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 (DOC),
Respondent.

Appeal from King County Superior Court
Honorable Jeffrey Ramsdell, Judge
Cause No. 15-2-05471-6 SEA

Appellants' REPLY TO RESPONDENT'S CONTINGENT CROSS PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The Petitioners—James D. Mock, Danelle Bame, on behalf of the minor child J.B. (date of birth 06/09/01), and Linda and Tom Ryan—are the Appellants who seek Supreme Court review, and now reply in opposition to the Respondent's Answer to Petition for Review and Contingent Cross Petition. The Petitioners are referred to as the McKay victims below.

B. COURT OF APPEALS DECISION

The Respondent raises a new issue for review: the Appellate Court's denial of quasi-judicial immunity to the Respondent Department of Corrections (DOC). The Court of Appeals decision is *Mock v. State,* 200 Wn. App. 667, 403 P.3d 102 (2017), hereafter referred to as *Mock.*

C. DOC'S ISSUE PRESENTED FOR REVIEW

> "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?"[1]

D. PETITIONER'S COUNTER-STATEMENT OF DOC'S ISSUE FOR REVIEW.

If the DOC does not participate in a superior court sentencing hearing, is it entitled to quasi-judicial immunity for its non-participation?

[1] Respondent's Answer to Petition for Review and Contingent Cross Petition (DOC's Answer) at 15.

E. COUNTER-STATEMENT OF THE CASE

The DOC distorts the factual record by claiming the McKay victims sought to solely change McKay's sentence and deny him a Drug Offender Sentencing Alternative (DOSA).[2] The McKay victims, among two of three alternatives, sought to keep McKay in jail until his inpatient DOSA bed became available.[3] The DOC then uses its fallacious straw man argument, that if the sentencing court has immunity for ordering a DOSA, then the DOC has immunity because, if it participated in sentencing, it would have also recommend a DOSA.[4]

F. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

1. The Court of Appeals decision does not conflict with decisions of the Supreme Court and other Courts of Appeals. RAP 13.4(b)(1) and (2).

The DOC cites cases that are not in conflict with, but are consistent

[2] DOC'S Answer at 6: "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." *Id.* at 14: "If a dispute turns on whether a sentencing court should have made a different sentencing decision, quasi-judicial immunity applies."

[3] CP 216 (Declaration of Judge Michael Fox, Retired, expert witness for the McKay Victims) at ¶ 12: Judge Fox testified that had the Superior Court been informed by the DOC of its knowledge of McKay, it is "more likely than not that the Court would have done any one of the following three things: imposed the recommendation of the State for 12 months and a day, continued the sentencing to align with release to the residential bed date, or sought to move up the bed date by contacting the facility directly." (emphasis added).

[4] DOC'S Answer at 6 and 14.

with, appellate court decisions. The DOC's cited cases follow long accepted precedent that quasi-judicial immunity is only given to witnesses who participate in court hearings or act as an arm of the court. No case supports quasi-judicial immunity for a probation officer's non-participation in our criminal justice system.

Tibbets v. State, 186 Wn. App. 544, 346 P.3d 767 (2015) does not support the DOC's position. The *Mock* Court of Appeals gave short shrift to the DOC's *Tibbet's* argument: "Only the most tortuous reading of *Tibbets* would interpret it as holding that immunity for performing a quasi-judicial function applies equally when the actor is not performing a quasi-judicial function." *Mock v. State*, 200 Wn. App. 667, 675, ¶25, 403 P.3d 102, 107 (2017). *Tibbets* recognizes that participation in our justice system is necessary for immunity. "Judicial immunity extends to actors of governmental agencies performing quasi-judicial functions." *Tibbets*, 186 Wn. App. at 549, ¶ 13 (emphasis added). The DOC neither participated as a witness, or arm of the court, nor did it act in a judicial capacity setting or modifying conditions of a sentence.[5]

[5] CP 360-62 (CR 30(b)(6) depo of Dianne Ashlock); See also CP 459 (Plaintiff's EX E to CR 30(b)(6) depo of Ashlock); and See RCW 9.94A.704 (11): "In setting, modifying, and enforcing conditions of community custody, the department [DOC] shall be deemed to be performing a quasi-judicial function." (bracketed material added).

The DOC misplaces reliance on *Taggart v. State*, 118 Wn.2d 195, 213, 822 P.2d 243, 252 (1992), which reiterates the universally held opinion that a person "is entitled to quasi-judicial immunity only for those functions they perform that are an integral part of a judicial or quasi-judicial proceeding." (emphasis added). A person must participate in a judicial or quasi-judicial proceeding to qualify for immunity. "Quasi-judicial immunity does not apply where defendant county fails to adequately monitor and report probation violations or fails to provide all material information to the court." *Estate of Jones v. State*, 107 Wn. App. 510, 520, 15 P.3d 180, 186 (2000), *review denied*, 145 Wn.2d 1025, 41 P.3d 484 (2002) (emphasis added).

To illogically grant immunity for non-participation in our justice system undercuts its legitimacy, prevents courts from acting with knowledge and evidence, and cripples the administration of justice.

