

NO. 47599-5-II

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

RICHARD TURAY,

Respondent/Plaintiff,

v.

AL NERIO, MARY REGER, KRISTIN CARLSON, TODD DUBBLE,
BYRON EAGLE, ELENA M. LOPEZ, HOLLY CORYELL, JOHN SCOTT,

Appellants/Defendants.

APPELLANTS' AMENDED OPENING BRIEF

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I. INTRODUCTION

Appellants are employees of the Special Commitment Center (SCC), a program operated by the Washington State Department of Social and Health Services. The SCC is a total confinement treatment and care facility for persons whom the superior courts have civilly committed or detained as sexually violent predators pursuant to Chapter 71.09 RCW. Respondent Richard Turay is a civilly committed resident of the SCC.

After being granted discretionary review by this Court, the SCC employees now appeal the trial court's order denying their motion for summary judgment dismissal of Mr. Turay's civil rights claim involving a temporary telephone restriction. CP 106-07. The employees asserted below and continue to assert now that dismissal of Mr. Turay's claim was required because he presented no evidence of a constitutional violation and because the employees are entitled to qualified immunity. CP 21-33.

The trial court's order denying summary judgment on these grounds was erroneous because the undisputed record fails to establish a constitutional violation, clearly established or otherwise. This Court should accordingly preclude a needless trial and order the dismissal of Mr. Turay's suit.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying the SCC employees' motion for summary judgment after incorrectly concluding that there were disputed material facts in the record. CP 102-03.
2. The trial court erred by denying the SCC employees qualified immunity from suit, incorrectly concluding that this defense was "unavailable under these circumstances." CP 103.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred by denying the SCC employees' motion for summary judgment where the undisputed facts reflected that a constitutional violation did not occur. (Assignment of Error 1)
2. Whether the trial court erred by denying the SCC employees qualified immunity from suit where Mr. Turay failed to satisfy his burden of showing a violation of a clearly established constitutional right. (Assignment of Error 2)

IV. STATEMENT OF THE CASE

Respondent Richard Turay is civilly committed to the SCC, a total confinement treatment facility for sexually violent predators. On April 11, 2014, the SCC received a report from Ingrid Hunter, legal guardian for Mr. Turay's mother, Betty Turay, that Mr. Turay's calls to his mother were causing her stroke-related conditions to worsen and that Mr. Turay was manipulating Ms. Turay to obtain money. Declaration of Becky Denny (Denny Decl.) ¶ 4, Attach. A (CP 44-45, 48-49). Ms. Hunter asked for the SCC's assistance in stopping Mr. Turay's calls to Ms. Turay, which were reportedly occurring at a rate of up to 30 times per day. *Id.*

As permitted by its resident telephone access policy,¹ the SCC on April 15, 2014 placed a temporary phone use restriction on Mr. Turay that prohibited him from using the living unit pay phones in response to Ms. Hunter's report.² Denny Decl. ¶ 5, Attach. B (CP 45, 50). The restriction contained a review/expiration date of May 15, 2014. *Id.* While

¹ SCC Policy 203 provides that "SCC residents may have reasonable access to a telephone to make and receive personal calls providing they have not been placed on a phone restriction for misuse." Denny Decl. ¶ 13, Attach. H (CP 46, 64-66). The policy also provides that staff may restrict a resident's phone access for personal calls if the resident abuses his or her telephone privileges. *Id.*

² The SCC's living unit pay phones are not monitored by the SCC for the content of the phone calls or for the numbers called by the residents of the SCC. Denny Decl. ¶¶ 11-12, Attach. G (CP 46, 63). The SCC is therefore unable to enforce a restriction that would prohibit a particular resident from dialing a specific number. *Id.* In order to avoid monitoring the pay phone usage, the SCC places temporary phone use restrictions on residents who misuse the telephones. *Id.*

this restriction was in effect, Mr. Turay could continue to use the unit legal phones, continue to send and receive mail, and receive visitors. *Id.*

