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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 38775-1-II

**COURT OF APPEALS, DIVISION II OF THE STATE OF
WASHINGTON**

JOHN T. ENTLER,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

**RESPONSE BRIEF OF RESPONDENT WASHINGTON STATE
DEPARTMENT OF CORRECTIONS**

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COMES NOW the Respondent, by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and DOUGLAS W. CARR, Assistant Attorney General, and submits the following brief.

I. IDENTITY OF RESPONDENT

The Respondent in this brief is the Washington State Department of Corrections (DOC) which was added as a Respondent in this matter by Order of this Court on November 17, 2009. *See* letter dated November 17, 2009 from Court Clerk David C. Ponzoha.

II. STATEMENT OF THE CASE

DOC accepts as accurate Appellant's statement of the case.

III. ISSUES PRESENTED FOR REVIEW

A. Whether DOC is a proper Respondent in this appeal when DOC was not involved in the criminal trial court proceeding being appealed, Appellant has made no claim against DOC, and DOC does not have the funds at issue in this appeal.

B. Whether the trial court erred in denying Appellant's motion for a refund of Legal Financial Obligations (LFOs) that were received by

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the Cowlitz County Clerk and applied to Appellant's LFO obligation in Cowlitz County Superior Court Cause No. 90-1-00077-7:

1. Whether Appellant's LFO obligations in Cowlitz County Superior Court Cause No. 90-1-00077-7 had expired at the time the Cowlitz County Clerk applied funds to this cause.

2. Whether the trial court had the authority to order the Cowlitz County Clerk to refund LFO overpayments to Appellant.

IV. ARGUMENT

A. DOC Is Not A Proper Respondent In This Criminal Appeal

DOC agrees with Appellant's assertion that DOC is not a proper party to this appeal. DOC was not a party to Appellant's 1990 criminal case at any stage of the proceedings in the trial court, including Appellant's motion in the trial court for the return of LFOs that were allegedly wrongfully applied to his 1990 cause by the Cowlitz County Clerk. The Cowlitz County Prosecutor failed to establish any legal or factual basis for DOC to now become a respondent in this appeal of a trial court ruling in this criminal case.

The record presented by Appellant makes clear that DOC collected LFOs from Appellant only on his 1993 causes and was not involved in the decision to apply these LFOs to his 1990 cause. Appellant has demonstrated that the Cowlitz County Clerk made the decision to apply

LFOs forwarded to her by DOC to his 1990 cause rather than return them to DOC or Appellant. See Appendix 2 to Appellant's motion to modify, p. 1, letter dated October 6, 2003, from the Cowlitz County Clerk advising Appellant that "it is the policy of this office to apply overpayments in felony cases to others in which the defendant still owes money". All the funds at issue in this case are or were in the hands of the Cowlitz County Clerk. DOC does not have possession or control of the funds at issue in this case. As such, the Prosecutor's suggestion that DOC is the proper Respondent in this case and/or that Appellant's remedy is to sue DOC in a civil action is not well taken. The Cowlitz County Prosecutor is the only proper Respondent in this appeal, just as it was the only proper Respondent in Appellant's motion in the trial court for reimbursement of unlawfully applied LFOs.

Any claim against DOC is foreclosed on jurisdictional grounds. DOC has never been properly served and made a party to this case and this Court therefore lacks jurisdiction to decide any claim against DOC. It is well established that a court cannot adjudicate a claim or obligation against a party without personal jurisdiction over that party. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418, 77 S. Ct. 1360, 1 L. Ed.2d 1456, (1957); *Marriage of Powell*, 84 Wn. App. 432, 437, 927 P.2d 1154 (1996). The Washington DOC is an administrative agency of the State of Washington

and a party suing DOC is effectively suing the state. *Landreville v. Shoreline College*, 53 Wn. App. 330, 766 P.2d 1107 (1988); *Kaimowitz v. Board of Trustees of the Univ. of Ill.*, 951 F.2d 765, 767 (7th Cir. 1991); *Johnson v. Rodriguez*, 943 F.2d 104, 108 (1st Cir. 1991). In order to properly serve the state, a plaintiff must comply with the service requirements of RCW 4.92.020 which states:

Service of summons and complaint in such actions shall be served in the manner prescribed by law upon the attorney general, or by leaving the summons and complaint in the office of the attorney general with an assistant attorney general.

Strict compliance with RCW 4.92.020 is required and it is immaterial that the state has actual notice of the summons and complaint. *Landreville, supra*. DOC has not been properly served in this case and the court therefore lacks authority to adjudicate any claim against DOC.

Appellant's claim against DOC for the return of money is also foreclosed because Appellant has not complied with the tort claim requirements of Chapter 4.92 RCW. Chapter 4.92 RCW provides mandatory procedures precedent to filing claims against the state and/or state employees and officers for damages when tortious actions are alleged. In order to litigate such claims for damages against the state and/or state employees and officers, a claim must first be filed under RCW 4.92.100. State law further provides that no action shall be commenced

until 60 days have elapsed after the claim is presented and filed with the risk management division of the Office of Financial Management:

No action shall be commenced against the state or against any state officer, employee, or volunteer, acting in such capacity, for damages arising out of tortious conduct until sixty days have elapsed after the claim is presented to and filed with the risk management division.

