
NO. 44841-6

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

JANET G. HUSTED as Personal Representative of the ESTATE OF
KURT HUSTED; WILBERT R. PINA, an individual; and JOEL
FLORES, guardian ad litem for minor EMMETT PINA;

Plaintiffs/Appellants,

vs.

STATE OF WASHINGTON,

Defendant/Respondent.

BRIEF OF APPELLANTS

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I. ASSIGNMENT OF ERROR

The trial court erred in dismissing the State of Washington, ruling that the State owed no duty to supervise Calvin Finley because he had not reported for supervision.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Calvin Finley was subject to Community Custody supervision by the State. Finley skipped an appointment and the State issued a Secretary's warrant for his arrest. Did Finley's failure to show for the appointment and the issuance of the Secretary's warrant terminate the State's duty to supervise?

2. The Plaintiffs established that the State breached its duty to supervise Finley, and, that if the State had not breached its duty, Finley would have been unable to participate in the planning and execution of the June 2, 2009 robbery. Did the trial court err to the extent it dismissed the case based on a lack of proximate cause?

3. Does qualified immunity apply where the plaintiffs have only sued the State of Washington, and not any individual state employees?

III. STATEMENT OF THE CASE

A. INTRODUCTION

On June 2, 2009, Calvin Finley ("Finley") shot and killed Kurt Husted and wounded Wilbert Pina while Finley committed a robbery at the Lakewood, Washington Wal-Mart store. At the time, Finley was subject to a sentence of Community Custody supervision from his September 1, 2006 conviction for Domestic Violence Court Order

Violation. Prior to the June 2, 2009 incident, the Washington State Department of Corrections (“DOC”)¹ had identified Finley as an imminent threat and risk to the community.

B. STATEMENT OF FACTS

1. DOC’S SUPERVISION OF FINLEY

DOC has an expansive, longstanding history with Calvin Finley. CP 220-426, 464-526 (for a summary, see CP 1040-1059).

Prior to September 1, 2006, DOC had supervised Finley for various crimes. In fact, on September 1, 2006, DOC still supervised Finley pursuant to Community Custody imposed as a result of Finley’s July 29, 2005 conviction and sentence for assault in the second degree. CP 484-492. Prior to September 1, 2006, DOC had recognized Finley as having a history of violence and as presenting an imminent risk and threat to the community and to his victims. CP 344-348, 925-926.

Finley’s criminal history confirms his dangerous propensities. CP 523-526, 1061. Before September 1, 2006, Finley had already been convicted of three batteries, residential burglary, recklessly endangering safety, criminal assault/DV, and assault in the second degree/DV. CP 523-526, 1061. DOC had also imposed sanctions upon Finley for violating the terms of his Community Custody supervision. CP 335-362. Finley’s violations included possessing a firearm, contacting an individual he had

¹ Plaintiffs claim that the State of Washington is liable for damages resulting from the acts and omissions of DOC, one of its departments. Any reference to DOC is also a reference to the State of Washington.

been ordered not to contact, intimidating/threatening an individual he had been ordered not to contact, and recklessly endangering public safety by discharging a firearm. CP 356.

On September 1, 2006, Finley was found guilty in Pierce County Superior Court, Cause No. 06-1-0209-6-5, of Domestic Violence Court Order Violation. CP 363-373, 500-510. The crime involved violating the terms of Tacoma Municipal Court Order #D-3436 by contacting Diamond Oliver.² CP 363-373, 497-498, 500-510, 924-927. The court sentenced Finley to 15 months confinement and nine to 18 months Community Custody. CP 363-373, 500-510. The court imposed the following conditions for Finley's Community Custody supervision (CP 368-505):

(1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at a DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody.

The court also ordered Finley to comply with "crime-related prohibitions: per CCO." CP 368, 372, 505, 509. In addition the court ordered Finley to pay legal financial obligations, to have no contact with Diamond Oliver for five years, and to undergo "DV Eval + Follow-up per cco." CP 366, 372, 503, 509.

² Diamond Oliver and Finley had a child, Nyzier Oliver, together. CP 156, 924.

On September 7, 2006, Finley transferred from Pierce County Jail to Washington Correction Center to begin confinement on the September 1, 2006 conviction. After serving that confinement, Finley served time in Pierce County Jail for unrelated charges until March 1, 2007. The jail released Finley on March 1, 2007. CP 248-249, 449-450, 457.

On March 2, 2007 Finley reported to the DOC office. CP 248. At that time, DOC imposed additional “Conditions, Requirements and Instructions” with regard to his September 1, 2006 conviction including (CP 374-378):

Secure written permission from the community corrections officer before leaving the state of Washington.

Remain within a geographic area as directed by the Department of Corrections as follows: Pierce County.

Obtain written permission from the community corrections officer before traveling outside the county in which you reside, unless you have been advised in writing by your community corrections officer that it is not necessary to do so.

Notify the community corrections officer before changing residence or employment.

* * *

1. OAA ONLY: Obey all municipal, state, tribal, and federal laws.

DOC workers documented community concerns regarding Finley on March 1, 2007, and again on September 4, 2007. CP 248, 295.

On October 24, 2007, DOC conducted an Offender Accountability Act (OAA) hearing for Finley’s Community Custody violations of driving

with a suspended license and marijuana consumption. The hearing officer approved a negotiated sanction, which included enhanced reporting and required Finley to undergo a chemical dependency evaluation. CP 378-380, 450, 457.

On July 11, 2008, DOC logged Finley's arrest for violating his supervision by consuming marijuana. CP 237. On July 24, 2008, DOC held another OAA full administrative hearing for the violation. CP 450, 458. The hearing officer sanctioned Finley to confinement for time served, plus a day, and ordered him to report within one day and then weekly for five weeks. CP 381-392.

On July 28, 2008, Oliver notified DOC that Finley drove up and down her street shooting, and that Finley carried a handgun with him or in his car. Oliver stated that in the past Finley had threatened to kill her, her kids, and her boyfriend and that she believed Finley would do so. Oliver told DOC that she was scared of Finley and what he might do to her or her family. CP 236, 926-927.

On July 28, 2008, DOC requested an arrest warrant for Finley for Finley's failure to report to DOC. CP 236, 450-451, 458. On September 14, 2008, Finley was apprehended. CP 451, 458. On September 25, 2008, DOC conducted another OAA hearing. CP 393-397, 451, 458. The hearing officer found that Finley violated his Community Custody supervision by:

- (1) failing to report to the department of Corrections since July 28, 2008;
- (2) failing to comply with Domestic Violence Treatment since on or about

August 1, 2008; (3) failing to obey all laws by driving without a valid license on or about September 14, 2008; (4) failing to obey all laws by possessing marijuana on or about September 14, 2008; and (5) failing to obey all laws by obstructing a public servant on or about September 14, 2008. The hearing officer sanctioned Finley to 35 days confinement, report to DOC within one business day of release, follow facility rules, and provide verification of enrollment in domestic violence treatment within 14 days of release. CP 393-397, 451, 458.

In a “DECLARATION OF RESIDENCE / REPORTING INSTRUCTIONS” signed by Finley and CCO Kelly Dean on September 23, 2008, Finley listed himself as “homeless” and the name of his emergency contact as “Odtis Walker” whom he designated his “cousin.” CP 399.

On October 15, 2008, while Finley was in custody at the Kitsap County Jail, DOC convened another OAA full administrative hearing. DOC alleged that Finley violated the conditions of his supervision by: (1) failing to obey all laws by assaulting Sandra Oliver; (2) failing to obey all laws by destroying the property of Diamond Oliver; (3) failing to obey all laws by having contact with Diamond Oliver; (4) failing to obey all laws by having contact with Nyzier Oliver. CP 400-404, 926-927, 933-934.³

³. Nyzier Oliver was the victim in Finley’s July 29, 2005 conviction for Assault in the Second Degree. CP 314-322, 479-480, 482, 484-492. As a condition of the sentence, the Court ordered that Finley have no contact with Nyzier Oliver (2/21/03) for a period of 10 years and the Court entered an Order Prohibiting Contact. CP 487.

The "DOC – REPORT OF ALLEGED VIOLATION" for the October 15, 2008 OAA full administrative hearing stated, in part (CP 122, 157, 403):

ADJUSTMENT AND SUPERVISION SUMMARY:

Mr. Finley is a RMA offender, whose criminal history includes the following: Residential Burglary (2001), Assault 2nd degree (2004), Criminal Assault-DV (2005), Violation of a sentencing NCO (2005), Violation of a sentencing NCO (2005), Felony Protection Order Violation (2006), Possession of Marijuana (2006), Obstruction of Law Enforcement (2006). Mr. Finley has Obstruction, DWLS, and Marijuana possession charges currently pending.

This is Mr. Finley's 4th hearing process on this cause.

It is worth repeating that the 2nd degree assault listed above was the result of an Assault on his own son Nyzier when the child was less than 2 years old. Mr. Finley assaulted his girlfriend, his own son, and now the mother of his ex-girlfriend. Sandra Oliver is terrified that Mr. Finley is going to kill her or one of her family members. Ms. Oliver is obtaining a protection order although they obviously do not deter Mr. Finley.

Mr. Finley is not only a danger to the Oliver family but to the community at large.

