analysis regarding the application of quasi-judicial immunity. The court erroneously stated that quasi-judicial immunity does not apply to discretionary decisions to refrain from taking an action, but applies to discretionary decisions to take an action. *Mock v. State*, 200 Wn. App. 667, 675, 403 P.3d 102 (2017). This ignores the functional analysis required for the application of quasi-judicial immunity and opens DOC to claims of negligent supervision where it declines to impose any condition in the full array of possible additional conditions of supervision. It also conflicts with decisions from this Court and the Court of Appeals and presents an issue of substantial public interest.

II. NATURE OF CASE AND DECISION

This case arises out of crimes committed by John McKay on October 27, 2012. McKay shot Petitioners James Mock and Linda Ryan and kidnapped Petitioner J.B. while McKay was awaiting an inpatient bed date during community supervision by DOC. This case does not involve a claim of negligent supervision *per se*, however, as Petitioners admit there is no evidence DOC was grossly negligent in supervising McKay's conditions.

DOC moved for summary judgment on three grounds.[1] First, Petitioners presented no evidence DOC was grossly negligent in supervising McKay's conditions of supervision.[2] To the contrary, DOC's supervision was exemplary following McKay's court-ordered September 28, 2012 release. CP at 1368:7-22. McKay had no violations of the court's conditions for which DOC could have arrested him, much less for which DOC could have sanctioned him with incarceration through the date of his crimes against Petitioners.[3] CP at 1376:22-1378:1; 1162-63.

DOC's Community Correction Officers (CCOs) met face-to-face with McKay 21 times in 27 days, far exceeding the CCO-offender contact requirements set forth by DOC policy.[4] CP at 1368:7-22; 1374:4-18. McKay's CCOs also conducted a home visit, spoke with McKay's parents, performed five tests for alcohol consumption on McKay (all of which were negative), and verified his attendance at his support meetings.[5] McKay fully satisfied his conditions of supervision.[6] CP at 1154-59.

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[1] Appendix 1 to Petitioner's Statement of Grounds for Direct Review.

[2] Appendix 1, p. 27:1-17.

[3] Appendix 1, pp. 27:17-28:7.

[4] *See* Appendix 2, pp. 13-18, ¶¶77-111. DOC policy regarding contacts with offenders having McKay's risk assessment scores requires the CCO to see the offender once a month in the office, once every three months in the field, with one collateral contact. *Id.*, pp.17-18, ¶103. CCOs met McKay nearly 20 times more often than DOC required.

[5] *Id.*

[6] Appendix 3, p. 2, ¶¶6-12.

Second, DOC was entitled to quasi-judicial immunity, because Petitioners' sole theory was that the trial court erred in issuing McKay's criminal sentence. DOC had no duty to attend the court's sentencing.

Third, DOC fully met its duty to supervise McKay by monitoring and enforcing his conditions of supervision and imposing the maximum penalty for his known violations following a sanctions hearing.

Petitioners criticize the sentencing court's discretionary decision to release McKay into the community, arguing the court failed to appreciate the danger he posed. Petitioners then claim DOC is responsible for the court's decision, because DOC did not ensure the court appreciated that risk.

However, when McKay committed the malicious mischief crime for which he was sentenced, he was already on community supervision following a May 2012 conviction for felony harassment.[7] On July 9, 2012, McKay drank alcohol in violation of the conditions of supervision from his first felony conviction, then damaged the garage and cars belonging to family friends. Following that incident, law enforcement arrested McKay and referred him for prosecution for felony malicious mischief.[8] CP at 563-

[7] Appendix 2, p. 9, ¶53. Petitioners do not challenge DOC's supervision during this period of community custody either. Again, DOC regularly met with McKay, tested him for alcohol use, and referred him to services. App. 2, pp. 4-9, ¶¶ 23-52.

[8] Appendix 2, p. 9, ¶53.

65. DOC separately initiated a community custody sanction proceeding.[9] McKay's CCO also informed DOC's hearings officer of an incident occurring a week before the arrest, in which McKay damaged his own house.[10] CP at 563-65. On July 24, 2012, DOC imposed the maximum sanction of 30 days incarceration.[11] CP at 563-65.