After Mr. Turay's phone use was temporarily restricted, Ms. Hunter informed the SCC that Ms. Turay was being contacted by another SCC resident on Mr. Turay's behalf. Denny Decl. ¶ 6, Attach. C (CP 45, 51-53). Ms. Hunter obtained a TRO restricting Mr. Turay's contact with his mother on May 1, 2014 and provided a copy to the SCC. Denny Decl. ¶ 7, Attach. D (CP 45, 54-56). This order was followed by a second TRO issued on May 12, 2014 restraining Mr. Turay and other individuals from contacting Ms. Turay on Mr. Turay's behalf. Denny Decl. ¶ 8, Attach. E (CP 45, 57-59). In the May 12, 2014 order the court "authorized and directed [the SCC] to assist in the implementation of the restraints against Richard Turay" CP 59. The May 12, 2014 order was followed by a final Amended TRO entered on June 9, 2014. Denny Decl. ¶¶ 9-10, Attach. F (CP 45-46, 60-62). On May 27, 2014, the SCC lifted Mr. Turay's temporary pay phone restriction but maintained the prohibition against contacting Ms. Turay. Denny Decl. ¶¶ 11-12, Attach. G (CP 46, 63).

Mr. Turay thereafter filed a complaint in Pierce County Superior Court seeking damages on claims of loss of consortium, defamation and deprivation of phone use rights related to the temporary pay phone use

restriction. The trial court dismissed Mr. Turay's loss of consortium and defamation claims on the employees' summary judgment motion, but permitted him to file an amended complaint regarding his constitutional claim. CP 11-12.

Mr. Turay filed an amended complaint again alleging that his phone use rights were violated by the temporary pay phone restriction. CP 7-10. The complaint again sought only damages and not injunctive relief. *Id.* The sole legal theory asserted in the complaint was that “[u]nder the Turay Injunction^[3] civilly detained or commitment [sic] person [sic] have a right to adequate unmonitored phone access, including making and receiving calls.” CP 8. Both parties thereafter moved for summary judgment. The SCC employees argued that they were entitled to summary judgment dismissal because (1) Mr. Turay had failed to support his 42 U.S.C. § 1983 claim with any evidence suggesting that a constitutional violation occurred, (2) Mr. Turay could not base a cause of action on the injunctive relief ordered as part of the now-dissolved *Turay*

³ Mr. Turay's reference to the “Turay Injunction” refers to *Turay v. Weston*, No. C91-0664WD (W.D. Wash. 1994), a federal proceeding in which a special master was appointed by the federal district court to implement injunctive relief related to treatment conditions at the SCC. The injunctive relief included an order entered in November of 1998 requiring the SCC to lift its no longer active “bar on outgoing telephone calls (other than collect).” Mingay Decl. ¶ 2, Attach. A at 4 (CP 34, 40). This and several other orders were substantially complied with, and the injunction was totally dissolved by the court in 2007. *Turay v. Richards*, No. C91-0664RSM, 2007 WL 983132 (W.D. Wash. Mar. 23, 2007).

federal court injunction, and (3) they were entitled to qualified immunity. CP 21-33.

Mr. Turay sought summary judgment solely upon a theory that he has a clearly established right to unimpeded phone use as a result of the dissolved *Turay* injunction. CP 17-20. He submitted no evidence other than his own declarations and a declaration of another SCC resident stating that he has a right to “unlimited” and “unimpeded” telephone access pursuant to the *Turay* injunction, that the SCC did not inform him why his pay phone usage was being restricted, and that he disputed Ms. Hunter’s report to the SCC. CP 17-20, 75-96.

At the summary judgment hearing, the trial court recognized that Mr. Turay did not have an absolute right to use the unit pay phones, RP at 19, but nevertheless concluded that the employees were not entitled to summary judgment. In its findings, the court concluded that Mr. Turay’s “first amendment rights are subject to restrictions that are reasonably related to [the SCC’s] legitimate therapeutic and public safety interests. A genuine issue of material fact – specifically, the reasonableness of the Defendants’ deprivation of phone use rights – exists, which precludes summary judgment.” CP 102-03. The court did not consider the appropriateness of the employees’ qualified immunity

defense at the hearing, and in its findings concluded only that this defense to suit was “unavailable under these circumstances.” CP 103.