During the October 15, 2008 hearing, Odies Walker testified. The "HEARING AND DECISION SUMMARY" listed two phone numbers for Walker. CP 177-179, 405-406.

The hearing officer found Finley guilty of the charged violations and sanctioned him with 200 days confinement (with credit served since October 3, 2008). CP 177-179, 451, 458. He was also ordered to re-enter domestic violence treatment within one week of release and to have no

contact with Sandra Oliver. The sanction included 60 days confinement for each allegation of violating a protective order. CP 177-179, 451, 458.

On November 6, 2008, while Finley was in custody, DOC held another OAA hearing. CP 413-415. DOC charged that Finley violated the conditions of supervision by: (1) failure to obey facility rules by refusal to clean; and (2) failure to obey facility rules by using obscene, abusive, and disparaging language. CP 410. The "ADJUSTMENT AND SUPERVISION SUMMARY" of the "DOC- REPORT OF ALLEGED VIOLATION" stated in part (CP 411):

This is Mr. Finley's 5th hearing process on this cause. Mr. Finley poses a risk not only to the community, but his hostility is also evident during incarceration. It is evident by Mr. Finley's criminal history and these current violations that he has no regard for authority or societal norms.

The hearing officer found Finley guilty of the violations and sanctioned him to lockdown for one week in administrative segregation. CP 413-415.

On February 14, 2009, Finley gained release from the confinement imposed on October 15, 2008. CP 451, 458. Finley had only served 133 days of the 200 day confinement sanction. Had Finley served the full 200 days of the sanction, he would have remained incarcerated until April 20, 2009. Finley failed to report to DOC within one business day as required. CP 451, 458.

DOC OMNI Chrono⁴ entries document DOC's action and concerns

after Finley's release:

- An entry regarding Finley entered by DOC worker Natalie Simon dated February 17, 2009, at 4:00 P.M. states (CP 110, 233, 452, 458):

P released from confinement on 2/14/09. P has failed to report. P has allegedly been calling and harassing his victim which is a violation of his NCO. SW has been requested and requested that it be expedited as there is an emergent need due to victim concerns.
- An entry regarding Finley entered by DOC worker Sherina James dated February 17, 2009, at 4:13 P.M. states: "[t]here are community concerns regarding the offender. CCO and CVL alerted." CP 233.
- An entry regarding Finley entered by DOC worker Natalie Simon dated February 17, 2009, at 4:25 P.M. states: "[e]-mail sent to CCO Burke requesting CRU referral [sic]." CP 233, 452-458.
- An entry by Christina Horn regarding Finley dated February 18, 2009 at 10:50 A.M. states: "FUGITIVE INVESTIGATION ASSIGNED TO EVAN BRADY AND TONY NISCO PER CCS POSTON, SW CRU." CP 233, 452-458.
- An entry regarding Finley entered by DOC worker Natalie Simon dated February 19, 2009 at 8:41 A.M. states: "SW shows active on OBTS DT03 as of 2/17/09." CP 233, 452-458.
- An entry regarding Finley entered by DOC worker Natalie Simon dated February 24, 2009 at 3:11 P.M. states "P called and said he wanted to turn himself in but wanted to know what his violations are, I told him that he failed to report when he released. I told p that he could come to the office or go to the jail and he hung up." (CP 233, 452-458).

⁴ William T. Stough, a corrections expert and former employee of DOC, explained that OMNI Chronos are the centralized location where all information is stored regarding DOC's activities with respect to an offender and any action or conduct taken by any DOC worker should be documented and recorded in the OMNI Chronos for the offender. CP 961.

DOC generated no records or OMNI Chrono entries documenting any action by any employee of DOC to supervise and/or locate Calvin Finley from February 24, 2009 and June 2, 2009.

2. FINLEY'S ACTIVITIES AFTER HIS RELEASE FROM PIERCE COUNTY JAIL IN FEBRUARY 2009 UNTIL JUNE 2, 2009

After Finley's release from Pierce County Jail on February 14, 2009, he began living with Odies Walker and Tonie Williams-Irby at their home in University Place, Washington. CP 570-571, 589, 720, 841, 879, 929-930, 936. The address listed for Odies Walker by the Department of Licensing was 6110 Alameda Avenue West, University Place, WA 98467. CP 939. Finley lived in the home until June 2, 2009 when Finley shot and killed Kurt Husted and injured Wilbert Pina. CP 570-571, 589, 720, 841, 879, 929-930, 936.

Walker and Williams-Irby's home was about five minutes from the Wal-Mart store where the shooting took place. CP 588. In addition to Walker and Williams-Irby, three children lived in the home. Another child of Odies Walker would also come and go. CP 572.

Walker and Calvin Finley were cousins. CP 566-567. Before Finley's February 14, 2009 release from Pierce County Jail, Finley had informed DOC that his emergency contact was his cousin, Odies Walker. CP 398-399. While Finley lived with Walker and Williams-Irby, Finley used Walker's cell phone with a number recorded in Finley's DOC file. CP 589, 591. DOC had the ability to track cell phone numbers to locate people. CP 909, p. 20.

Finley did not work when he lived with Walker and Williams-Irby. CP 588-589. Instead, he planned the robbery of an armored car guard at the Lakewood Wal-Mart store. CP 592-603, 618-619, 628-629, 777-790. On June 2, 2009, Finley carried out the plan and in the process shot and killed Kurt Husted and injured Wilbert Pina. CP 528-538, 539-551.

The planning of the robbery began almost immediately upon Finley's release from jail on February 14, 2009. CP 592-597. The planning included the recruiting of various individuals to participate in the robbery. CP 601-603, 618-619. For example, initially a person named "Jonathan" was involved in the plan, but by April 2009, "Jonathan" was gone and a person named Marshawn Turpin got involved. CP 592-603. In May 2009, Jesse Lewis was recruited to participate in the robbery. Lewis ultimately declined the offer. CP 618-619, 779-790, 818-822. In mid-May 2009, Tonie Williams-Irby's son, Darrell Parrott, was recruited to participate in the robbery, but he declined the offer. CP 837-846.

In addition to recruiting participants in the robbery, the planning also involved casing the Wal-Mart where the robbery would take place. CP 585-607, 779-789. Williams-Irby was a department manager at Wal-Mart. Williams-Irby was repeatedly questioned about how much money the armored car was picking up. This began in late February 2009. CP 585-607. Finley and the others involved in the planning also studied the timing and movements of the armored car. They sat in the Wal-Mart parking lot and scouted inside the Wal-Mart store. CP 599-600, 783-789.

The planning involved obtaining a car to use in the robbery. Finley convinced Sartara Williams, a former girlfriend and the mother of his daughter, to give him her car and for her to report the car stolen. CP 1402-1403; 899-901. This occurred in April 2009. Williams' car was used in the Wal-Mart robbery and murder on June 2, 2009. CP 898-900.

The planning also involved purchasing a gun. In May 2009, Finley and Odies Walker purchased a gun from a person named "Natalie" at apartments near Monroe Street. The gun was black with a little silver and is consistent with the gun Finley used to murder Kurt Husted. CP 553-559, 628-629, 721-722.

Planning the robbery of an armored car guard at Wal-Mart while living with the person he identified as his emergency contact to DOC was not the only thing Finley did from February 14, 2009 until June 2, 2009. Finley continued to torment Diamond Oliver in violation of a protective order and the conditions of his Community Custody supervision. CP 927-928.

In March or April 2009, Sandra Oliver spotted Finley at the Lakewood, Washington Safeway store. Finley had assaulted Sandra Oliver in July 2008. CP 933-934.

Finley also spent time with the daughter he had with Sartara Williams. Finley would communicate with Sartara Williams by cell phone to arrange visits. Sartara Williams would drop off their daughter at Walker and Williams-Irby's house one or two weekends a month. CP 1399-1402.

Finley also attended Williams-Irby's birthday party in May 2009. CP 625, 778-780. Williams-Irby's friends from Wal-Mart also attended the party. CP 625. Williams-Irby's friend, Jordan Lopez, visited Odies Walker and Williams-Irby's home often between late February and June 2009. Lopez testified that Finley was almost always there and that "he came and went like anyone would and did not appear to be hiding out." CP 936. Finley spoke to Diamond Oliver from jail after the Wal-Mart shooting and told her that he had been living Odies Walker. He said he would ride his bike to the store a lot and "if they had looked for him after he was released from jail in February 2009, they would have found him." CP 929-930.

While it is unclear from the DOC OMNI Chrono entries what exactly, if anything, DOC did to supervise Finley from February 2009 until June 2, 2009, DOC worker Evan Brady ("Brady") testified he took the following actions to locate Finley:⁵

- On February 18, 2009, checked databases to develop leads about Finley's location. CP 204, 912 (p. 30).
- On February 18, 2009, attempted a cell phone trace, but Finley did not own a cell phone. CP 204.
- On February 18, 2009, attempted a "sting" operation with Diamond Oliver. Oliver was supposed to arrange to meet Finley in a public place where Finley would be arrested. Finley would not

⁵ Brady's declaration testimony and deposition testimony differed from the information he told an interviewer during DOC's incident review process. At that time, Brady did not mention anything about attempting to conduct a "sting" operation using the help of Diamond Oliver or driving by the address of 1430 East 30th Street in Tacoma, Washington, and running cars at the location when Brady was in the area. CP 443.

meet her and the “sting” did not occur. CP 204-205, 908-910 (pp. 16-22).

