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COURT OF APPEALS

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Ct. App No. 34409-2-II

**IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II**

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GLEN E. THOMAS

Appellant

Vs.

JOSEPH LEHMAN, et al

Respondent

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Appellant Brief

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Glen E. Thomas #287602  
Plaintiff, pro se  
Monroe Correctional Complex  
Twin Rivers Unit  
P.O. Box 888 D-406  
Monroe, WA 98272-0888

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## **B. ASSIGNMENT OF ERROR**

### **I**

The trial court erred in failing to recognize the property right of Appellant in the use of his funds for a constitutionally protected interest in having representation at his Parole Board hearing.

See Appellant's motion for Summary Judgment pp. 8-9, concerning denial of funds for mandatory purpose; and Verbatim Report of proceedings, dated November 18, 2005 and pp. 11-13.

### **II**

The trial court erred in holding that interest does not follow principle, by allowing the state to opt-out of the Fifth Amendments' taking clause by denying an obligation to pay interest without due process.

See Appellant's Motion for Summary Judgment pp. 6-7; and Verbatim Report of proceedings, dated November 18, 2005 and pp. 13-15.

### **III**

The trial court erred when it permitted its hearing to proceed when the Appellant could not hear the proceedings and also denied the Appellant the assistance trained in the law so that he could understand what was occurring.

See Verbatim Report of Proceedings, dated November 18, 2005 p. 4 where the Appellant discusses his lack of legal knowledge and pp. 6-7 and 9-10; and the Verbatim Report of Proceedings, dated January 20, 2006 p. 4 concerning the phone problems.

## **C. ISSUES PERTAINING TO ASSIGNMENTS OR ERROR**

### **I**

Police power based actions limiting use of private property can constitute de facto exercise of eminent domain under the takings clause according to Orion Corp. v. State, 109 Wn.2d 621, 747 P.2d 1062, cert. denied. 108 S.Ct. 1996, 486 U.S. 1072, 100 L.Ed.2d 227.

Therefore, can lawful use of mandatory savings monies be denied without due process under the Fifth Amendment's taking clause?

## II

In McIntyre v. Bayer, 339 F.3d 1097 (9<sup>th</sup> Cir. 2003) the court held that a state cannot redefine property rights by simply opting out of the requirements of the takings clause and due process. Since interest has been a part of the principle, which is property, for hundreds of years, how can the state deny paying interest on funds it requires held in trust?

## III

Since the central meaning of due process is that the party whose rights are to be affected is entitled to be heard [and to hear & understand] under Fuentes v. Shevin, 407 U.S. 67, 80, 32 L.Ed.2d 557, 92 S.Ct. 1883 (1972), can a trial court permit a hearing to proceed when a party cannot hear or understand the proceedings? Considering the holding in such cases as Bounds v. Smith, 450 U.S. 817, 97 S.Ct. 1491 (1977) can the court deny even minimal aide as was requested to enable the Appellant to fully participate in a court proceeding?

## D. STATEMENT OF CASE

The Appellant, Glen E. Thomas, brought a civil and civil rights action against the Department of Corrections and its employees for conversion breach of fiduciary duty and violation of his rights under the fifth and fourteenth amendments. The civil rights violation were for the denial of the use and interest in his state mandated savings account. See civil and civil rights complaint, Thurston County No. 04-2-01882-7.

The Appellant filed a motion for summary judgment contending that the common law of the United States since at least 1749 held that interest follows principal, and that the failure to

either pay it under these circumstances violates the fifth amendment's taking clause. The Appellant also contended that the failure of the DOC to place his funds at interest was a breach of their fiduciary duty. The Appellant also contended that as a matter of law (as was the case in all of his claims) that the defendants failure to permit him the use of funds for an attorney at his parole board hearing violated his rights under the fourth and fourteenth amendments requirements for due process. See motion for summary judgment, exhibits and supporting affidavit.

Prior to the telephonic hearing on November 18, 2005, the Appellant moved the court to permit the Appellant to have the assistance of another inmate this was denied and consequently Appellant was unable to understand the proceedings. See verbatim proceedings pages 3, 4 etc.

During the proceedings on November 18, 2005 the Appellant brought to the court's attention that he could not hear the proceedings. See Pages 6, 7, 8 etc. This went uncorrected and was repeated in the proceedings on January 20, 2006. See verbatim report of January 20, 2006 page 4.

## **E. ARGUMENT**

### **I**

The Appellant sought to use a small part of his mandatory savings account balance to secure an attorney for his parole board .100 hearing. The use of these funds is determined solely by DOC and under whom the criteria has been altered over time. In that an attorney is required and in that it is the Appellant's right to have said counsel, where do the limits of arbitrary authority of the defendants lie? Police power based actions limiting use of private property can constitute de facto exercise of eminent domain under the taking clause. Orion Corp. v. State, 109 Wn.2d 621, 747 P.2d 1062, cert. denied, 108 S.Ct. 1996, 486 U.S. 1072, 100 L.Ed.2d 227.

Substantial interference with assess may constitute a taking or damaging of property requiring compensation. Art 1, § 16. London v. City of Seattle, 93 Wn.2d 657, 611 P.2d 781 (1980). Regulatory takings, occur and limit the use of property to such an extent, as here, that a taking occurs. Art 1, § 16, Bosrt v. Snohomish County, 114 Wn.2d 245, 57 P.3d 273.

It is difficult to see how a penological interest exists here in preventing an inmate from obtaining an attorney for a hearing without violating the holdings in Sandin v. Conner, 515 U.S. 472, 477-78, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995) and Wolff v. McDonnell, 418 U.S. 539, 557, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974) Where a hearing is required before a state agency can deny, revoke, or otherwise arbitrarily abrogate a right to property.