The DOC cites dictum from an overturned case *Bishop v. Miche*, 88 Wn. App. 77, 943 P.2d 706 (1997), *reversed*, 137 Wn.2d 518, 973 P.2d 465 (1999), to overrule *Taggart* and its progeny.[6] In *Bishop* a defendant

[6] *Joyce v. DOC*, 155 Wn.2d 306, 319 ¶ 30, 119 P.3d 825, 832 (2005) ("'[T]he *failure* to adequately monitor and report violations, thus failure to adequately supervise' may result in liability.") (italics in the original) (emphasis added);

Plotkin v. State Dept. of Correction, 64 Wn.2d 373, 378, 826 P.2d 221, 223 (1992) ("It follows that each defendant is absolutely immune from liability due to the way in which the two parole officers reported to the Board. . .") (emphasis added);

(Miche) driving under-the-influence (DUI) struck and killed a child. *Bishop*, 88 Wn. App. at 79. At the time of this collision Miche was on probation for a prior DUI. *Id.* The prior DUI sentencing court gave probation in error, mistakenly believing there were no previous convictions, and that Miche was a first-time offender. *Id.* Miche, using an alias, had three prior convictions. *Id.* The "probation officer quickly realized that Miche's full record had not been before the court. The next day, the officer sent an advisory report to the district court advising the court of the alias and additions convictions. *Id.* "No action resulted from this notification." *Id.*

The case factually turned upon "the record [which] reflects that the probation officer did all that she could do to notify the court of the sentencing error." *Id.* at 81 (bracketed material added). Quasi-judicial immunity was given to the probation officer for reporting the fraudulent use

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Kelly v. Pierce County, 179 Wn. App. 566, 574 ¶ 12, 319 P.3d 74, 77 (2014), *review denied*, 180 Wn.2d 1019, 327 P.3d 55 (2014) ("[Q]uasi-judicial immunity protects those who perform judicial-like functions ....") (emphasis added);

Reddy v. Karr, 102 Wn. App. 742, 749, 9 P.3d 927, 931 (2000) (Immunity given "[w]hen performing court-ordered functions . . . investigators and evaluators act as an arm of the court") (emphasis added); and

Little v. Washington, 2013 WL 6173757, at *2 (W.D. WA. Nov. 25, 2013) ("Experts and agents who, at the request of the court, provide reports to assist the judicial or quasi-judicial officer in adjudicating the matter are also entitled to Immunity.") (emphasis added). A non-published foreign case may be cited as an authority when considered an authority by the foreign jurisdiction. GR 14.1 (b) and Fed. R. App. P. 32.1.

of aliases to the court. *Id.* at 80-1. "A government official, such as a probation officer, is entitled to an absolute quasi-judicial immunity for those functions he or she performs that are an integral part of judicial or quasi-judicial proceedings." *Id.* (emphasis added).

The *Bishop* appellate court's negligent supervision decision was overturned by the Supreme Court finding no proximate cause. *Bishop*, 137 Wn.2d at 531. The Supreme Court instructs that once the sentencing court was informed of the defendant's true record, violation of probation rules, and did not revoke probation, the judicial decision "broke any causal connection between any negligence and the accident." *Id.* at 532. The negligent supervision was no longer a proximate cause of Miche's freedom and motor vehicle accident killing plaintiffs' child. *Id.* The Supreme Court's opinion turns upon the absence of proximate cause. "We agree with the Court of Appeals' holding that the County owed a duty to control Miche, but hold that as a matter of law proximate cause is lacking. Therefore, summary judgment in favor of the County was proper. The Court of Appeals is reversed." *Id.* at 532.

RAP 12.1 states that "the appellate court will decide a case only on the basis of the issues set forth by the parties in their briefs." Consequently, any case precedent is limited to the issues before it. The issue before the *Bishop* Appellate Court was whether "the probation officer was negligent

in her method of reporting the sentencing error caused by Miche's use of an alias to either the original sentencing court or to the November reviewing court." *Bishop*, 88 Wn. App. at 86 (emphasis added). The issue of the failure of a probation officer to report to the sentencing court was not before the appellate court and not supported by the record, and therefore was not decided by the *Bishop* Supreme Court. *Id.* at 81.

The Supreme Court's opinion on the breaking of a causal connection is premised upon the sentencing judge's full knowledge of Miche's record: violation of probation, driving with suspended license, Miche had a severe alcohol problem which was untreated. *Bishop*, 137 Wn.2d at 531-32. Nevertheless, the fully informed judge did not revoke Miche's probation. *Id.*

In a footnote, the Supreme Court voiced agreement with the Court of Appeals stating: "that any claimed negligence resulting from the probation officer's failure to do anything about Miche's fraudulent representations to the sentencing court is protected by quasi-judicial immunity because sentencing decisions are absolutely immune." *Id.* at 532 n.3. Footnote 3 must be read in context of the record and that the sentencing court was fully informed by the probation officer for quasi-judicial immunity to apply. Otherwise, *Bishop*'s Supreme Court footnote conflicts

with decisions that do not extend quasi-judicial immunity for non-participation in judicial proceedings and would be internally inconsistent.

