

NO. 67475-7-I

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

THE ESTATE OF ZINA LINNIK, and MIKHAIL and VALENTINA
LINNIK, a married couple, and STANSISLAV M. LINNIK, and NINA
LINNIK, and MIKHAIL LINNIK, as parent and guardian for PAVEL
LINNIK, SVETLANA LINNIK, OKSANA LINNIK, VADIM LINNIK,
SAMUEL LINNIK, his minor children,

Appellants,

v.

STATE OF WASHINGTON, by and through its various state agencies
and subdivisions, including DEPARTMENT OF CORRECTIONS and
CHILD PROTECTIVE SERVICES, and PIERCE COUNTY, a municipal
corporation, and CITY OF TACOMA,

Respondents.

BRIEF OF STATE RESPONDENTS

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2012 MAY 29 AM 11:36

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I. INTRODUCTION

This case arises from the kidnapping and murder of Zina Linnik by Terapon Adhahn. Plaintiffs seek to impose liability upon the State for Adhahn's criminal misconduct under two theories.¹ First, plaintiffs seek to impose liability on the Department of Corrections (DOC) under a theory of negligent supervision. However, Adhahn was subject to supervision by DOC only from 1990 through 1997. Adhahn's abduction of Ms. Linnik did not occur until ten years later, in 2007. The trial court properly concluded that because Adhahn was not on supervision when he abducted Ms. Linnik, liability could not be based on the status of his sex offender classification and registration ten years before.

Plaintiffs' other claim is against the Department of Social and Health Services (DSHS) for negligent investigation of a report of child abuse that DSHS received in early 2004. The subject of that referral was not Zina Linnik. In fact, there is no evidence that Terapon Adhahn and Ms. Linnik knew each other, or had even met, before Ms. Linnik's abduction and murder on July 4, 2007. The trial court properly concluded

¹ Of course plaintiffs have asserted claims against two other defendants in this matter – Pierce County and the City of Tacoma – which are also on appeal here, but those defendants are represented by other counsel and claims against those defendants are addressed in separate briefing filed or expected to be filed by those defendants' counsel. This brief only addresses plaintiffs' claims against the State defendants, the Department of Social and Health Services (Child Protective Services) and the Department of Corrections.

that the claim of negligent investigation of a referral of child abuse was only cognizable by the subject of the referral, or that person's parent, guardian, or custodian.

DSHS is not liable to every future victim of an individual who was allegedly improperly investigated for an unrelated allegation of abuse or neglect. And, DOC's obligation to control offenders is based on and limited to the "take charge" relationship that empowers DOC to incarcerate an offender or to cause that offender to be incarcerated by a court. Neither DSHS nor DOC owes a duty to protect the general public from criminal misconduct of a person with whom the agency has had no association for many years (DSHS, more than three years, and DOC, more than nine years).

In addition to properly concluding that neither DOC nor DSHS owed Ms. Linnik an actionable tort duty at the time of her criminal abduction, the trial court also correctly concluded that the plaintiffs had failed to establish that any act or omission by the State was the proximate cause of Adhahn's kidnapping and murder of Ms. Linnik. The plaintiffs' claims that Adhahn would have been deported if DOC had reported his conviction, or that Adhahn would have been convicted of a new crime if DSHS had investigated the child abuse referral are, at best, speculative

and too attenuated to be within the ambit of risk of the events giving rise to this lawsuit.

II. ISSUES

1. Did DSHS owe a duty to plaintiffs when their injuries were inflicted by the intentional criminal acts of a third person, when the only contacts DSHS had regarding Adhahn occurred more three years prior to Ms. Linnik's injuries and those contacts did not involve Ms. Linnik in any manner?
2. Was DSHS's response to two referrals it received in 2004 regarding a child unconnected with Zina Linnik a factual cause of Ms. Linnik's injuries when plaintiffs failed to demonstrate that a different response by DSHS would have prevented Ms. Linnik's injuries in 2007?
3. Was DSHS's response to two referrals it received in 2004 a legal cause of Ms. Linnik's injuries when plaintiffs failed to demonstrate any temporal or spatial proximity between the receipt of the referrals in 2004 and Ms. Linnik's injuries in 2007?
4. Did DOC owe a duty to protect Zina Linnik from Terapon Adhahn when the "take charge" relationship that gave DOC the ability to control Adhahn had terminated almost ten years previously by order of the sentencing court?