- On February 18, 2009, Oliver told Brady that Finley may be located at 1430 East 30th Street in Tacoma, Washington. On the evening of February 18, 2009, Brady and the South Sound Gang Task Force staked out the residence for several hours but Finley did not show. CP 909 (pp. 18-20).
- After February 18, 2009, if Brady was in the area of 1430 East 30th Street he ran cars he saw. CP 913 (pp. 35-37).
- In March 2009, Diamond Oliver told Brady that Finley may be hanging around 56th Street and Orchard Street in Tacoma. CP 205, 913 (pp. 34-35). Brady drove around the area but did not contact Finley. CP 913 (pp. 34-35).

Brady’s testimony significantly conflicts with the testimony of

Diamond Oliver. She testified:

- Finley called her numerous times from jail before his release in February 2009. Oliver met with DOC worker Sherina James, and told James about Finley and his violent history and the pending charges against Finley. Oliver told James that she feared for her life. CP 927.
- During a meeting with James, Finley called Oliver and she put him on speaker phone. Finley threatened Oliver over the speaker phone in James’ presence. CP 927.
- In February 2009, Oliver called Brady and gave him telephone numbers that Finley had called her from. Oliver also told Brady where to find Finley and offered to take Brady to Walker’s home. Brady said that they would find Finley. CP 927-928.
- In late April 2009, Finley called Oliver and offered her \$10,000 to let Finley see their son. Oliver declined. Finley said he may end up dead or in jail for a long time. When Oliver asked why, Finley said she would see it on the news. Oliver called Brady and told him

what Finley had said and told Brady about Walker again. She did not speak with Brady again prior to June 2, 2009. CP 928.

- On June 2, 2009, Oliver returned voice mails from Brady, who told her that Finley was a suspect in the Wal-Mart shooting. Oliver met with Lakewood detectives. Oliver told the detectives that Finley was staying with Walker and Irby-Williams, that Irby-Williams was an employee at Wal-Mart, and that they lived close to Wal-Mart. Oliver positively identified Finley from the surveillance video. CP 928-929.
- On June 3, 2009, Finley called Oliver from jail. Finley told Oliver that he had been living with Walker most of the time from February 2009 to June 2009. Finley said that he was not hiding and that he rode his bike from Walker's to the store a lot. Finley said that he came and left and if they had looked for him, they would have found him. CP 929-930.
- Oliver testified that she was more than willing to help locate Finley and that she knew that Finley was likely living with Walker, that she knew where Walker lived, and that Brady was not interested in the information she had or the help she offered. Oliver testified that she never worked with Brady to set up Finley. Oliver testified that if Brady would have let her help him locate Finley, Finley would not have had an opportunity to commit the murder at Wal-Mart. CP 930-931.

On March 11, 2009, Finley was charged with "CRIMINAL ASSAULT" and "DESTRUCTION OF PROPERTY" and "DV-VIOL SENTENCING NO CON" in separate Tacoma Municipal Court actions. CP 512-513, 515-526. Finley failed to appear for the arraignments in both cases, and the courts issued bench warrants on March 24, 2009. Each warrant had a bail amount of \$5,000. CP 512, 515.

On June 2, 2009, Finley shot and killed Kurt Husted and wounded Wilbert Pina during a robbery. Kurt Husted, an armored car guard, was

making a pickup at the Lakewood, Washington Wal-Mart store. CP 519-521, 528-538, 539-551.

On June 3, 2009 Finley was apprehended. CP 230.

On June 11, 2009, while Finley was in custody at the Pierce County Jail, an OAA full administrative hearing occurred. CP 423-426. DOC alleged that Finley violated his conditions of Community Custody supervision by: (1) failure to report to DOC since February 14, 2009; (2) failure to provide UA's since February 14, 2009; (3) failure to participate in domestic violence treatment as directed since February 14, 2009; and (4) violating a court ordered protective order by calling the protected individual on or about February 16, 2009. CP 418, 423. Finley was found guilty of the alleged violations and sanctioned to 120 days confinement. The sanction included 60 days confinement for the allegation of violating a protective order. CP 424.

On March 19, 2010, Finley pleaded guilty of the following crimes involving the events that occurred on June 2, 2009: aggravated murder first degree (RCW 10.95.020(1), RCW9A.32.030(1)(a)); assault first degree (RCW 9A.36.011(1)(a)); robbery first degree (RCW 9A.56.190, RCW 9A.56.200(1)(a)(i)); criminal solicitation to commit robbery first degree (RCW 9A.28.030, RCW 9A.56.190); and unlawful possession firearm first degree (RCW 9.41.040(1)(a). CP 523-528, 539-551.

3. TESTIMONY OF PLAINTIFFS' EXPERT WITNESSES

Plaintiffs presented the testimony of two expert witnesses. William Stough is a former DOC supervisor and a corrections expert. William Stough has the following opinions regarding DOC's supervision of Finley (CP 950):

- DOC had a definite, established and continuing relationship with Finley that existed through June 2, 2009;
- DOC significantly departed from any measure of what would be considered common and standard practice in the corrections industry for the supervision of an offender and DOC failed to exercise even slight care in its supervision of Finley from February 2009 until June 2, 2009;
- DOC should have devoted significant resources to the supervision of Finley;
- DOC failed to exercise any care to ascertain Finley's planned living arrangement prior to his February 14, 2009 release from Pierce County jail and DOC failed to impose conditions with regard to Finley's living arrangements;
- DOC failed to exercise even slight care in its attempts to locate and contact Finley from February 14, 2009 through June 2, 2009;
- Had DOC exercised even slight care in its supervision of Finley from February 2009 through June 2, 2009, Finley would have been apprehended prior to June 2, 2009;
- Had DOC exercised even slight care in its supervision of Finley from February 2009 through June 2, 2009, Finley would have been in jail on June 2, 2009 and would not have shot and killed Kurt Husted and injured Wilbert Pina while committing the June 2, 2009 robbery at the Lakewood Wal-Mart;

Plaintiffs also retained Allen Garber, who formerly served with the Federal Bureau of Investigation and was the U.S. Marshal for the District of MN. Allen Garber has extensive experience investigating violent crimes

and locating wanted individuals. Allen Garber has offered the following opinions:

- Finley was not actively hiding (CP 943-944);
- DOC failed to use even the most basic and rudimentary efforts to locate Finley (CP 945);
- DOC's failures showed a near absence of care and certainly lacked even slight care (CP 945);
- If DOC engaged in even the slightest care to contact and locate Finley, Finley would have been apprehended prior to June 2, 2009 (CP 945);
- If Finley been apprehended and served even a minimal amount of time in confinement following the apprehension, Finley would not have had the opportunity to plan and carry out the June 2, 2009 robbery and murder (CP 946).

C. STATEMENT OF THE CASE

Plaintiffs Janet G. Husted, personal representative of the estate of Kurt Husted (Husted), and Wilbert Pina (Pina) filed suit against the State of Washington in Pierce County Superior Court on May 16, 2012 (CP 1-8), and filed an amended complaint on July 23, 2012 (CP 9-17). The State of Washington answered on September 12, 2012. CP 18-24.

The State moved for summary judgment dismissal on March 13, 2013. CP 79-102. The State supported its motion with its brief (CP 89-102) and the declarations of Suzanne Braverman (CP 103-202), Evan Brady (CP 203-206) and Christina Horn (CP 207-212).

The plaintiffs resisted the motion. They filed a brief (CP 983-1406) declarations of counsel (CP 213-922, 1395-1406), declarations from Diamond Oliver (CP 923-931), Sandra Anne Oliver (CP 932-934), Jordan

Mahealani Lopez (CP 935-937), Jeff Paynter (CP 938-939), and expert witnesses Allen Garber (CP 940-947) and William Stough (CP 948-982).

The State filed a reply brief (CP 1407-1430) and submitted the declarations of Garth Ahearn (CP) 1429-1441), Patricia Jordan (CP 1442-1448), Dell Autumn W. Witten (CP 1449-1451, 1455-1476) and Evan Brady (CP 1452-1454).

The trial court heard the motion on April 12, 2013. The court framed its statement of the issue as follows (RP 4):

THE COURT: My question is really for the plaintiff. I need to know whether or not you believe that there is case law that supports the very narrow issue of whether the Department of Corrections has the responsibility to – and these are, I think, a term of art – take charge when the judgment and sentence has been entered and there is community custody but the defendant fails to appear, even to be registered for community custody, fails to show up and a bench warrant is issued. That was, I mean, the first business day, I think, after he was sentenced he failed to show. So then what is that duty? Where is that duty? What is the duty?

MR. JOHNSTON: I don't –

THE COURT: Because I didn't – in the case law that I read, I didn't – all the case law seemed to me to be cases in which the defendant had reported, so the Department of Corrections was supervising. I searched for a case in which there wasn't that initial supervision.

The trial court commented later (RP 9):

The Court goes on later after lots of cites – to Taggart as well – to say; once the relationship is created, it is the relationship itself which ultimately imposes the duty upon the government; and the failure to adequately monitor and report violations, thus failure to adequately supervise the probationer, may result in liability.