DOC forwarded all the information it possessed to law enforcement and to the King County Prosecutor.[12] Fifty days after DOC imposed the maximum penalty for violating his conditions of supervision, McKay pleaded guilty to a new felony conviction for Malicious Mischief with an aggravating factor of rapid recidivism.[13] CP at 1162. In the plea deal, the King County Prosecutor stipulated to facts set forth in the probable cause statement, which did not include the information provided by DOC.

On September 28, 2012, the sentencing court granted McKay's request for a residential Drug Offender Sentencing Alternative (DOSA) and

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[9] Appendix 2, pp. 10-11, ¶¶59-64. DOC reported the information contained in the diagram on Petitioners' Statement of Grounds to the DOC hearing officer, with the exception of a possible violation of a no-contact order. The CCO did not include that information because it would not have altered the maximum possible sanction. Appendix 2, pp. 11-12, ¶¶65-67.

[10] Appendix 2, pp.7-8 ¶¶43-44. The CCO determined he did not have probable cause to sanction McKay for this potential violation because it was not witnessed, but he did report it to the DOC hearing officer for consideration.

[11] Appendix 2, p. 12, ¶68; RCW 9.94A.633(1).

[12] Appendix 2, p. 9, ¶¶53-55, p. 11, ¶66. This included McKay's possible violation of a no-contact order, an incident in which McKay damaged his own home, the CCO's opinion regarding McKay's adjustment to supervision, and the CCO's guess about whether McKay would be arrested.

[13] Appendix 2, p.12, ¶70-71. McKay was still being held in pre-trial detention because he could not make bail.

released him into the community until the next available inpatient bed date.[14] CP at 1164. DOC did not attend McKay's sentencing hearing.[15] CP at 1159. The sentencing court had a statutory mechanism to solicit DOC's recommendation, but did not use it. Had the sentencing court requested the input of McKay's CCO, the CCO would have recommended the very same sentencing alternative the court in fact ordered.[16] CP at 1809.

On Friday, October 26, 2012, McKay dined with his sister at a Renton Taco Time.[17] CP at 1115. As they left the restaurant, McKay saw his estranged wife across the street, dressed as if she were going on a date.[18] CP at 1115. The next day, he stole guns from his nephew, broke into his wife's home, and committed the crimes underlying Petitioners' claims.[19] CP 1115-16; 1312-13. On these facts, Petitioners cannot prove DOC was negligent, much less grossly negligent.[20] Petitioners' have admitted this.

Although Petitioners assert McKay was a dangerous, homicidal, domestic-violence offender, he displayed no behaviors suggesting continued violence during the month of October 2012.[21] CP at 1863-71.

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[14] Appendix 2, p.12, ¶72.

[15] Appendix 2, p.13, ¶73.

[16] Appendix 2, p.13, ¶¶73-74. DOC believed a DOSA sentence would provide the structure McKay needed.

[17] Appendix 3, p. 3, ¶¶16-23.

[18] *Id*.

[19] *Id*. at p. 3, ¶¶22-23.

[20] *See* RCW 72.09.320 (gross negligence standard for community supervision).

[21] Although illustrative of the dangers of domestic violence, this case does not involve a failure to appreciate those dangers. *See e.g*. Appendix 2, pp. 5-6, ¶¶29-30 (CCO

DOC was aware of the dangers posed by domestic violence offenders, but McKay's CCOs could only arrest him if he violated the court's conditions of supervision. In short, McKay's crimes were the result of a chance encounter that was not preventable by any level of supervision.

III. COUNTER STATEMENT OF THE ISSUE

Where Petitioners concede there is no evidence DOC's supervision of McKay was grossly negligent, and where the trial court applied settled law to hold DOC is not liable for a sentencing court's exercise of judicial discretion, did the trial court err in granting DOC summary judgment?

IV. REASONS DIRECT REVIEW SHOULD BE DENIED

A. The Trial Court Followed Precedent In Concluding DOC's Statutory Duty Did Not Apply To Sentencing Proceedings

Washington's courts have consistently held that DOC's duty to supervise offenders on community supervision is a statutory duty, not a common law duty. *Taggart v. State*, 118 Wn.2d 195, 224, 822 P.2d 243 (1992) (negligent supervision cause of action applies where an officer "failed to perform *a statutory duty* according to the procedures dictated *by statute* and superiors.") The cases Petitioners cite as recognizing a duty to

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contacted victim liaison program within 26 minutes of receiving the file). McKay was separated from his wife, who had received victim services both from DOC and King County and was living in a location unknown to McKay. McKay complied with the court's orders and gave every appearance of preparing to benefit from entering treatment. Meanwhile, DOC supervised him as closely as possible, meeting him every business day.

report to a court as part of supervision do not advance their claim in any way; those cases were statute-based too, because in each instance, DOC was directed by statute to sanction the offender via a court process.