5. Was DOC a factual cause of plaintiffs' injuries when plaintiffs did not prove that Adhahn would have been in jail or deported if DOC had supervised Adhahn differently ten years prior to Ms. Linnik's injuries?

6. Was DOC's supervision of Adhahn which ended in 1997 a legal cause of plaintiffs' injuries which occurred in 2007, when policy and precedent dictate that the connection between DOC's alleged failures and plaintiffs' injuries is too remote in time and space?

III. COUNTER STATEMENT OF THE CASE

The following facts were undisputed below. At the time Terapon Adhahn committed his crimes against Ms. Linnik, he had not been under DOC supervision for close to ten years. CP 11. At one time DOC had supervised Adhahn as a requirement of a judgment and sentence for a March 25, 1990 crime of Incest in the First Degree. CP 1413-17. Under that judgment and sentence, the last contact DOC had with Adhahn was on July 8, 1997, when Superior Court Judge Karen Strombom entered an order that terminated Adhahn's treatment and supervision. CP 1411.

DOC's supervision of Adhahn began in 1990 when he pled guilty to Incest in the First Degree. CP 1413. Adhahn received an exceptional sentence under the Special Sex Offender Sentencing Alternatives of 14 months total confinement, which was suspended with the following conditions imposed: 60 days in jail and 60 months of treatment concurrent

with 60 months of supervision. CP 1416. Adhahn was never confined in a DOC facility for that or any other crime until after he was sentenced for the 2007 murder related to this lawsuit. CP 1407.

At the outset of his supervision period Adhahn only began treatment for substance abuse, though he was supposed to also obtain sex offender treatment. CP 1419. The reason Adhahn provided for not enrolling in both treatment programs simultaneously was that he did not have enough money. CP 1419. Adhahn's DOC Community Corrections Officer (CCO) Brad Garrett repeatedly worked with Adhahn to ensure his compliance with the required treatment and learned that Adhahn had been in to inquire about sex offender treatment twice and that Adhahn continued to look for employment. CP 1419. Nevertheless, the CCO kept the sentencing court informed of Adhahn's non-compliance by issuing a Notice of Violation. CP 1419-20, *see also* CP 476-80.

After CCO Garrett informed the sentencing court of Adhahn's deficiencies, by order dated November 27, 1991 (CP 1424), the court ordered that Adhahn begin treatment "no later than 11/01/91." CP 1424. The court apparently back-dated that start date because Adhahn had begun the required treatment on October 29, 1991. CP 476. During that treatment period – which he completed – Adhahn was "an active and cooperative group therapy member." CP 1426.

As a result of the work done by the CCOs, Adhahn's supervision period ran from 1990 to 1997 – longer than the originally sentenced 60 months. CP 1422-24 (Petition on Non-Compliance); CP 1419-20 (Notice of Violation); CP 1413-17 (Judgment and Sentence). During that lengthy supervision period, Adhahn not only completed substance abuse (CP 488) and sex offender (CP 1426-27) treatments, he was closely monitored by his CCOs. *See* CP 468-80.

Adhahn provided the sentencing court a letter from therapist Daniel DeWaelsche that informed the court that Adhahn had successfully “completed all aspects of the sex offender treatment program with this agency.” CP 1426-27. Specifically, the therapist noted that “Terapon has demonstrated that he is using the skills and techniques, gleaned in sex offender treatment, on a day-to-day basis to avoid recidivism.” CP 1426. Based on Adhahn's completion of the ordered sex offender treatment, on July 8, 1997, Superior Court Judge Karen Strombom entered an Order Terminating Treatment and Supervision. CP 1411.

In late January and early February 2004, seven years after Adhahn's supervision had ended by order of the sentencing court and three and a half years before Zina Linnik was abducted and murdered, DSHS received two back-to-back referrals relating to a “young teenage [girl] was living with Adhahn and had been ‘sold’ to him for sex.”

CP 2896-97. It is undisputed that the referrals did not relate to Zina Linnik. In fact, there is no evidence that DSHS ever received a referral related to any of the plaintiffs or Zina Linnik in particular. DSHS forwarded one or both of those referrals to law enforcement for investigation, but Adhahn was never located as a result of the referrals or investigation. CP 962. DSHS did not conduct its own investigation of the referrals. CP 2838.