The employees thereafter moved this Court for discretionary review of the trial court’s order denying their summary judgment motion. In their motion for discretionary review, the employees argued that the trial court erred by determining that they were not entitled to qualified immunity from suit, and that it erred by finding there was a disputed material fact that precluded summary judgment in their favor. Commissioner Barse granted discretionary review on both of these issues. Ruling Granting Motion for Discretionary Review (Ruling) at 10.

In respect to the trial court’s denial of qualified immunity, the commissioner noted that “myriad opinions support that institutions may place reasonable restrictions on detainee telephone access,” Ruling at 7, and that the employees “present compelling argument that Turay did not have a clearly established right to use the telephone to contact Ms. Turay under these circumstances,” Ruling at 9. The commissioner also concluded that the employees’ alternative argument regarding the absence of a disputed material fact that would preclude summary judgment should be reviewed in the interest of judicial economy given the determination to review the denial of qualified immunity. Ruling at 10-11.

Mr. Turay then moved to modify the commissioner's ruling granting discretionary review, which this Court denied.

V. ARGUMENT

The trial court committed two errors that, if either were corrected, would necessitate dismissal of Mr. Turay's 42 U.S.C. § 1983 phone access claim. There are no disputed material facts in the record, and none of the evidence supplied by Mr. Turay suggests that a constitutional violation occurred. The lone disputed material fact identified by the trial court – the reasonableness of the SCC's decision to implement the temporary phone restriction – was at most a question of law ripe for judicial resolution since no underlying facts relevant to that decision were in dispute. When viewing all of the evidence in Mr. Turay's favor, there was no reasonable basis to conclude that a constitutional violation could have occurred.

Even if the trial court did not err when it determined that Mr. Turay's constitutional claim hinged on the resolution of a disputed fact, it failed to engage in a qualified immunity analysis at the summary judgment hearing and incorrectly concluded in its findings that the employees were not entitled to this protection from suit. One of the express purposes of the qualified immunity defense is to avoid the time-consuming process of litigating a trial on the merits. *Robinson v. City of Seattle*, 119 Wn.2d 34, 65, 830 P.2d 318, 336 (1992) (recognizing

that qualified immunity entitles government officials to immunity from suit, making it critical to resolve the applicability of the defense as quickly as possible). This consideration makes it especially appropriate for this Court to examine the trial court's denial of qualified immunity on interlocutory review.

A. The SCC Employees Are Entitled to Summary Judgment Because the Undisputed Factual Record Fails to Support a Constitutional Claim Even When Viewed in the Light Most Favorable to Mr. Turay

An appellate court reviews a grant or denial of summary judgment *de novo*. *Green v. American Pharmaceutical Co.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). Summary judgment should be granted where “there is no genuine issue of material fact or if reasonable minds could reach only one conclusion on that issue based upon the evidence construed in the light most favorable to the non-moving party.” *Weatherbee v. Gustafson*, 64 Wn. App. 128, 131, 822 P.2d 1257 (1992). The granting of summary judgment is proper if the non-moving party, after the motion is made, fails to establish any facts which would support an essential element of its claim. *Id.*

Even when viewed in the light most favorable to Mr. Turay, the evidence in the record fails to establish that a constitutional violation occurred under the First Amendment, procedural due process, or substantive due process.⁴

1. First Amendment Free Speech

The evidence failed to support a claim premised on a violation of Mr. Turay's First Amendment free speech rights. In the context of phone use rights of an institutionalized person, the correct characterization of the right is the right to communicate with persons outside prison walls, with the use of the telephone being merely "a *means* of exercising this right." *Valdez v. Rosenbaum*, 302 F.3d 1039, 1048 (9th Cir. 2002) (holding that pretrial detainees do not have a First Amendment right to use the telephone). After appropriately defining the right, the Court must then analyze whether the restrictions on Mr. Turay's use of the phone violated that right.