> "Our approval of *Sterling* is of particular note here, because the court in Sterling held that a duty exists to protect others from harm posed by dangerous probationers, including investigation and reporting of probation violations for the purpose of seeking revocation."

Bishop, 137 Wn.2d at 526 (emphasis added).[7]

Assume, for argument's sake, that even if the *Bishop* Court of Appeals or the *Bishop* Supreme Court purports to extend quasi-judicial immunity for the non-participation of a probation officer in a judicial proceeding, it would be considered dicta,[8] unsupported by the record, and in conflict with subsequent precedent.[9]

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[7] *Taggart v. State*, 118 Wn.2d 195, 213. 822 P.2d 243, 252 (1992) ("[P]arole officers are entitled to quasi-judicial immunity only for those functions they perform that are an integral part of a judicial or quasi-judicial proceeding.") (emphasis added); and

Hertog v. Seattle, 138 Wn.2d 265, 278, 979 P.2d 400, 408-08 (1999) (The parole officer lacks immunity when "the officer's actions were not part of any judicial or quasi-judicial process ….") (emphasis added).

[8] The word "dicta" means observations or remarks made in pronouncing an opinion concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination. *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464, 468 (1954). Statements that constitute "obiter dictum" need not be followed. *DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 683 n. 16, 964 P.2d 380, (1998) (citing *State v. Potter*, 68 Wn. App. 134, 150, 842 P.2d 481 (1992)). *Amalgamated Transit Union Local 587*, 142 Wn.2d 183, 262 n. 4, 11 P.3d 762, 808-09 (2000).

[9] See footnote 6.

The DOC's use of *Loveridge v. Schillberg*, 17 Wn. App. 96, 561 P.2d 1107 (1977), is inapposite.[10] *Loveridge* recognizes that "absolute immunity" is "afforded to prosecuting attorneys in the performance of their official duties." *Loveridge*, 17 Wn. App. at 99. Probation officers who merely report to the court are not given the same broad immunity.

> Because these caseworkers performed investigative, rather than quasi-prosecutorial functions, they cannot claim prosecutorial immunity.
>
> The Supreme Court has granted prosecutors absolute immunity for "initiating a prosecution and in presenting the State's case". *Imbler v. Pachtman*, 424 U.S. at 431, 96 S.Ct. at 995.

Babcock v. State, 116 Wn.2d 596, 610, 809 P.2d 143, 151 (1991).

Additionally, the DOC's use of *Reddy v. Karr*, 102 Wn. App. 742, 9 P.3d 927 (2000) is inapplicable.[11] *Reddy* involved a family court investigator "ordered by the court to do an investigation and prepare an evaluation to assist the court in determining who should be the child's primary residential parent." *Id.* at 749. "[T]hese investigators and evaluators act as an arm of the court." *Id.* The family court investigator submitted her report to the court and was given quasi-judicial immunity. *Id.* at 745 and 750. But *Mock* is clearly distinguishable. No report was

[10] DOC's Answer at 16.
[11] *Id.*

submitted by the *Mock* probation officer who did not participate in the McKay sentencing hearing.[12]

The DOC misplaces reliance upon 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." A report to the court of McKay's probation and behavioral violations is not within the purview of this statute.

2. The Court of Appeals decision finding quasi-judicial immunity inapplicable does not present an issue of substantial public interest as required by RAP 13.4(b)(4).

The DOC fears that the *Mock* Court of Appeals logic—that quasi-judicial immunity does not apply to the non-participation in a judicial proceeding—destroys the immunity the DOC is entitled to by statute and case law.[13] That fear may be set aside. The failure to report McKay's violations to the sentencing court is not a matter of "setting, modifying, and enforcing conditions of community custody" where "the department shall be deemed to be performing a quasi-judicial function." RCW 9.94A.704(11). The DOC still retains its immunity both by statute and case law when acting in a judicial capacity.

[12] CP 360-62 (CR 30(b)(6) depo of Dianne Ashlock); See also CP 459 (Plaintiff's EX E to CR 30(b)(6) depo of Ashlock).
[13] DOC's Answer at 16.

If the *Mock* Court of Appeals decision on quasi-judicial immunity "involved an issue of substantial public interest that should be determined by the Supreme Court",[14] it should not be contingent upon reviewing the other issues that the McKay victim petition for review. By making review of quasi-judicial immunity contingent, the DOC implicitly admits it is not an imperative issue of public importance.

G. CONCLUSION

It is respectfully requested that the Supreme Court deny the Respondent's Answer to Petition for Review and Contingent Cross Petition which is without precedent and conflicts with well settled and accepted case law.

RESPECTFULLY SUBMITTED this 24th day of January, 2018.

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[14] RAP 13.4(b)(4).

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DECLARATION OF SERVICE

I hereby declare that on January 24, 2018, I filed with the Washington State Supreme Court the attached REPLY TO RESPONDENT'S CONTINGENT CROSS PETITION FOR REVIEW via Electronic Filing to ac.courts.wa.gov and E-mailed the same to:

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

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