In *Hertog v. City of Seattle*, 138 Wn.2d 265, 279, 797 P.2d 400 (1999), this Court concluded that because the probation statute authorized probation officers to initiate proceedings to revoke parole by filing a report asking for it, supervision included a duty to ask for revocation. *Id*. In *Joyce v. State*, 155 Wn.2d 306, 316-317, 119 P.3d 825 (2005), this Court turned to a statutory analysis to determine whether that duty arose under the Offender Accountability Act. The *Joyce* court determined that where the statute directed DOC to file a violation report with the court to seek sanctions, the duty to supervise included making such a report. *Id.* at 311.

Washington's appellate courts have also looked to statutes to define the contours of the negligent supervision cause of action. *See, e.g., Hustad v. State*, 187 Wn. App. 579, 587, 348 P.3d 776 (2015) ("*pursuant to that statute*, a community corrections officer must monitor the offender's compliance with the conditions of supervision and his or her progress on supervision.") (emphasis added); *Estate of Davis v. State*, 127 Wn. App. 833, 842, 113 P.3d 487 (2005) ("A corrections officer cannot take charge of an offender without a court order and he can only enforce the order according to its terms and controlling statutes"). Though Petitioners observe that the

Taggart and *Joyce* courts referred to common law concepts in the Restatement to explain the scope of the duty, the duty itself is and has always been statutory.

The *Taggart* court referred to the Restatement not to adopt it, but to explain that the supervision statutes created "a *similar duty* for the officers." *Taggart*, 118 Wn.2d at 219 (emphasis added). And the *Joyce* Court referred to the Restatement simply to address the DOC's argument about the foreseeability of the ultimate injury. *Joyce*, 155 Wn.2d at 315 (noting that once a duty exists, "the question remains whether the injury was reasonably foreseeable"). *Joyce* does not alter the principle that the duty is statutory.

Here, the trial court simply followed precedent directing it to analyze the applicable statute to determine whether the negligent supervision cause of action included a duty to participate in criminal sentencing decisions. Unlike the statutes in *Taggart*, *Joyce*, and *Hertog*, which provided that community custody were remedied by reporting those violations to the court, the applicable statute here is RCW 9.94A.6332, which does not authorize a court to punish violations. That authority is exclusively reserved to the DOC. RCW 9.94A.6332(7). The statutory framework here does not remove DOC's obligation to supervise offenders. Rather, it removes the sentencing court's participation in determining sanctions for violations of the conditions of supervision.

Petitioners' argument that excluding judicial officers from the imposition of sanctions negatively impacts public safety is factually supported in this record and is irrelevant to the question before this Court. The statutory amendment implementing administrative sanctions, colloquially referred to as "Swift and Certain," is grounded in evidence-based policy making. It is supported by studies conducted by the Washington State Institute of Public Policy demonstrating that using shorter, more certain, and quicker administrative DOC sanctions reduces recidivism rates.[22] Petitioners offer nothing more than argument in support of their challenge to the Legislature's decision.

Here, DOC followed the statutory process as designed. DOC fully performed its duty in monitoring McKay's compliance with his conditions of supervision. His CCO reported his violations to the proper quasi-judicial DOC hearing officer, who then conducted a hearing and imposed the maximum sanction. These functions occurred two months before McKay's new criminal process resulted in a guilty plea and conviction. DOC then went beyond its statutory obligation and provided all material information it had regarding McKay to law enforcement and to the King County Prosecutor. The fact that those entities chose not to use that information or

[22] Appendix 4, p. 5, ¶35. In contrast. the additional time, process, and uncertainty of a court's discretion undermines the effectiveness of sanctions in deterring conduct.

require McKay to plead to a higher-level crime is part of the judicial process, not the CCO's supervision of McKay's conditions of release.

The trial court recognized the clear distinction between supervision and criminal prosecution and properly held that DOC's duty to supervise does not include ensuring that a sentencing court punishes a criminal act in a particular way. This holding does not overrule the common law or introduce any confusion in statutory analysis. Direct review is unwarranted.