To determine whether a detention facility policy violates this right, courts apply the four-part balancing test articulated in *Turner v. Safley*, 482 U.S. 78 (1987), to assess the reasonableness of the regulation. *See Valdez*, 302 F.3d at 1048-49 (applying the *Turner* test to a pretrial

⁴ Mr. Turay did not allege in his complaint or otherwise argue that the temporary phone use restriction violated his due process rights – he at best referred only to the First Amendment in his complaint. CP 7-10. The due process analyses supplied herein are included to exhaust other cognizable legal theories for relief.

detainee's First Amendment phone deprivation claim). Although the *Turner* court was concerned with prison regulations that impacted speech, this test has been applied by other courts in the similar context of determining whether institutional regulations impacting a civilly-committed person's freedom of speech are permissible. *Balkum v. Sawyer*, No. 6:06-CV-1467, 2011 WL 5041206, at *5-6 (N.D.N.Y. Oct. 21, 2011) (unpublished) (collecting cases and concluding that it would apply the *Turner* test for assessing a civilly-committed person's challenge to institutional policy on First Amendment grounds); *Spicer v. Richards*, No. C07-5109 FDB, 2008 WL 3540182, at *10 (W.D. Wash. Aug. 11, 2008) (unpublished) (applying the *Turner* test to a SCC resident's First Amendment claim).

Courts applying the *Turner* test must consider four factors to determine the reasonableness of the regulation at issue: (1) whether there is a " 'valid, rational connection' " between the regulation and a legitimate government interest put forward to justify it; (2) "whether there are alternative means of exercising the right that remain open" to residents; (3) whether accommodation of the asserted constitutional right would have a significant impact on guards and other detainees; and (4) whether ready alternatives are absent (bearing on the reasonableness of the regulation). *Turner*, 482 U.S. at 89-90. Application of the *Turner* factors

to an undisputed record is a question of law, reviewed *de novo*. *Iron Eyes v. Henry*, 907 F.2d 810, 813 (8th Cir. 1990); *see also King v. Snohomish Cnty.*, 146 Wn.2d 420, 423 (2002) (recognizing that when facts are undisputed, the court is “presented with only questions of law”).

In respect to the first factor, the SCC has a strong interest in protecting the public from unwanted and harassing contact by SCC residents. *See Overton v. Bazzetta*, 539 U.S. 126, 133, 123 S. Ct. 2162 (2003) (concluding that the protection of the public is a legitimate penological interest); *Morgan v. Rabun*, 128 F.3d 694, 697 (8th Cir. 1997) (recognizing that “[t]he governmental interests in running a state mental hospital are similar in material aspects to that of running a prison”). The SCC’s telephone access policy, which permits the SCC to temporarily restrict resident phone usage when there is reason to believe that phone privileges are being misused, is rationally related to that interest. Denny Decl. ¶¶ 12-13, Attach. H (CP 46, 64-66).

The second inquiry is whether alternative means of exercising the right at issue remain available to the detainee. When SCC residents are put on a phone restriction, they may still engage in written correspondence and have visitors. Residents subject to these restrictions also have access to the legal phones for all calls relating to their commitment cases and cases challenging their conditions of confinement. All of these

alternatives were available to Mr. Turay during the course of his temporary phone use restriction. Denny Decl. ¶ 5, Attach. B (CP 45, 50). Mr. Turay thus had alternative means of exercising his right to communicate with persons outside of the facility.

The third factor of the *Turner* test is whether accommodation of the asserted rights will trigger a “ripple effect” on fellow inmates and prison officials. Allowing unfettered phone access to all residents for any purpose – including harassing members of the public – would cause chaos and commotion in an environment designed to be therapeutic and somewhat restrictive. In addition it would greatly impact the SCC’s programmatic goal of providing for community security.

Finally, courts consider whether a ready alternative to the regulation would fully accommodate the prisoner’s rights at *de minimis* cost to the state’s interests. In the present case there is no ready alternative to the restriction that would accommodate Mr. Turay’s rights at little cost to the state’s interests. The current SCC policy is a reasonable compromise between completely unrestricted phone access and an overly restrictive phone policy. Continued phone access for residents who have engaged in inappropriate phone activities would be counter-therapeutic and counter-productive for the treatment environment. This is contrary to the goals of the SCC.