An outline of relevant dates is as follows:

03-25-90	Commission of crime for which supervision was ordered (CP 1413);
09-04-90	Sentenced on Incest charge (CP 1416);
11-24-90	Completed 60 day jail sentence (CP 1419);
03-07-91	DOC issues Notice of Violation for failing to enter sexual deviancy treatment (CP 1419-20);
07-31-91	Completed alcohol treatment (CP 488);
10-29-91	Began sex offender treatment (CP 476);
11-27-91	Incest sentence modified requiring 60 months of sexual deviancy treatment and 60 more months of community supervision (CP 1424);
09-03-92	Washington Supreme Court issued its opinion in <i>State v. Onefrey</i> , 119 Wn.2d 572, 835 P.2d 213 (1992); ²
09-09-92	Sentenced on intimidation charge (CP 490);
07-03-97	Completes “all aspects of the sex offender treatment program” (CP 1426-27);
07-08-97	Order Terminating Treatment and Supervision entered (CP 1411);

² *State v. Onefrey*, 119 Wn.2d 572, 835 P.2d 213 (1992), held that a sentencing court in 1990 could not impose a supervision period lasting more than two years in a SSOSA case in which the crime occurred in 1989, as is the case here. The impact of this case to Adhahn’s sentence is addressed in detail below. *See* pp. 36-40 *infra*.

01-26-04 First DSHS referral received (CP 2896);
02-02-04 Second DSHS referral received (CP 2897);
07-04-07 Zina Linnik abducted and murdered (CP 4).

IV. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate if the pleadings, depositions, admissions and affidavits on file show that there exists no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A material fact is one upon which the outcome of litigation depends. *Amant v. Pacific Power & Light Co.*, 10 Wn. App. 785, 786, 520 P.2d 181 (1974), *aff'd*, 84 Wn.2d 872, 529 P.2d 829 (1975). Once the moving party has met its burden, the non-movant must then produce concrete evidence, without merely relying on allegations in the pleadings, that there remain genuine factual issues. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Our supreme court has characterized the facts necessary to oppose a motion for summary judgment as follows:

A fact is an event, an occurrence, or something that exists in reality It is what took place, an act, an incident, a reality as distinguished from supposition or opinion The “facts” required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient Likewise, conclusory statements of fact will not suffice

Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (citations omitted). Plaintiffs did not – and could not – supply evidence sufficient to avoid summary judgment under these standards in the matter below.

B. Plaintiffs' Claims Against Both State Defendants Fail As A Matter Of Law

The elements of negligence are: (1) a duty owed by the defendant to the plaintiff; (2) breach of that duty; (3) an injury to the plaintiff; and (4) a proximate causal relationship between the defendant's breach and the plaintiff's injury. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). In order to preclude summary judgment, the plaintiffs must come forth with evidence of the existence of each of the above elements. *See Lettengarver v. Port of Edmonds*, 40 Wn. App. 577, 580, 699 P.2d 793 (1985).

Plaintiffs alleged negligence on the part of DOC regarding DOC's "negligent" supervision of Adhahn from 1990 through 1997. Plaintiffs also alleged negligence on the part of DSHS based on a "negligent investigation" claim relating to two referrals to which Ms. Linnik was not the subject and happened more than three years before her injuries at the hands of Terapon Adhahn. Each of these negligence theories is discussed

separately below and for the reasons described, each theory is unsupported as a matter of law.

C. DSHS Owed No Duty To Zina Linnik Under The Facts Alleged And Plaintiffs Failed To Establish That A Breach Of Any Such Duty Proximately Caused Their Injuries In Any Event

Generally, a tort duty may be based on either the common law or a statute. *Degel v Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48-49, 914 P.2d 728 (1996). However, state agencies are creatures of statute; thus, the role of creating new legal duties and obligations owed by government agencies is constitutionally delegated to the Legislature, not the superior court. *Murphy v. State*, 115 Wn. App. 297, 317, 62 P.3d 533, review denied, 149 Wn.2d 1035 (2003). See also Wash. Const. art. II, § 26. Likewise, since DSHS is a creature of statute; it, too, does not exist by virtue of the common law. See, e.g., RCW 43.20A.030. It immediately follows that DSHS's authority (and any actionable duties related thereto) also derive from statute.