V. STATEMENT OF ISSUE ON CROSS-PETITION

If a discretionary decision to take a judicial action is entitled a quasi-judicial immunity, is a discretionary decision to refrain from taking a judicial action also entitled to quasi-judicial immunity?

VI. REASON CROSS-PETITION SHOULD BE GRANTED

The Court of Appeals correctly stated that if McKay's CCO had submitted a Presentence Investigation Report (PSI) or testified at McKay's sentencing hearing, the CCO would have been entitled to quasi-judicial immunity. *Mock*, 200 Wn. App. at 674 (citing *Bruce v. Byrne-Stevens & Assocs. Eng'rs, Inc.*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989)). However, without offering any analysis or referencing any guiding statute or case law, the Court of Appeals then concluded that DOC is not entitled to quasi-judicial immunity if it refrains from submitting a PSI. *Mock*, 200 Wn. App. at 675. This holding in effect states that quasi-judicial immunity applies to

judicial actions, but not to judicial omissions. In other words, a judicial action is immune from scrutiny but a decision not to take a judicial action is not. This conclusion contradicts decisions of this Court and of the Court of Appeals.

Though the Court of Appeals held DOC had no duty to participate in McKay's sentencing, if (and only if) this Court accepts review and disagrees with the Court of Appeals by concluding DOC had such a duty, DOC would be entitled to quasi-judicial immunity. Thus, though there is no basis to grant review to Petitioners, there may be a basis to grant DOC's contingent cross-petition under these circumstances.

Every participant in the criminal sentencing process—the judge, the prosecutor, correction officers who issue pre-sentence reports, and witnesses who testify in sentencing hearings—have quasi-judicial immunity from suit for that participation. *See Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976) (recognizing absolute immunity for acts intimately associated with the judicial phase of the criminal process); *Broam v. Bogan,* 320 F.3d 1023, 1029-1030 (9th Cir. 2003); *Gaines v. County of Los Angeles,* 2014 WL 2042243 at *4 (C.D. Cal May 16, 2014) (a sentencing recommendation is "squarely protected by prosecutorial immunity"); *Loveridge v. Shillberg*, 17 Wn. App. 96, 99-100, 561 P.2d 1107 (1977) (immunity to prosecutors); *Bruce*, 113 Wn.2d at 123

(immunity to witnesses). Washington courts follow the *Imbler* analysis. *Babcock v. State*, 112 Wn.2d 83, 97, 768 P.2d 481 (1989). Quasi-judicial immunity applies to sentencing recommendations made to a judicial officer by a CCO. *Taggart*, 118 Wn.2d at 212-213 (citations omitted).

The *Taggart* court observed that the key inquiry was the function being performed, not the identity of the person performing the function. *Id.* at 211. Accordingly, when parole officers are "providing the Board [of Parole] with a report to assist the Board in determining whether to grant parole, the officer's actions are protected by quasi-judicial immunity." *Id.* Washington's courts have consistently recognized this immunity. In *Bishop*, the Court of Appeals held that "[a supervising agency] may not be sued because of a mistake in sentencing." *Bishop*, 88 Wn. App. at 81. On review, this Court endorsed that holding. *Bishop*, 137 Wn.2d 532 n.3. It is only "when the officer takes purely supervisory or administrative actions" that quasi-judicial protection does not attach. *Taggart*, 118 Wn.2d at 211.

Moreover, quasi-judicial immunity applies whether DOC's alleged failure was an act or an omission. *Tibbets v. State*, 186 Wn. App. 544, 551, 346 P.3d 767 (2015) (if omissions were not also covered by quasi-judicial immunity, there would be no immunity). This reasoning is implicit in *Taggart*, where the court focused on the process and function, rather than specific act or the person taking the action. *Taggart*, 118 Wn.2d at 212-213.

To the extent a person is permitted to participate in a sentencing hearing, immunity shields from liability his/her participation or non-participation.

Petitioners argue that participation in a criminal sentencing hearing is part of supervision, rather than a part of a judicial process, but Petitioners do not and cannot dispute that by the time the sentencing court issued its decision, DOC had already "supervised" McKay to the maximum allowed in its supervisory role. DOC's "take-charge" relationship with offenders on community supervision does not extend to determining what criminal sanctions are appropriate for new crimes. That is the court's function.