So then the question that I wrote in the margin for this case is; does the State have a “take-charge” relationship with the offender who is on bench warrant status? The Joyce case, they weren’t reporting all those things. They had a duty to know it and discover it. The question is, when you know that your offender is violating the terms of his judgment and sentence – in this case and the Husted case, by failing to report – and the Department takes a step of reporting it and getting a bench warrant, what’s the duty at that point?

And I think it refines, I really do, I think it refines and perhaps it is an issue of first impression from what Joyce did and from what Bordon did.

The trial court voiced concern about the scope of the State’s duty

(RP 12):

THE COURT: Alright, you may have answered this question, but what you just said triggers another question in my mind; let me ask you this, and I think I’ve asked you this in different words, but isn’t the Court extending the duty of the Department of Corrections – and law enforcement for that matter – if it finds that there is an issue of fact as to whether the State should have affirmatively gone out and located Finley on his bench warrant status? In other words, the second question, the follow-up question to that is where is the line? I mean, does this duty extend forever for everything?

With respect to causation, the court disparaged as “beyond speculation” the testimony of Allen Garber (CP 945-946) that if the State had arrested Finley he would not have had the opportunity to prepare for the crime. RP 16.

The State urged “there’s no state in the union that enforces a duty upon a correctional agency to go out and apprehend an offender.” RP 17.

Counsel for the State continued (RP 18):

Once they issue that warrant, the duty ends because there is no longer – the underpinnings of what that duty is, the ability to monitor, the ability to engage in perhaps requiring the offender to do a UA or calling up an offender’s treatment provider and saying, what’s going on, is he coming in for or is she coming in for treatment? All those types of abilities to take charge or in essence control the offender are gone because that offender is a fugitive now.

Ultimately, the court decided to dismiss this case to permit the appellate courts to resolve what it saw as the issue (RP 22):

THE COURT: I’m not going to hear any more. I think this is a case of first impression. I think that I am – I would be if I allowed this to go to trial, I am extending the duty. And so on that basis, as well as what I believe are significant causation issues, but primarily, it was the duty that I focused on. I am going to dismiss as a matter of law –

MR. AHEARN: Thank you.

THE COURT: -- and I am going to look forward to the Court of Appeals or the Supreme Court refining that for us and telling us what the answer is and perhaps across the country they’ll be interested to watch it as well.

The trial court signed the order dismissing the case (CP 1477-1479).

IV. ARGUMENT

A. THE STANDARD OF REVIEW

An appellate court reviewing a trial court’s ruling on summary judgment makes the same inquiry as the trial court. The court may only grant summary judgment where the evidence discloses no genuine issues of material fact and the moving party demonstrates it deserves a judgment as a matter of law. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). The court must consider the facts and reasonable

inferences from them in a light most favorable to the non-moving party. *Taggart v. State*, 118 Wn.2d 195, 199, 822 P.2d 243 (1992). The court reviews questions of law de novo. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). The testimony of an expert witness, alone, suffices to preclude summary judgment. *Lamon v McDonnell Douglas*, 91 Wn.2d 345, 588 P.2d 1346 (1979).

**B. THE STATE OF WASHINGTON HAD A “TAKE CHARGE”
RELATIONSHIP WITH FINLEY THAT CREATED A DUTY TO
PROTECT THE PUBLIC FROM HIS VIOLENT PROPENSITIES**

In Washington, the relationship between a parole officer and the parolees he or she supervises creates a duty to exercise reasonable care to control the parolee to protect anyone who might reasonably be endangered by the parolee’s behavior. *Taggart v. State*, 118 Wn.2d 195, 219-222, 822 P.2d 243 (1992). The relationship between a parole officer and a parolee constitutes a “special relationship” under the Restatement of Torts (Second) § 315 (1965). The relationship gives rise to a duty to protect the public from harm that the parolee might cause. *Taggart*, 118 Wn. 2d at 219. The court explained, at 220, as follows:

When a parolee’s criminal history and progress during parole show that the parolee is likely to cause bodily harm to others if not controlled, the parole officer is under a duty to exercise reasonable care to control the parolee and prevent him or her from doing such harm.

The court cited to the Restatement (Second) of Torts § 319 (1965) for the proposition that “[O]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not

controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.” *Taggart*, 118 Wn. 2d at 219.

Various aspects of the relationship between the government and the offender under supervision satisfy the “take charge” element of the duty. The statutes that authorize and empower supervision establish a “take charge” relationship. *Taggart*, 118 Wn. 2d at 219-220; *Joyce v State*, 155 Wn.2d 306, 317, 119 P.3d 825 (2005); *Couch v State*, 113 Wn.App. 556, 565, 54 P.3d 197 (2002). The terms of the judgment and sentence or other court order can create the relationship. *Bishop v. Miche*, 137 Wn.2d 518, 526, 973 P.2d 465 (1999); *Joyce*, 155 Wn.2d at 318; *Bordon v State*, 122 Wn.App. 227, 236, 95 P.3d 764 (2004). *See also*, *Hertog v City of Seattle*, 138 Wn.2d 265, 277, n.3, 979 P.2d 400 (1999). The supervising agency’s rules and regulations governing supervision can create the take charge relationship as well. *Bishop*, 137 Wn. 2d at 528.

The supervising agency need not actually know of the court order sentencing the offender to supervision for the take charge relationship to arise. *Bordon*, 122 Wn. App. at 232, 236-238. In addition, the take charge relationship can exist in the absence of the power to arrest or full custodial control of the offender. *Hertog*, 138 Wn.2d at 290,

Once the special relationship exists, the State has a duty of reasonable care and may face liability for lapses of reasonable care when damages result. *Joyce*, 155 Wn.2d at 310. Once the duty exists, the

question remains whether the injury was reasonably foreseeable. *Joyce*, 155 Wn.2d at 316. The duty arises from the special relationship between the government and the offender. The judgment and sentence and the conditions of release create the relationship, which in turn creates the duty. Once the relationship exists, the relationship itself ultimately imposes a duty on the government, and the failure to adequately monitor and report violations, thus failure to adequately supervise a probationer, may result in liability. *Joyce*, 155 Wn.2d at 318-319, citing *Bishop*, 137 Wn.2d at 526.

As explained below, the State had a “take charge” relationship with Finley that continued through June 2, 2009 and beyond.

1. FINLEY’S SEPTEMBER 1, 2006 JUDGMENT AND SENTENCE AND THE CONDITIONS IMPOSED AS A RESULT OF FINLEY’S SENTENCE TO COMMUNITY CUSTODY SUPERVISION CREATED A SPECIAL RELATIONSHIP WHICH GAVE RISE TO DOC’S DUTY TO SUPERVISE FINLEY

Finley’s September 1, 2006 conviction for Domestic Violence Court Order Violation imposed a sentence of confinement and Community Custody supervision.⁶ CP 500-509. The sentencing court imposed conditions with regard to Finley’s Community Custody supervision CP 503-505, p. 3, *infra*. Thus, the Judgment and Sentence created a recognized “take charge” relationship between DOC and Finley sufficient to give rise to a duty to supervise. *See, Bishop*, 137 Wn.2d at 526.

⁶ Finley’s crime involved a “crime against a person” as defined by former RCW 9.94A.411 (2006), which required the sentencing court, pursuant to former RCW 9.94A.715(2006) to impose a sentence of Community Custody.

2. THE DEPARTMENT OF CORRECTIONS' CONDITIONS, REQUIREMENTS AND INSTRUCTIONS CREATED A SPECIAL RELATIONSHIP WHICH GAVE RISE TO DOC'S DUTY TO SUPERVISE FINLEY

Upon Finley's release from confinement in March of 2007, DOC required him to report to "sign paperwork." CP 248-249. The next day, Finley signed DOC's "Conditions, Requirements and Instructions," which subjected Finley to additional conditions CP 374-376, p.4 *infra.* These administratively imposed conditions created a take charge relationship between DOC and Finley sufficient to give rise to DOC's duty to supervise him. *Bishop*, 137 Wn.2d at 528.

3. THE STATUTES REQUIRING AND EMPOWERING THE STATE TO SUPERVISE FINLEY GAVE RISE TO DOC'S DUTY TO SUPERVISE FINLEY

RCW 9.94A.720⁷ compelled and empowered DOC's supervision:

(1)(a) Except as provided in RCW 9.94A.501,⁸ all offenders sentenced to terms involving community supervision, community restitution, community placement, or community custody shall be under the supervision of the department and shall follow explicitly the instructions and conditions of the department. The department may require an offender to perform affirmative acts it deems appropriate to monitor compliance with the conditions of the sentence imposed. The department may only supervise the offender's compliance with payment of legal financial obligations during any period in which the department is authorized to supervise the offender in the community under RCW 9.94A.501

(b) The instructions shall include, at a minimum, reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, notifying the community corrections officer of any change in the in the

⁷ In effect at the time of Finley's September 1, 2006 conviction as well as at all times relevant in this matter.

⁸ RCW 9.94A.501 did not apply to Finley because Finley had been convicted of a crime against a person as defined by RCW 9.94A.411.

offender's address or employment, and paying the supervision fee assessment.