The SCC's phone access policy as applied to Mr. Turay satisfies the four inquiries of the *Turner-Safley* test and does not violate Mr. Turay's First Amendment rights. Mr. Turay offered no evidence that would lead to any other reasonable conclusion when applying the four *Turner* factors to the policy in question. Further, no evidence suggests that the policy was arbitrarily applied to Mr. Turay. The trial court erred to the extent that it concluded otherwise.

2. Procedural Due Process

The evidence presented by Mr. Turay would not support a constitutional claim premised on procedural due process. In order to establish a procedural due process violation in this context, a state law must establish a liberty interest protected by the Constitution. *Valdez*, 302 F.3d at 1044. The law must set forth substantive predicates to govern official decision making and must also contain language that mandates a particular outcome if the substantive predicates have been met. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462-63, 109 S. Ct. 1904 (1989). Nothing in Washington State law provides an unqualified right to utilize a phone to make outgoing calls at the SCC. Absent a state created liberty interest in using telephones, any claim made by Mr. Turay that relies on procedural due process must fail. *Valdez*, 302 F.3d at 1045.

3. Substantive Due Process

The evidence would also fail to support a claim premised on substantive due process because no evidence suggested that the phone restriction constituted punishment. While civilly committed persons have a substantive due process right to be free of restrictions that amount to punishment, there is no constitutional infringement if restrictions are imposed incident to a legitimate government purpose. *U.S. v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095 (1987). In order to distinguish between a permissible restriction and impermissible punishment, courts first must look to whether the restriction is based upon an express intent to inflict punishment and then whether the intent can be inferred from the nature of the restriction. *Valdez*, 302 F.3d at 1045. If a particular restriction is reasonably related to a legitimate governmental objective, it does not, without more, amount to “punishment.” *Bell v. Wolfish*, 441 U.S. 520, 539, 99 S. Ct. 1861 (1979).

Here, there is no evidence of an express intent to inflict punishment. The evidence suggests only that the employees imposed the phone restriction in response to the reports of Mr. Turay’s harassing telephone contact provided to the SCC by Ms. Turay’s guardian, Ms. Hunter. Denny Decl. ¶¶ 4-5, Attachs. B and C (CP 44-45, 50-53). As discussed, the SCC has a legitimate interest in protecting the public from

harassment by residents of the SCC. *See Overton*, 539 U.S. at 133. Mr. Turay offered no evidence suggesting that the SCC acted unreasonably by imposing a temporary phone restriction following receipt of the concerning report from Ms. Hunter.

A reasonable relationship between the governmental interest and the challenged restriction does not require an exact fit. *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999). Further, it does not require showing a least restrictive alternative. It does not matter whether the court agrees with the policy or whether the policy in fact advances legitimate interests. *Id.* The only relevant question is whether the defendants' judgment was rational, that is, "whether the defendants might reasonably have thought that the policy would advance its interests." *Id.* Here, that standard is easily met. The report of abusive conduct by Mr. Turay towards his mother justified the temporary restriction to limit the risk of future harm. Further, the brief duration of the phone restriction demonstrates that the restriction was not intended to punish Mr. Turay. *See e.g. Valdez*, 302 F.3d at 1046 (finding no punitive intent due to the short time of the restriction and only for as long as it served its stated purpose where the restriction was in place for four and one half months). Absent a showing that the restriction on Mr. Turay's telephone access constituted punishment, there is no substantive due process violation.

B. The SCC Employees Are Entitled to Qualified Immunity From Suit

The trial court also erred when it concluded that qualified immunity was “unavailable under these circumstances” to the employees. CP 106-07. Because a successful assertion of qualified immunity results in immunity from suit and not merely a shield from liability, interlocutory review of the trial court’s denial is critical to effectuating the purpose of this defense.