The trial court's recognition of settled law regarding quasi-judicial immunity does not present a question of broad public import. Contrary to Petitioners' argument, the distinction between DOC's role when assisting a court in making sentencing decisions and DOC's role when enforcing a sentencing court's conditions of supervision is clear and unambiguous.

If a dispute turns on whether a sentencing court should have made a different sentencing decision, quasi-judicial immunity applies. If a dispute turns on whether a CCO should have taken different administrative or supervisory actions to enforce conditions of supervision, quasi-judicial immunity does not apply. This function-based distinction is consistent with precedent, easy to recognize and was properly applied by the trial court.

In *Bishop*, this Court affirmed the Court of Appeals' holding that negligence resulting from a probation officer's failure to report to the sentencing court regarding the probationer's fraudulent misrepresentations was protected by quasi-judicial immunity. *Bishop*, 137 Wn.2d at 532 n.3. Similarly, in *Loveridge*, the Court of Appeals held that a prosecutor who failed to perform a statutory duty of sending a recommendation for minimum term to the Parole Board was entitled to prosecutorial immunity, because sending a recommendation was an integral part of the sentencing/judicial process. The same analysis should apply here. The only difference between the holding in *Loveridge* and the instant case is that DOC had no statutory duty to submit a sentencing recommendation. *Mock*, 200 Wn. App. at 678.

In *Tibbits*, the court analyzed RCW 9.94A.704(11), a statute that affords DOC the same immunity that a judge enjoys in setting, modifying or enforcing the conditions of supervision. *Tibbits*, 186 Wn. App. 544. The *Tibbits* court held that a decision by DOC to modify *or not modify* a condition of supervision is entitled to the same quasi-judicial immunity as that of a superior court judge making the same decision. *Id.* Here, the sentencing judge had absolute immunity for her decision not to order a PSI. McKay's CCO is entitled to the same immunity where he did not submit a PSI, particularly since he had no duty to do so. *Mock*, 200 Wn. App. at 678.

The Court of Appeals' misapplication of the doctrine of quasi-judicial immunity creates a basis for significant judicial mischief, if uncorrected. *See e.g. Mock*, 200 Wn. App. at 675. DOC routinely faces claims of liability based upon DOC's alleged failure to impose various additional conditions of supervision, or DOC's failure to modify existing conditions of supervision. Under the Court of Appeals' reasoning, the DOC's decision *not to* impose additional conditions of supervision, or *not to* modify an existing condition of supervision, can be used by advocates to argue such decisions are not a quasi-judicial function. This would deprive DOC of an immunity to which it is clearly entitled by statute and the precedent of this Court and the appellate courts. RCW 9.94A.704(11); *Bishop*, 137 Wn.2d at 532 n.3; *Loveridge*, 17 Wn. App. at 99-100; *Tibbits*, 186 Wn. App. at 549-50; *Reddy v. Karr*, 102 Wn. App. 742, 9 P.3d 927 (2000) (family court investigator allegedly negligent in preparing parenting evaluation entitled to quasi-judicial immunity.).

The court's misstatement of the law creates potential DOC liability whenever DOC fails to impose every conceivable additional condition of supervision upon every offender on supervision, whether or not those additional conditions are necessary or appropriate, lest DOC be vulnerable to a claim of gross negligence for failing to do so. It also encourages DOC to abandon fact-based, discretionary decision-making where a CCO may

refrain from imposing unnecessary or inappropriate conditions in favor of imposing additional conditions, or modifying existing conditions, simply to limit legal liability, without consideration for any correctional benefits. In this regard, the Court of Appeals' decision is in conflict with the decisions of this Court and with the Court of Appeals. This conflict warrants contingent cross-review under RAP 13.4(b)(1), (2) and (4).

VII. CONCLUSION

The issues presented by Petitioners do not warrant review by this Court because they fail to satisfy the criteria under RAP 13.4(b). However, if this Court grants review, DOC respectfully requests that this Court review the Court of Appeals' misapplication of the scope of quasi-judicial immunity to clarify that a judicial decision to take no action is entitled to the same immunity as a judicial decision to take action.

RESPECTFULLY SUBMITTED this 10th day of January, 2018.

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DECLARATION OF SERVICE

I hereby declare that on this 10th day of January, 2018, I caused to be electronically filed the foregoing document: State's Answer to Petition for Review, and which will also send notification to:

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

DATED this 10th day of January, 2018 at Seattle, Washington.

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