(c) For offenders sentenced to terms involving community custody for crimes committed on or after June 6, 1996, the department may include, in addition to the instructions in (b) of this subsection, any appropriate condition of supervision, including but not limited to, prohibiting the offender from having contact with any other specified individuals or specified class of individuals.

(d) For offenders sentenced to terms of community custody for crimes committed on or after July 1, 2000, the department may impose conditions as specified in RCW 9.94A.715.

The conditions authorized under (c) of this subsection may be imposed by the department prior to or during an offender's community custody term. If a violation of conditions imposed by the court or the department pursuant to RCW 9.94A.710 occurs during community custody, it shall be deemed a violation of community placement for the purpose of RCW 9.94A.740 and shall authorize the department to transfer an offender to a more restrictive confinement status as provided in RCW 9.94A.737. At any time prior to the completion of an offender's term of community custody, the department may recommend to the court that any or all of the conditions imposed by the court or the department pursuant to RCW 9.94A.710 or 9.94A.715 be continued beyond the expiration of the offender's term of community custody as authorized in RCW 9.94A.715(3) or (5).

The department may require the offenders to pay for special services rendered on or after July 25, 1993, including electronic monitoring, day reporting, and telephone reporting, dependent upon the offender's ability to pay. The department may pay for these services for offenders who are not able to pay.

(2) No offender sentenced to terms involving community supervision, community restitution, community custody, or community placement under the supervision of the department may own, use, or possess firearms or ammunition. Offenders who own, use, or are found to be in actual or constructive possession of firearms or ammunition shall be subject to the violation process and sanctions process under RCW 9.94A.634, 9.94A.737, and 9.94A.740.

“Constructive possession” as used in this subsection means the power and intent to control the firearm or ammunition. “Firearm” as used in this subsection has the same definition as in RCW 9.41.010.⁹

RCW 9.94A.715¹⁰ provided, in part:

Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4).¹¹ The conditions may also include those provided for in RCW 9.94A.700(5).¹² The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community, and the department shall enforce such condition pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender’s risk of reoffense and may establish and modify additional conditions of the offender’s community custody based upon the risk to community safety. In addition, the

⁹ RCW 9.94A.720(2006); RCW 9.94A.720(2009).

¹⁰ In effect at the time of Finley’s September 1, 2006 conviction and at all times relevant in this matter.

¹¹ RCW 9.94A.700(4) contains the following conditions: (a) the offender shall report to and be available for contact with the assigned community corrections officer as directed; (b) the offender shall work at department-approved education, employment, or community restitution, or any combination thereof; (c) the offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions; (d) the offender shall pay supervision fees as determined by the department; and (e) the residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement. *See* RCW 9.94A.700(4)(2006); RCW 9.94A.700(4)(2009).

¹² RCW 9.94A.700(5) contains the following conditions: (a) the offender shall remain within, or outside of, a specified geographical boundary; (b) the offender shall not have direct or indirect contact with the victim of the crime or specified class of individuals; (c) the offender shall participate in crime-related treatment or counseling services; (d) the offender shall not consume alcohol; or (e) the offender shall comply with any crime-related prohibition. *See* RCW 9.94A.700(4)(2006); RCW 9.94A.700(4)(2009).

department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

In this case, DOC had the legal authority to impose significant conditions on Finley during his term of Community Custody pursuant to RCW 9.94A.720, 9.94A.715, 9.94A.700(4), and 9.94A.700(5). DOC did impose such conditions, including requiring Finley to obey all laws.

Pursuant to RCW 9.94A.740 and 9.94A.737, DOC had the power to arrest, confine, and sanction Finley up to 60 days per violation of the terms of his Community Custody supervision. DOC had acted pursuant to these powers prior to February 2009 and sanctioned Finley multiple times for his violations of the conditions of his Community Custody supervision. CP 177-179, 378-380, 381-392, 393-397, 400-404, 410, 411, 413-415, 451, The powers and duties that RCW 9.94A.720, 9.94A.715, 9.94A.700(4), 9.94A.700(5), 9.94A.740 and 9.94A.737 gave DOC to respond to violations through arrest and sanctions, clearly created a “take charge” relationship, and corresponding duty to supervise Finley. *Taggart*, 118 Wn. 2d at 219-220.

C. THE ISSUANCE OF THE SECRETARY’S WARRANT DID NOT TERMINATE DOC’S “TAKE CHARGE” RELATIONSHIP WITH AND SUPERVISION OF FINLEY BECAUSE THE LEGISLATURE INTENDED THAT COMMUNITY SUPERVISION WOULD NOT BE CURTAILED BY AN OFFENDER’S ABSENCE FROM SUPERVISION FOR ANY REASON

Despite the clarity in the case law and the facts of this case, DOC persuaded the trial court that it lacked any duty because DOC issued a

Secretary's Warrant to arrest Finley when he failed to report on February 15, 2009 and DOC issued its warrant. CP 87. In oral argument, the State mischaracterized the effect of the warrant and the legal underpinnings of its duty to supervise Finley (RP 18):

Once they issue that warrant, the duty ends because there is no longer -- the underpinnings of what that duty is, the ability to monitor, the ability to engage and perhaps requiring an offender to do a UA or calling up an offender's treatment provider and saying, what's going on, is he coming for treatment or is she coming in for treatment? All those types of ability to take charge or in essence control the offender are gone because that offender is a fugitive now.

Actually, the duty to supervise Finley flowed from the relationship created between him and DOC, based on the judgment and sentence, the statutes mandating and empowering DOC supervision and DOC's own "Conditions, Requirements and Instructions." *Taggart*, 118 Wn. 2d at 219-220; *Joyce*, 155 Wn.2d at 318; *Bishop*, 137 Wn. 2d at 528. Contrary to DOC's contentions, the duty does not require a custodial relationship or the power to arrest. *Bishop*, 137 Wn.2d at 528.

Nonetheless, the trial court agreed with DOC, and announced that the case presented "an issue of first impression from what Joyce did and from what Borden did." RP 9.

No case decided by any Washington appellate court has ever held that the "take charge" relationship and duty to supervise comes and goes according to the inclination of the offender to submit to supervision. In fact, in the only case to consider the issue, our Supreme Court

unequivocally rejected the idea that DOC's authority to supervise switches on and off. *In the Matter of the Personal Restraint of Amel W. Dalluge, Petitioner*, 162 Wn.2d 814, 177 P.3d 675 (2008) There, the court had to decide whether DOC's power to enforce the conditions of Community Custody became suspended while the offender was confined. The court viewed this as a question of statutory interpretation. *Dalluge*, 162 Wn.2d at 817-818.

RCW 9.94A.625(3) provided that a "period of Community Custody...shall be tolled during any period of time the offender is in confinement for any reason." The offender contended that since confinement tolled the "period" it tolled the Department's power to enforce community custody conditions as well. The court disagreed. It held as follows, at 818-819 (emphasis the court's in original):

The Sentencing Reform Act of 1981, Chapter 9.94A RCW, says nothing about the Department's power and responsibility being tolled while offenders are confined and instead uses sweeping language. E.G., RCW 9.94A.720(1)(a) ("all offenders sentenced to terms involving...*Community Custody shall be under the supervision of the Department and shall follow explicitly the instructions and conditions of the Department.* (Emphasis added)). It would be peculiar, to say the least, if an offender could evade the requirements of Section 720(1)(a) by committing an offense that results in confinement. It also seems very unlikely to us that the legislature intended that Community Custody conditions, such as no contact orders, would be suspended while an offender is in jail. *Cf. United States v. Camarata*, 828 F.2d 974, 981 (3d Cir. 1987)(parole could be revoked before it began based on offender violation of laws; *see also State v. Keller*, 98 Wash.2d 725, 728, 657 P.2d 1384 (1983)(court will not read statutes in an absurd or strained way).

The *Dalluge* court highlighted the legislature's intent that Community Custody supervision continue uninterrupted, at 819 (emphasis the court's in original):

The Department's reading is consistent with the legislature's uncodified statement of purpose:

The legislature intends that all terms and conditions of an offender's supervision in the community, *including the length of supervision*, and payment of legal financial obligations, *not be curtailed by an offender's absence from supervision for any reason, including confinement in any correctional institution.*

Laws of 2000 ch. 226, § 1. Based on all these statutes, we conclude that the legislature intended the department to retain supervisory power and responsibility while offenders on community supervision are confined.

Dalluge makes it clear that an Finely's refusal to report did not suspend the DOC's power and duty to supervise him. The legislature's uncodified statement of purpose provides unequivocally that "an offender's supervision in the community, including the length of supervision...not be curtailed by an offender's absence from supervision for **any** reason, including confinement in a correctional institution." *Daluge*, at 819, emphasis added.

Appellants agree with DOC's argument in *Dalluge* that an offender's absence from supervision, even confinement in prison, does not terminate DOC's power to enforce the terms of community custody. In a like manner, an offender's refusal to report certainly would fall within the scope of the legislature's contemplation of "any reason."