The doctrine of qualified immunity provides immunity from a civil suit for damages in a 42 U.S.C. § 1983 action to a state actor who violates a constitutional right if the “contours of the right” were not “ ‘sufficiently clear [at the time so] that a reasonable official would understand that what he is doing violates that right.’ ” *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). If the contours of the right were not clearly established, then the court may affirm on that basis without reaching the question of whether a constitutional violation has occurred. *Pearson*, 555 U.S. at 232-33. The qualified immunity defense applies with equal force in 42 U.S.C. § 1983 actions brought in state court. *Robinson*, 119 Wn.2d at 65 (recognizing that qualified immunity entitles government officials to immunity from

suit, making it critical to resolve the applicability of the defense as quickly as possible).

Government officials are denied qualified immunity only if (1) “the facts that a plaintiff has alleged . . . make out a violation of a constitutional right”; and (2) “the right at issue was clearly established at the time of [the] defendant’s alleged misconduct.” *Pearson*, 555 U.S. at 232 (internal quotation marks omitted). These two prongs need not be addressed in order. *Id.* at 236. The first prong assesses whether the wrong alleged by the plaintiff in fact amounts to a constitutional violation. *Moss v. United States Secret Service*, 675 F.3d 1213, 1222 (9th Cir. 2012). The second prong “assesses the objective reasonableness of the official’s conduct in light of the decisional law at the time.” *Id.*

A government official’s conduct violates clearly established law when, at the time of the challenged conduct, “[t]he contours of [a] right [are] sufficiently clear” that every “reasonable official would have understood that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Although a case directly on point is not required, “existing precedent must have placed the statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*,

131 S. Ct. 2074, 2083 (2011)).⁵ The plaintiff bears the burden of proof that the right allegedly violated was clearly established. *Romero v. Kitsap Cnty.*, 931 F.2d 624, 627 (9th Cir. 1991); *Robinson*, 119 Wn.2d at 65-66 (recognizing that “[o]nce the affirmative defense of qualified immunity has been raised . . . the *plaintiff* bears the burden of demonstrating the existence of the allegedly ‘clearly established’ constitutional right.”)

As discussed above, a constitutional right was not violated on the evidence presented. And even if this Court were to find otherwise, any such right was not clearly established. Mr. Turay has failed to satisfy his burden of establishing that the employees are not entitled to qualified immunity. He cites no authority suggesting that a constitutional violation occurs when a detention facility places a detainee on a temporary phone restriction following allegations of abuse and harassment carried out via telephone.⁶ This consideration alone is sufficient to warrant dismissal of

⁵ Recent decisions of the United States Supreme Court have made clear that the “clearly established” bar for qualified immunity purposes is a high hurdle for § 1983 plaintiffs to clear. *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012) (casting doubt on whether even a controlling circuit court decision “could be a dispositive source of clearly established law . . .”); *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam) (same proposition); *City and Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1769, 191 L. Ed. 2d 856 (2015) (same proposition). The Court has further warned against defining clearly established law in general terms, saying that “[q]ualified immunity is no immunity at all if ‘clearly established’ law can simply be defined as the right to be free from unreasonable searches and seizures.” *Id.* at 1769.

⁶ Mr. Turay did cite one unpublished case in the trial court. *Young v. Seling*, No. 01-35697, 2003 WL 21920006 (9th Cir. Aug. 11, 2003), to support his claim that the alleged violation was clearly established. His citation to this authority is not permissible pursuant to GR 14.1(b), which permits citation to unpublished opinions in Washington courts only if “citation to that opinion is permitted under the law of the jurisdiction of the

Mr. Turay's civil rights claim, and it was clear error for the trial court not to meaningfully evaluate and recognize the merit of this defense.