RCW 4.92.110.

The Supreme Court of Washington has held that the procedures of this statute are mandatory, and compliance is a condition precedent to recovery. *O'Donoghue v. State*, 66 Wn.2d 787, 405 P.2d 258 (1965). The constitutionality of the statute has been consistently upheld. *Hall v. Niemer*, 97 Wn.2d 574, 649 P.2d 98 (1982); *Coulter v. State*, 93 Wn.2d 205, 608 P.2d 261 (1980); *Mercer v. State*, 48 Wn. App. 496, 739 P.2d 703 (1987). In *Coulter*, the Supreme Court held that the failure to comply with RCW 4.92.100 precluded initiation of a suit against the state. *Id.* 93 Wn.2d at 207. *See also Mercer*, 48 Wn. App. at 499. The state appellate courts have held that the mandatory procedures in Chapter 4.92 RCW must be “strictly enforced.” *Levy v. State of Washington*, 91 Wn. App. 934, 942, 957 P.2d 1272 (1998) (citations omitted).

DOC employee/officials were acting in their official capacities as state employees when they made deductions from Appellant’s funds for

LFOs and forwarded these deductions to Cowlitz County. Because Appellant's claim arguably concerns the unlawful actions of state employees who were acting in their capacities as a state employees, Plaintiff was required to file a tort claim before filing a lawsuit over the employees' actions. RCW 4.92.110; *Hardesty v. Stenchever*, 82 Wn. App. 253, 917 P.2d 577 (1996). This requirement is jurisdictional. *Id.* Appellant has not alleged, much less demonstrated, that he filed a tort claim with Risk Management over the allegedly wrongful deductions of LFOs from his account. Because Appellant did not file a tort claim against DOC, this Court is without jurisdiction over any action against DOC for a refund.

B. The Cowlitz County Clerk Unlawfully Applied LFO Deductions To Cause No. 90-1-00077-7¹

1. Appellant's LFO Obligations In Cause No. 90-1-00077-7 Expired in 2000.

Assuming that Appellant has accurately set forth the facts concerning his conviction and release from incarceration on Cause No. 90-1-00077-7, Appellant's LFOs on this cause expired in 2000 for the reasons

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¹ Although the LFO deductions at issue in this appeal were made by DOC, they were not made for Appellant's 1990 Cowlitz cause, but for Appellant's later criminal causes which are not at issue in this case.

set forth in Appellant's brief. RCW 9.94A7.60 (effective August 1, 2009)

states in relevant part:

All other legal financial obligations for an offense committed prior to July 1, 2000, may be enforced at any time during the ten-year period following the offender's release from total confinement or within ten years of entry of the judgment and sentence, whichever period ends later.

Subsequent incarceration on other charges or convictions does not toll the period in which LFOs may be collected. *In re Sappenfield*, 138 Wn.2d 588, 980 P.2d 1271 (1999). Although the state may request a 10-year extension of the time in which LFOs may be paid, there is no evidence in this case that the prosecutor sought or received such an extension. Because Appellant's LFOs in Cause No. 90-1-00077-7 expired in December 2000, any funds applied by the Cowlitz County Clerk to the above cause after December 2000 were done so unlawfully.

2. It Is Unclear Whether The Trial Court In Appellant's Criminal Cause Has The Authority To Order The Court Clerk To Refund LFOs.

As a general rule, a trial court in a criminal matter relinquishes authority over a criminal defendant to DOC once the court enters a judgment and sentence. *January v. Porter*, 75 Wn.2d 768, 453 P.2d 876 (1969). There are undoubtedly exceptions to this general rule, however, DOC is unaware of any specific statute or court rule that gives the trial court authority to order a court clerk to provide a refund of LFOs to a

criminal defendant. The trial court's authority would not likely be an issue in this case if the court clerk still had the funds at issue. However, it is highly likely that these funds have already been distributed by the clerk as required by law. It would appear that Appellant would be required to file a separate cause of action against the court clerk for conversion and, as a predicate to any such suit, would have to file a claim against the county. *See* Chapter 4.96 RCW.² However, this is not an issue concerning DOC but is instead an issue only between Appellant and the Prosecuting Attorney who represents the court clerk.

V. CONCLUSION

DOC is not a proper party to this criminal appeal which only concerns an issue between Appellant and the Prosecuting Attorney.

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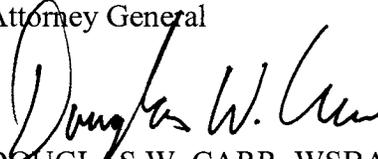
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² It appears that Appellant in fact filed such an action against the court clerk in *Entler v. Nielsen*, Cowlitz County Superior Court Cause No. 04-2-0152-1. *See* Attachment A to Brief of Prosecuting Attorney.

For the foregoing reasons, Respondent DOC requests that it be dismissed from this appeal.

RESPECTFULLY SUBMITTED this 25th day of February, 2010.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Douglas W. Carr". The signature is written in a cursive style with a large initial "D".

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record as follows:

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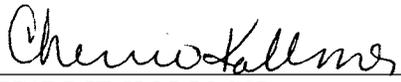
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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 25th day of February, 2010 at Olympia, WA.



CHERRIE KOLLMER
Legal Assistant