In this case, DOC's contentions, and the trial court's ruling, thwart the intent of the legislature. If the legislature intended that an offender would not terminate supervision by committing acts that subjected the offender to confinement it surely intended that an offender would not terminate supervision by failing to appear for an appointment with a CCO. One simply cannot reconcile the trial court's ruling that Finley's failure to report terminated DOC's supervision with the will of the legislature as explained in *Dalluge*. DOC retained the power and duty to supervise Finley, even after he missed his appointment and DOC issued the warrant. The trial court erred when it ruled otherwise.

D. DOC'S OWN POLICY DEMONSTRATES THAT COMMUNITY CUSTODY SUPERVISION OF AN OFFENDER CONTINUES AFTER AN OFFENDER ABSCONDS, AND AFTER THE ISSUANCE OF A SECRETARY'S WARRANT

DOC's Field Policy No. DOC 350.750, regarding warrants and detainers, demonstrates that even DOC understood that absconding and issuance of a secretary's warrant did not terminate DOC's power and duty to supervise. CP 192-199. This policy provided that:

- DOC had the authority to issue a Secretary's Warrant to law enforcement and designated corrections staff to arrest and detain offenders in violation of Community Custody. CP 193.
- DOC also had the authority to arrest and detain an offender. The policy gave DOC the authority to request a bench warrant and recommend the detention and arrest of an offender who absconds from or violates supervision. CP 193.
- The policy gave community corrections supervisors and community corrections officers the authority to issue or recommend issuance of warrants and detainers. CP 193.

- The policy also defined absconding as an offender “failed to make a required contact and cannot be located or failed to return to the state of Washington when ordered to do so...” CP 194.
- According to the policy, if an offender absconds, “the CCO **will** make reasonable attempts to located him/her” (emphasis added) “within 72 hours...” CP 194.
- For a High Violent offender (like Calvin Finley) who absconds, “the CCO **must** conduct a field contact at the last known residence...” (emphasis added). CP 194.
- The policy requires the CCO to “document all attempts to located the offender in the offender’s electronic file.” CP 194.
- The policy permits the CCO to issue or request the immediate issuance of a warrant in emergent situations without first making an attempt to locate the offender. If this occurs, the CCO **must** document the emergency and the need for immediate request for a warrant, and within 72 hours “the CCO **will** make attempts to locate the offender and document the attempts in the electronic file.” (emphasis added) CP 194.
- If the CCO cannot locate the offender within the 72 hours, “s/he **will** issue or request the issuance of a warrant and document in the offender’s electronic file.” (emphasis added) CP 194.
- The policy also requires a CCO to “e-mail DOC 11-005 Wanted Person Entry Request to the Headquarters Warrants Desk and to the Section Correctional Records Supervisor to provide details of the incident.” CP 195. The policy also describes the Warrant Service Area. An offender’s risk level determines the Warrant Service Area. For High Violent offenders (such as Calvin Finley), the service area is “Nationwide Washington Crime Information Center/National Crime Information Center (WACIC/NCIC).” CP 196.
- The policy also authorizes a CCO to issue bench warrants and detainers to effect the arrest of an offender. CP 196-197. The policy provides that “warrants for offenders who pose the highest risk to the community...will be referred to the Fugitive Task Force(s) for more concentrated search efforts.” CP 198.

In the case at bench, DOC protested to the trial court that once an offender fails to report for supervision DOC becomes powerless to

supervise him. See, e.g. RP 17-18. The argument lacks credibility. DOC, in issuing policy DOC 350.750, obviously did not contemplate that CCO's lost their power or responsibility to supervise absconding offenders. The policy assumes that the CCO would act and try to find the offender, utilizing different tools depending upon the risk the offender posed to the community. While the policy permits referral to the Fugitive Task Force, nothing stated therein excuses the CCO from further responsibility to supervise the offender. The policy actually sets forth mandatory procedures for CCO's to take action and record that action in the offender's electronic file.

Counsel for the State posited the question to the trial court (RP 18):

Once that warrant is issued, the next question is do we have a duty to go out and apprehend him?

DOC's own policies answer that question "yes," despite the State's protestations otherwise. CP 192-199. The trial court erred when it ruled that DOC lost its power to supervise an offender when it issued a Secretary's warrant for missing an appointment. This court should reverse.

E. THE ABSENCE OF CONTACT BETWEEN AN OFFENDER AND CCO DOES NOT TERMINATE COMMUNITY CUSTODY SUPERVISION

Joyce recognized that a gap in contact between an offender and CCO did not terminate DOC's duty to supervise. The offender in *Joyce* had failed to report to DOC for seven months in one instance, and for three months prior to the criminal act that was at issue in that case. *Joyce*,

155 Wn.2d at 313-314, 320. Despite the lack of reporting and lack of contact between the offender in *Joyce* and DOC for three months prior to the criminal act, the Washington State Supreme Court still recognized that a duty existed.

The Court of Appeals in *Bordon* went even further and held that DOC owed a duty to supervise even though it did not know of the court order sentencing an offender to undergo supervision. *Bordon*, 122 Wn.App. at 236. The court in *Bordon* sentenced the offender to 12 months of community supervision. DOC, however, never received a copy of the judgment and sentence and had done nothing to supervise the offender. Nonetheless, the Court of Appeals found that because DOC should have known about the conviction and because RCW 9.94A.120(13) mandated that DOC supervise offenders under supervision, a duty existed. *Bordon*, 122 Wn.App at 232, 236-238.

The State can cite no case supporting the argument that an offender can discharge himself from DOC supervision by failing to show up for an appointment. The argument makes no sense. The imposition of supervision represents a legislative determination that offenders need oversight to ensure compliance with the terms of the judgment and sentence and to protect the public. The duty to supervise requires the State to take reasonable precautions to protect anyone foreseeably endangered by the offender's dangerous propensities. *Taggart*, at 224. The notion that properly conducted supervision will control the offender and protect the

public clearly underlies the legislature's decision to impose supervision and the Supreme Court's long line of supervision decisions beginning with *Taggart*. The State's argument, and the trial court's ruling, removes control of supervision from DOC and places it into the hands of the offender. The State can offer no policy rationale for delegating its duty to control the offender and protect the public to the whim of an offender.

Moreover, the fact that the legislature and DOC gave CCO's tools to apprehend absconding offenders shows that the State's power to supervise continues even if an offender absconds. Apprehending an absconded offender constitutes a part of supervision. It is supervision. DOC cannot label an offender as an absconder unless the court has imposed supervision pursuant to a judgment and sentence. The ability and power to apprehend an absconded offender only exists by virtue of the powers granted DOC by virtue of judicially imposed supervision. The purpose of apprehending an absconded offender is to compel him to submit to supervision.

The trial court erred in ruling that an offender ends DOC's duty to supervise by failing to show up for an appointment. DOC does not abandon its effort to supervise absconding offenders like Calvin Finley. The duty to supervise continues, and can include efforts to apprehend the offender to make him submit to supervision.

In the case at bench, Calvin Finley's OMNI Chrono database entries show that after referring the hunt for Finley to the Fugitive Task

Force, the CCO's basically did nothing, although Evan Brady took some steps to locate him. The trier of fact must decide whether DOC's efforts to supervise Finley after he missed the appointment, including its efforts to apprehend him, breached its duty.

F. PROXIMATE CAUSE PRESENTS AN ISSUE OF FACT

Proximate causation consists of two elements: (1) cause in fact and (2) legal causation. *Taggart*, 118 Wn.2d at 225. As explained below, sufficient evidence of both cause in fact and legal causation exists, and this matter should be permitted to go to the jury.

**1. CAUSE IN FACT DOES NOT REQUIRE PROOF OF
“WHEN MR. FINLEY WOULD HAVE BEEN APPREHENDED
AND WHAT SANCTION WOULD HAVE BEEN IMPOSED”**

The State argued to the trial court that cause in fact did not exist because “[p]laintiffs cannot establish the requisite factual causation, i.e. that Mr. Finley would have been in jail on the day of the shooting, June 2, 2009, without relying upon speculative assumption piled upon speculative assumption.” CP 96-97. This argument ignores controlling Supreme Court precedent, ignores evidence, and impermissibly denies the plaintiff favorable inferences from the evidence.

To establish cause in fact, a plaintiff must establish that the harm suffered would not have occurred but for an act or omission of the defendant. Cause in fact usually presents a question for the jury. The court may determine it as a matter of law only when reasonable minds cannot differ. *Joyce*, 155 Wn.2d at 322.

Taggart, Hertog, and Joyce illustrate that cause in fact in a supervision case generally presents a jury question. In *Taggart*, the offender's extensive criminal history included sexual deviation, excessive drinking and personality disorders. *Taggart*, at 199. Upon release on parole, he entered a halfway house for four months. After leaving, his parole officer did not require the offender to submit to urinalysis and the monitoring consisted of seeing the offender weekly. The parole officer never contacted the offender's employers or girlfriend. If the parole officer had, he would have learned that the offender drank regularly. The offender's attacks on women usually involved alcohol. *Taggart*, at 226.

Approximately seven months after parole, the offender assaulted *Taggart* after meeting her in a bar. While the court agreed that the evidence would allow the State to defend the parole officer, the court refused to declare as a matter of law that no actions of the State or its agents caused *Taggart's* injuries. *Taggart*, at 227.