The state has the burden of showing that the inmate either does not have a property right in his mandatory savings or that it has a legitimate penological interest in preventing inmates from obtaining representation for proceedings in which the inmate has clearly established constitutional right to representation.

## II

The principal that interest follows principle has been a feature of common law since at least the mid-1700s. Beckford v. Tobin, 1 Ves. Sen. 308, 27 Eng. Rep. 1049, 1051, (Ch. 1749) (“Interest shall follow the principle, as the shadow the body”). This rule comes to Washington law by the common law in Washington by action of RCW 4.04.010 where a common law provision is not contrary to enacted law or the constitution.

In Phillips v. Washington Legal Foundation, 524 U.S. 156, 118 S.Ct. 1925, L.Ed.2d 174 (1998) the court acknowledged that common law was firmly embedded in Washington law. Making interest clearly part of the ownership of the funds at the center of this case.

A state, by ipse dixit, may not may not transform private property into public property

without compensation simply by legislation, abrogating the traditional rule that ‘earnings of fund are incidents of ownership of the fund itself is property.’ Webb’s Fabulous Pharmacies, inc. v. Beckwith, 449 U.S. 155, 162, 101 S.Ct. 446, 451, 66 L.Ed.2d 358 (1980). Here we have an even more interesting situation, one where the legislation has indicated intent to pay interest, but an executive agency has decided to abrogate the property rights of the Appellant. The government does not have unlimited power to redefine property rights. Loretto v. Teleprometer Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164 73 L.Ed.2d 868 (1982); Phillips, at 1200; Lucas v. South Carolina Coastal Counsel, 505 U.S. 1003, 1029-30, 112 S.Ct. 2880, 120 L.Ed.2d 798 (1992).

This leaves us in the position of asking where and when were the property rights of inmates reduced by legislative action and is it really a situation as the trial court held that the legislature’s failure to act somehow indirectly alters the requirements of property law and the constitution?

A claim under the Fifth Amendment’s taking clause requires that the Appellant state that he possesses a constitutionally protected property interest. Ruckelshaus v. Monsanto Co., 467 U.S. 989, 1000-01, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1994). In the action below, no one asserted that the Appellant did not have a protected right, merely that it did not apply to interest on his funds because of lack of explicit legislative action to provide for it. This as a matter of law is plain error. The court mentioned this very situation in McIntyre v. Bayer, 339 F.3d 1097 (9<sup>th</sup> Cir. 2003) n.5. Where it stated “To consider ourselves bound by State’s bald assertion regarding inmate’s rights or lack thereof, in the interest generated by the property fund would be to allow the state to ‘unilaterally dictate the content of – indeed opt out of – both the taking clause and the due process clause by simply statutorily

recharacterizing traditional property rights.” Here we merely have the bold assertion of a superior court judge that the Appellant had no property rights absent legislative action, thereby granting DOC the ability to define the contours of property rights in violation of the existing law and both state and federal constitutional provisions concerning due process and property rights.

### III

For more than a century the central meaning of due process has been clear that the party whose rights are to be affected are entitled to be heard. Fuentes v. Shevin, 407 U.S. 67, 80, 32 L.Ed.2d 557, 92 S.Ct. 1883 (1972). Here we have the problem of the party whose rights are under discussion during the hearing not being able to fully hear proceedings and equally importantly cannot gain the aid of someone who can help him argue in the instances where he can hear. The verbatim report supports this contention as being the case in both hearings. In effect, both hearings were a sham effectuating them as being essentially ex parte when the Appellant could not participate. It is important to note that phones were available that did not have the noise problems associated with the so called ‘legal call’ phone that has been subject to years of complaints over the very problems complained of here.

The trial court’s unwillingness to make the hearing more than a sham after being made aware of the problem shows clearly the presence of clear error in those proceedings and a due process violation.

### F. CONCLUSION

The Appellant brings sufficient supporting case law to show that as a matter of clearly established law he is entitled to judgment against the State and its defendant

employees and the judgment below was in error. He therefore asks this court to nullify the superior court's judgment and grant him a directed judgment on the merits.

Dated this 16 of October , 2006

A handwritten signature in black ink, appearing to read 'Glen E. Thomas', with a long horizontal flourish extending to the right.

Glen E. Thomas #287602  
Appellant, pro se  
Monroe Correctional Complex  
Twin Rivers Unit  
P.O. Box 888 D-406  
Monroe, WA 98272-0888

By Direction Robert J. Miller JD  
MCC - TRU

# CERTIFICATE OF MAILING

Cause No.  
Court of Appeals No. 34409-2-II

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Today, I Glen E. Thomas, deposited in the United States mail by delivering to prison authorities a properly stamped envelope (or an authority to affix postage) processed through institutional mail room in accordance with CR 5 (b) (1) and (2) and Addressed to the below named parties

TO:

Washington Court of Appeals Div. II  
Attn: Case Manager; Debbie  
950 Broadway, Suite 300  
Tacoma, WA 98402-3694

Attorney General of Washington  
Attn: Douglas Carr, Asst. AG  
P.O. Box 40116  
Olympia, WA 98504-0116

Containing:

Appellant Brief

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Pursuant to Rule GR 13, I declare under penalty of perjury under the laws of the State of Washington the foregoing is true and correct. [See RCW 9A.72.085 – 2004].

October 16, 2006  
Date



Glen E. Thomas #287602  
Monroe Correctional Complex  
Twin Rivers Unit  
P. O. Box 888 - D-406  
Monroe, Washington 98272-0888

CERTIFICATE OF MAILING