Mr. Turay's reliance on a portion of the injunctive relief ordered in *Turay v. Weston*, No. C91-0664WD (W.D. Wash. 1994) for the proposition that he has a clearly established right to "unrestricted" phone use is flawed for at least two reasons. First, the *Turay* court never recognized a constitutional right to phone access, unimpeded or otherwise. It ordered the SCC to lift its "bar on outgoing telephone calls (other than collect)" to facilitate family support for residents; the order was not of constitutional dimension. Mingay Decl. ¶ 2, Attach. A at 3-5 (CP 34, 39-41). In fact, the *Turay* court cited approvingly to WAC 388-880-050(2)(f), which permits SCC residents to have "reasonable access to a telephone to make and receive confidential calls *within SCC limitations*." (Emphasis added.) *Id.* The *Turay* court simply never recognized a constitutional right to unimpeded phone access and Mr. Turay submits no evidence to the contrary.

issuing court." The Ninth Circuit Court of Appeals prohibits citation to its unpublished cases for precedential value if the case was filed prior to 2007. FED. R. APP. P. 32.1; see *Washington State Communication Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 190, 293 P.3d 413 (2013) ("Under GR 14.1(b) and FED. R. APP. P. 32.1, parties and Washington courts may cite to federal unpublished opinions filed on January 1, 2007 or later."). Because *Young v. Seling* was filed in 2003, it should not be considered by this Court.

Second, case law at most recognizes that SCC residents have a right to communicate with persons outside of the facility. There is no clearly established constitutional right to communicate via telephone, let alone a right to unlimited phone access as Mr. Turay asserts. *See Valdez*, 302 F.3d at 1048 (holding that a pretrial detainee had no constitutional right to telephone access and instead recognized telephone use as one means of exercising the right to contact other persons); *U.S. v. Footman*, 215 F.3d 145, 155 (1st Cir. 2000) (recognizing that in the First Amendment context “prisoners have no per se constitutional right to use a telephone”); *Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994) (holding that “an inmate has no right to unlimited telephone use”). The employees therefore were not on notice that placing a temporary phone use restriction on Mr. Turay while leaving alternative means of communication in place could have violated his constitutional rights.

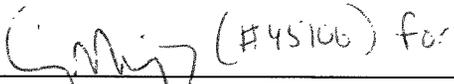
While Mr. Turay is permitted to use the telephone pursuant to SCC policy, he does not have a constitutional right to unimpeded phone use after the SCC receives complaints that Mr. Turay was abusing members of the public via telephone. The trial court erred by refusing to grant the employees qualified immunity from suit because no clearly established right was identified by Mr. Turay and because there is no clearly established constitutional right to unrestricted phone usage.

VI. CONCLUSION

The trial court erred by denying summary judgment in favor of the SCC employees on Mr. Turay's 42 U.S.C. § 1983 civil rights claim because the undisputed evidence reflects that the SCC reasonably applied its resident phone use policy. The trial court also erred by determining that the employees were not entitled to qualified immunity from suit because no clearly established constitutional right was violated. Correction of either error would necessarily result in the dismissal of Mr. Turay's claim. This Court should preclude a needless trial and order the dismissal of Mr. Turay's suit.

RESPECTFULLY SUBMITTED this 21st day of April, 2016.

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CERTIFICATE OF SERVICE

Jeffrey S. Nelson, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein.

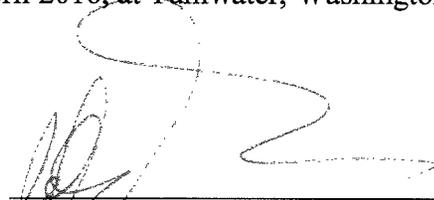
I certify that on April 21, 2016, I served a true and correct copy of this **APPELLANTS' AMENDED OPENING BRIEF** and this **CERTIFICATE OF SERVICE** by sending an electronic copy to Becky Denny, Legal Coordinator at the Special Commitment Center, and upon information and belief, the same was printed and delivered to Respondent/Plaintiff Richard Turay, and a copy was also sent via U.S. Mail as follows:

Respondent/Plaintiff

Richard Turay
Special Commitment Center
PO Box 88600
Steilacoom, WA 98388

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

Dated this 21st day of April 2016, at Tumwater, Washington.



JEFFREY S. NELSON
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

April 21, 2016 - 8:51 AM

Transmittal Letter

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Appellants' Amended Opening Brief

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