Hertog involved an offender who raped a six year old while on probation for a lewd conduct conviction. *Hertog*, 138 Wn.2d at 268. The court held a revocation hearing, and declined to revoke probation but ordered the offender to submit to alcohol and sexual deviancy treatment. The probation officer only saw the offender one time in a three month period before the rape. The offender had been using drugs and alcohol at least two weeks before the rape, and had consumed alcohol and cocaine on the night of the rape. The court found that if, after the revocation hearing,

the probation counselor had attempted to learn earlier whether monitoring by random urinalysis was being done and learned it was not, the probation counselor could have sought revocation earlier. *Hertog* at 272-273. The court held that a material issue of fact remained as to cause in fact regarding whether the probation counselor sufficiently inquired about urinalysis or other testing *Hertog*, at 283.

Joyce involved an offender under DOC's community supervision as a result of a conviction for assaulting his girlfriend and threatening her with a gun. *Joyce*, 155 Wn.2d at 310. While under supervision, the offender stole a car under the influence of marijuana, drove erratically, and struck and killed Paula Joyce. *Joyce*, at 314.

From the beginning of supervision, the offender in *Joyce* seldom reported as required, did not perform community service, did not receive domestic violence counseling, and with few exceptions, failed to make payments towards his monthly financial obligations.

During a violation hearing that occurred approximately nine months before the offender struck and killed Paula Joyce, the judge ordered the offender to sign a release of his medical records so DOC could review the offender's psychiatric history. This never occurred, despite the fact that DOC knew that the offender had been in the psychiatric ward at Providence Hospital. The court explained that "[h]ad [DOC] required [the offender] to sign the medical release as ordered by [the judge] and had [DOC] obtained [the offender's] medical records, [DOC] and [the judge]

would have learned of [the offender's] psychiatric condition and may have been able to craft appropriate modifications to [the offender's] conditions of release." The court continued: "[DOC] and the judge also would have learned the [the offender] had been using marijuana, that he had stolen another vehicle from a relative by popping the ignition, and that he pleaded guilty to driving without a license." *Joyce*, at 311-313.

Our Supreme Court rejected DOC's argument that, as a matter of law, DOC's negligence did not constitute a factual cause of Paula Joyce's death (155 Wn.2d at 322-323):

The Department contends that there was insufficient evidence to support the jury's finding of cause in fact. We disagree. Stewart had a known history of drug abuse. Had the State obtained medical records as directed by Judge Pasette, it would have learned of Stewart's drug use, visual and auditory hallucinations, and episodes of psychotic behavior. The State knew of Stewart's propensity to drive stolen vehicles of speeds at least up to 86 miles per hour.

It is undisputed that Stewart committed numerous violations of his supervision that were not reported to the court or diligently pursued by community corrections officials. A court had previously sentenced Stewart to jail time for reported violations. Joyce's expert, William Stough, testified that if the Department had obtained a bench warrant for Stewart prior to the accident, he "would have been in jail, either awaiting a hearing or doing time on the violations" without bail on August 8, 1997. 5 Report of Proceedings (RP) at 792. While we recognize that a reasonable jury could have decided against the plaintiffs on this issue, especially if properly instructed, the trial court did not err in denying the Department's motion to dismiss as a matter of law.

The *Joyce* court rejected the State's proximate cause argument that "even if it had properly monitored Stewart and reported violations to the

court, it is unknown what action, if any, the court could have taken.” 155

Wn.2d at 321. The court explained (emphasis the court’s):

It is true that *if* the Department had properly supervised the offender and reported his violations, and *if* a judge had nonetheless decided to leave Stewart at large in the community, the causal chain may have been broken as a matter of law. That is what we held in *Bishop [v. Miche]*, 137 Wash.2d 518, 973 P.2d 465 (1999)]. Even though the judge in *Bishop* was aware that the supervised offender had violated conditions of probation, that he had a severe alcohol problem, and that he had willfully ‘[driven] after his license had been suspended, the judge did not revoke probation.’ 137 Wash.2d at 532, 973 P.2d 465. ‘As a matter of law, the judge’s decision not to revoke probation under these circumstances broke any causal connection between any negligence and the accident.’ *Bishop*, 137 Wash.2d at 532, 973 P.2d 465. If the Department had properly monitored Stewart and reported his violations to either of the two sentencing judges, and if the Department had unsuccessfully asked for judicial action, the causal chain would have been broken.

Joyce, 155 Wn.2d at 321. The causal chain was not broken in *Joyce* and the State could not avoid the plaintiff’s proximate cause showing or liability with that argument. 155 Wn.2d at 321–322.

DOC ignored *Taggart*, *Hertog* and *Joyce*. Instead, it focused its argument on *Hungerford v Dep’t of Corrections*, 135 Wn.App. 240, 139 P.3d 1131 (2006), and *Estate of Bordon v Dep’t of Corrections*, 122 Wn.App. 227, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005). DOC argued that the courts in *Bordon* and *Hungerford* held that a plaintiff must produce evidence establishing that the offender would have been incarcerated on the date of the plaintiff’s injury but for DOC’s alleged negligence. CP 96-97. Our Supreme Court, however, has declined

to adopt DOC's position, as shown by *Hertog and Joyce*. Moreover, *Bordon* predated *Joyce*, and one can distinguish *Hungerford* from the case at bench.

Hungerford involved an offender who murdered a woman while on DOC supervision for misdemeanor theft conviction and for legal financial obligations imposed as a result of an assault conviction. Prior to the murder, the court in the misdemeanor theft conviction at a revocation hearing limited the offender's supervision to only legal financial supervision. *Hungerford*, 135 Wn.App. at 246-248. The plaintiff argued two theories of causation. First, had the offender been properly supervised the offender would have been rehabilitated and would not have committed the murder. Next, had the judge at the misdemeanor revocation hearing revoked the offender's probation, the offender would have been in jail on the date of the crime. *Hungerford*, at 255-256.

The Court of Appeals rejected the first theory by recognizing that DOC has no duty enforceable in tort to rehabilitate offenders. *Hungerford*, at 256. With respect to the second theory, the court found no evidence showing that the trial court did not have all the relevant facts at the revocation hearing. Consequently, the court's decision to place the offender on only legal financial obligations constituted an intervening cause under *Joyce*. *Hungerford*, at 252.

In *Hungerford*, unlike here, DOC's active supervision, i.e., its take-charge relationship, of the offender ended 10 months before the murder.

135 Wn.App. at 246. In contrast, DOC's take charge relationship with Finley continued beyond June 2, 2009.

The *Hungerford* court never held that a plaintiff can only prove causation through evidence that the offender would have been in jail on the date of the injury. The court simply addressed the theories of causation presented by the plaintiff. The court could not and did not change any of our Supreme Court's precedent regarding required proof of causation in a supervision case.

Bordon involved an offender who drove intoxicated and killed another driver. A court had sentenced the offender to DOC community supervision for a crime of eluding and he was supposed to be under DOC's supervision at the time of the collision. DOC never received a copy of the judgment and sentence for the eluding conviction and therefore did not supervise the offender. *Bordon*, 122 Wn.App. at 231-232.

The plaintiff's sole theory of causation argued that if DOC had supervised the offender more closely, the offender would have been in jail when the accident occurred. *Bordon*, at 234-235. The court found a lack of evidence to support that theory. In particular, the plaintiff did not show when a violation report would have been filed and when it would have been heard. The plaintiff presented no evidence (expert or otherwise) that the court would have sentenced the offender to additional jail time if DOC

had reported the offender violating driving conditions, or that any jail time would have encompassed the date of the incident. *Bordon*, at 241-242.

The court found that, given the lack of evidence, a jury would have to guess not only whether and when the violation would have been pursued but also whether a judge would have done something differently if he or she had known about the violation and what different result would have transpired *Bordon*, at 241-242.

The *Bordon* court did not hold that, to establish cause in fact in a supervision case, a plaintiff must produce evidence establishing that the offender would have been in jail on the date of plaintiffs' injury but for DOC's negligence. Instead, the court simply held that there must be some evidence of a direct link between DOC's negligence and the harm, at 243-244 (emphasis the court's):

We hold that some evidence of a direct link between DOC's negligence and the harm to a third party is necessary to survive a CR 50 motion in negligent supervision cases. In previous cases, the nature of that evidence has varied. It has included expert testimony about how judges rule in particular proceedings, factual evidence that the very nature of the negligence led to an offender's release, testimony of the sentencing judge, or expert testimony that the State's negligence directly caused the injury. Causation evidence could also include statistical evidence about what judges do in similar cases. While we agree that expert testimony is not always required, *some* evidence establishing causation must be presented to survive a CR 50 motion. That evidence must allow a jury to determine causation without resorting to speculation.

Obviously, analyzing evidence of cause in fact involves a case specific inquiry. Our Supreme Court's rulings in *Taggart*, *Hertog*, and

Joyce confirm that the evidence required to take the matter to the jury need not be overwhelming, but simply consist of some evidence from which a jury can conclude that but for the acts or omissions of DOC, the injury complained of would not have happened.

2. THE EVIDENCE SUPPORTS MULTIPLE THEORIES OF FACTUAL CAUSATION

In the present case, the evidence supports multiple theories from which a jury could conclude that but for DOC's breach of its duty, Finley would not shot Kurt Husted and wounded Wilbert Pina.