Plaintiffs contend that DSHS has "an existing common law duty of care not to negligently harm children," citing *M.W. v. Dep't Soc. & Health Servs.*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003). However, the supreme court in *M.W.* did not expand DSHS's responsibilities to include other duties not imposed by the Legislature. Rather, the supreme court explained that the tort of negligent investigation was limited to "harmful

placement decisions.” *Id.* There is no duty to prevent children from harm by predators in the community at common law. Again, the duties that arise from DSHS’s intervention in child abuse investigations are purely statutory in nature and arise only after DSHS receives a referral.

There is no genuine dispute that DSHS’s duty with respect to child abuse and neglect investigations arises solely out of RCW 26.44.050. *Ducote v. State*, 167 Wn.2d 697, 702-03, 222 P.3d 785 (2009) (cause of action implied from the statutory language of RCW 26.44.050); *M.W.*, 149 Wn.2d at 596-99 (supreme court declined to extend the scope of duty in RCW 26.44.050 to any injury that harmed the family unit); *Tyner v. Dep’t Soc. & Health Servs.*, 141 Wn.2d 68, 77-82, 1 P.3d 1148 (2000) (supreme court recognized that the State’s duty to investigate child abuse under RCW 26.44.050 created an implied cause of action for parents under investigation). Plaintiffs have cited no contrary authority.

Indeed, Washington courts have repeatedly held that there is no common law cause of action against DSHS for negligence in the context of a CPS investigation. *See, e.g., Ducote*, 167 Wn.2d at 706 (“A cause of action for negligent investigation against DSHS does not exist at common law[.]”); *M.W.*, 149 Wn.2d at 600-02 (noting that Washington courts “have not recognized a general tort claim for negligent investigation” outside the confines of RCW 26.44.050, and **rejecting** argument that

“DSHS has a general duty of care to act reasonably when investigating child abuse, which includes following correct procedures”). Because no common law duty arises under plaintiffs’ alleged facts, and the statutory duty created by RCW 26.44.050 is limited to circumstances outside those alleged by plaintiffs, their claim against defendant DSHS was properly dismissed.

1. The Statutory Duty That DSHS Owes A Plaintiff Under RCW 26.44.050 Is Limited To Circumstances Outside Those Alleged by Plaintiffs

As defendant DSHS has previously pointed out, Washington courts have expressly declined to expand the tort of negligent investigation beyond the narrow confines of RCW 26.44.050, because the statute does not contemplate other types of harms. *Ducote*, 167 Wn.2d at 703-06 (rejecting expansion of the class who can sue for negligent RCW 26.44.050 investigations to include stepparents); *M.W.*, 149 Wn.2d at 599, 602 (tort of negligent investigation does not encompass a general statutory duty of reasonable care); *Roberson v. Perez*, 156 Wn.2d 33, 46-48, 123 P.3d 844 (2005) (rejecting request to enlarge the negligent investigation cause of action to include harms caused by “constructive placement decisions”); *Blackwell v. Dep’t Soc. & Health Servs.*, 131 Wn. App. 372, 378-79, 127 P.3d 752 (2006) (rejecting expansion of the class who can sue for negligent RCW 26.44.050 investigations to include foster parents).

The Washington Supreme Court in *M.W.* described the limited circumstances of a negligent investigation claim as follows:

[A] claim for negligent investigation against DSHS is available only to children, parents, and guardians of children who are harmed because DSHS had gathered incomplete or biased information that results in a harmful placement decision, such as removing a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home. We decline to expand this cause of action beyond these bounds because the statute from which the tort of negligent investigation is implied does not contemplate other types of harm.

M.W., 149 Wn.2d at 602. Even more recently, the supreme court “confirm[ed] that the class of persons who may sue for negligent investigation is limited to those specifically mentioned in RCW 26.44.010, namely, parents, custodians, and guardians, and the child or children themselves.” *Ducote*, 167 Wn.2d at 704-05, citing *Pettis v. State*, 98 Wn. App. 553, 558, 990 P.2d 453 (1999) and *Blackwell v. State Dep’t of Soc. & Health Servs.*, 131 Wn. App. 372.

Here, whatever negligent investigation claim plaintiffs purport to make against defendant DSHS is premised on DSHS’s alleged failure to investigate a third party referral regarding alleged abuse suffered by a child other than Zina Linnik. “DSHS’s duty to conduct a reasonable investigation of allegations of child abuse is owed to a *particular, circumscribed class; children who are alleged to be abused, and their*

parents. There is no legal support for the expansion of DSHS's duty beyond biological parents and children." *Blackwell*, 131 Wn. App. at 376 (2006) (emphasis in original).