After Finley left jail in February 2009, Finley lived with his DOC emergency contact, Walker, until committing the June 2, 2009 robbery. CP 398-399, 570-571, 589, 720, 841, 879, 929-930, 936. Walker gave DOC his cell phone number prior to Finley's February 2009 release from Pierce County Jail. CP 177-178, 405-406. Finley used Walker's cell phone from February 2009. CP 589, 591. DOC, however, never bothered to contact Finley through Walker even though Finley had listed Walker as his DOC emergency contact. Also, DOC ignored the help of Diamond Oliver who even offered to take one of the DOC workers to Walker's house where she suspected Finley was living CP 930-931..

From February 2009 until June 2, 2009, Finley was not hiding from DOC. CP 943-944. Had DOC attempted to locate Finley through Walker or with the help Diamond Oliver offered, DOC would have located and apprehended Finley prior to June 2, 2009. CP 945 If DOC had apprehended Finley prior to June 2, 2009, Finley would have been in jail

on June 2, 2009 and would not have shot and killed Kurt Husted and injured Wilbert Pina while committing the robbery at the Lakewood, Washington Wal-Mart. CP 946.

Corrections expert William Stough explained that regardless of the date that DOC would have apprehended Finley, Finley would have been in violation of at least seven conditions of supervision, each one of which could result in confinement of up to 60 days, or a total of 420 days or more. Stough testified that given his experience, Finley's history, and recent sanctioning practices with regard to Finley, Finley would have been in jail on June 2, 2009 had Finley been apprehended prior to June 2, 2009. CP 977-979.¹³ In fact, Stough testified "to conclude Finley would have been released prior to June 2, 2009 requires significant speculation and ignoring certain realities." CP 979.

Unlike *Bordon* and *Hungerford* the evidence shows that Finley had violated supervision conditions after February 2009, that if DOC had not breached its duty Finley would have been sanctioned for violating those conditions, and that the sanction would have placed Finley in jail on June 2, 2009. Certainly given Finley's history, the prior sanctioning practice, and the number of supervision conditions Finley had violated when he failed to report to DOC in February 2009, any sanction imposed would

¹³ Stough also explained that among other facts that support his opinion, the sanctioning practice of Finley after June 2, 2009 supports his opinion, as does the fact that Finley also had two outstanding bench warrants, each with \$5,000 bail, that would have had to be addressed prior to his release. CP 974-979.

have been significant even if it did not somehow land Finley in jail on June 2, 2009.

Furthermore, the robbery at the Wal-Mart was not a spontaneous crime. Finley planned and prepared for the crime from his release in February 2009 until its commission on June 2, 2009. The planning and preparation were comprehensive and involved recruiting various people, obtaining a get-away car, obtaining a gun, staking out the Wal-Mart store, both inside and out, to learn the timing and operation of the armored car guard, and gathering inside information from a Wal-Mart employee.

As explained in detail by Allen Garber, had Finley served even a minimal amount of confinement after his release in February 2009 and prior to June 2, 2009, it “is extremely unlikely and even speculative to suggest that Finley may still have engaged in the June 2, 2009 crime.” Garber explained that Finley would have lacked the opportunity to plan and carry out the crime on June 2, 2009. Garber testified that, in his opinion, Kurt Husted would not have been murdered and Wilbert Pina would not have been injured by Finley on June 2, 2009. CP 945-946. Corrections expert William Stough reaches the same opinion.¹⁴

DOC’s inaction and breach of its duty permitted Finley to avoid sanctions for the violations of his Community Custody supervision and

¹⁴ CP 979-980.. In addition to a sanction interrupting Finley’s opportunity to plan and carry out the June 2, 2009 crime, Stough also explains that if Finley served the full 200 days of his prior sanction instead of receiving 1/3 credit for good time applied, Finley would not have had the opportunity to commit the June 2, 2009 crime. Stough knows of no legal authority for DOC to reduce a hearing officer’s sanction of confinement by 1/3 for good time earned and if none existed, it would be extremely reckless for DOC to implement such a policy and carry out such a practice. CP 961

gave Finley the opportunity to plan and carry out the June 2, 2009 robbery. A review of all of the evidence, drawing all inferences favorably to the plaintiffs, makes it quite difficult to comprehend any conceivable way in which the crime could have occurred if DOC had satisfied its duty. Clearly, cause in fact presents a jury question. The trial court erred to the extent it dismissed the case based upon cause in fact. This court should reverse.

3. LEGAL CAUSATION EXISTS BECAUSE THE STATE HAD A TAKE CHARGE RELATIONSHIP WITH FINLEY AND FAILED TO SUPERVISE HIM, ALLOWING HIM TO KILL KURT HUSTED AND WOUND WILBERT PINA

“Legal causation rests on considerations of policy and common sense as to how far the defendant’s responsibility for its actions should extend.” *Taggart*, 118 Wn.2d at 226. “Legal causation is intertwined with the question of duty.” *Hertog*, 138 Wn.2d at 284. The question here concerns whether policy and common sense should compel DOC to face liability to the plaintiffs for failing to supervise Calvin Finley

DOC contended that it should “not be held liable when an offender absconds from supervision and causes harm,” because “[w]hen an offender absconds from supervision any realistic ability the officer has to control the offender disappears.”¹⁵ CP 99. This argument ignores that the duty to supervise arises from the judgment and sentence, the statutes mandating supervision and DOC’s own Conditions, Requirements and

¹⁵ One can question whether Finley truly “absconded” when Finley had listed himself as homeless before his February 2009 release and after his release Finley lived with the person he identified as his emergency contact to DOC,

Instructions. *Taggart*, at 219-220; *Bishop*, at 526, 528. Those factors created DOC's duty to supervise Finley, not "any realistic ability" to control him. Whether he absconded or not, the take charge relationship existed and so did DOC's duty.

DOC's argument essentially rehashes its recurring forlorn refrain that it should have no duty in the absence of a custodial relationship with the offender. This argument has failed since *Taggart*, and it should fail here as well (*Taggart*, 118 Wn.2d at 223):

We reject this approach and hold that a parole officer takes charge of the parolees that he or she supervises despite the lack of a custodial or continuous relationship.

The *Taggart* court emphasized that the duty existed without a custodial relationship, and without exercising "continuing hourly or daily dominance and dominion" over offenders. *Taggart*, at 224. An offender's absconding, like the absence of a custodial relationship, does not show the lack of legal causation.

DOC's duty arose as a result of its special relationship with Finley. Imposing liability for damages that occurred as a result of DOC's failure to adequately supervise Finley is not too remote from that duty and DOC's breach. DOC, however, proposed that it would be bad policy to impose liability in situations where an offender has "absconded." CP 99-100. Contrary to what DOC suggests, social policy is better served when DOC acts to control dangerous offenders under supervision who roam loose in the community without oversight. Imposing liability on DOC for its

failure to meet its duty, when those failures result in the death and injury to innocent members of our community, is sound policy. The trial court erred when it dismissed the case. This Court should order the matter to go to the jury.

G. QUALIFIED IMMUNITY DOES NOT APPLY TO DOC

DOC also argued that qualified immunity precludes liability. CP 89-94. DOC's argument, however, ignores *Savage v. State*, 127 Wn.2d 434, 899 P.2d 1270 (1996) and *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999). *Savage* held that the qualified personal immunity for parole officers does not extend to DOC. *Savage*, 127 Wn.2d at 445-447. *Hertog* confirmed that holding. *Hertog*, 138 Wn.2d at 278. Plaintiffs have not brought claims against any individual corrections officers. Qualified immunity does not apply.

V. CONCLUSION

The trial court erred when it ruled that Finley's failure to show up for an appointment terminated DOC's duty to supervise. This court should reverse and remand for trial.

DATED this 31st day of October, 2013.

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By  _____
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NO. 41451-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

JANET G. HUSTED as Personal Representative of the ESTATE OF
KURT HUSTED; WILBERT R. PINA, an individual; and JOEL
FLORES, guardian ad litem for minor EMMETT PINA;

Plaintiffs/Appellants,

vs.

STATE OF WASHINGTON,

Defendant/Respondent.

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Vickie LoFranco, being first duly sworn, on oath deposes and says:

That on NOVEMBER 1, 2013, I delivered, via Legal

Messengers, a copy of Brief of Appellants for service upon:

Glen Anderson, Esq. + GARTH O'HEARN, Esq.
Torts Division
1250 Pacific Ave Ste 105
Tacoma, WA 98401

Vickie Lo Franco
VICKIE LOFRANCO

SIGNED AND SWORN to before me on the 1st day of

Nov., 2013, by Vickie LoFranco.

[Signature]
Notary Public in and for the State of
Washington, residing at Tacoma.
My appointment expires 10-16-14

2013 NOV -1 PM 1:13
STATE OF WASHINGTON
COURT OF APPEALS

NO. 41451-1-II

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On November 1, 2013, I filed, via Legal Messengers, the original and 1 copies of Brief of Appellants with the Clerk of the Court of Appeals, District II, of the State of Washington.

Vickie LoFranco
VICKIE LOFRANCO

SIGNED AND SWORN to before me on the 1st day of Nov., 2013, by Vickie LoFranco.

[Signature]
Notary Public in and for the State of Washington, residing at Tacoma.
My appointment expires 10-16-14