Similarly, the court in *Rodriguez v. Perez*, 99 Wn. App. 439, 994 P.2d 874 (2000), stated that "both the children who are suspected of being abused and their parents comprise a protected class under RCW 26.44 and may bring action for negligent investigation under that statute." *Id.* at 445. Because plaintiffs' complaint did not allege that defendant DSHS negligently investigated a referral DSHS received regarding Zina Linnik – the victim in this case – plaintiffs are not within the "particular, circumscribed class" anticipated by the courts in creating the negligent investigation claim. Law enforcement, not DSHS, investigates allegations of child abuse or neglect relating to abuse or neglect perpetrated on a child who is not the child of the alleged abuser. CP 1283-84. For those reasons, plaintiffs' negligent investigation claims against the State defendants were properly dismissed.

2. There Is No Common Law Duty To Protect Others From The Criminal Acts Of Third Persons

It is well-established that there is no common law duty to protect others from the criminal acts of third persons, unless there is an "special relationship" between (a) the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) the actor

and the other which gives the other a right to protection. *See Aba Sheikh v. Choe*, 156 Wn.2d 441, 449, 128 P.3d 574 (2006); *Taggart v. State*, 118 Wn.2d 195, 217-19, 822 P.2d 243 (1992). Although Washington courts have recognized a special relationship and corresponding duty in a few situations, no court has recognized that such a special relationship exists between DSHS and children in general.

That Washington courts have squarely rejected claims that a “special relationship” exists between DSHS and dependent children giving rise to a common law duty to protect dependent children from abuse and neglect is illustrative of this point. *Aba Sheikh*, 156 Wn.2d at 454-55 (the State does not stand *in loco parentis* with foster children); *Terrell C. v. State Dep’t of Soc. and Health Servs.*, 120 Wn. App. 20, 28, 84 P.3d 899 (2004) (social worker’s role is to integrate services, not supervise the general day-to-day activities of a foster child).

To illustrate the point further that DSHS is not charged with protecting all children from all harms, the Washington Supreme Court has also rejected the claim that DSHS has a special relationship duty to control foster parents. In *Aba Sheikh*, the court expressly held that DSHS has “no right to control the daily actions of the foster parent and thus no ability to supervise or interfere with the day-to-day interaction between a foster parent [and foster children].” 156 Wn.2d at 456-57 (rejecting contention

that the State is vicariously liable for foster parents' torts). *See also DeWater v. State*, 130 Wn.2d 128, 139-40, 921 P.2d 1059 (1996) (noting that the State has "no right to control the daily actions of the foster parent" and thus no ability to supervise or interfere with the day-to-day operation of the foster home); *Beltran v. Dep't Soc. & Health Servs.*, 98 Wn. App. 245, 255, 989 P.2d 604 (1999) ("the mere presence of the children in the [foster] home . . . is insufficient to establish legal causation, regardless of the propriety or impropriety of the licensing or placement decision.").

Consistent with *M.W.*, *Aba Sheikh*, *Terrell C.*, *DeWater* and *Beltran*, this court should reject plaintiffs' assertion that DSHS has a common law duty to protect children from all forms of abuse, including unreported abuse. DSHS does not have a duty to protect unknown and unidentifiable children from an adult's future conduct. Nor does DSHS have the authority to monitor or control – in perpetuity – the conduct of adults alleged to have abused a child so as to ensure that they do not harm other unknown and unidentifiable children in other, future, unknowable circumstances, much less a common law or statutory duty related thereto.

Importantly here, DSHS's duty under RCW 26.44.050 only arises after receipt of a report of child abuse or neglect. *See* RCW 26.44.050 ("Upon the receipt of a report . . ."). *See also, e.g.*, RCW 26.44.030(4) ("Upon receiving a report . . ."); RCW 26.44.030(10) ("Upon receiving

reports . . .”); RCW 26.44.030(11) (“Upon receiving a report . . .”); RCW 26.44.030(14) (“Upon receipt of a report . . .”). Likewise, RCW 26.44.030 provides that a mandatory reporter’s duty to report is triggered only when he/she “has reasonable cause to believe that a child has suffered abuse or neglect.” Simply stated, DSHS had no reason in 2004, or any other time, to intervene in the lives of the Linnik family or otherwise investigate them. Nor did DSHS have the legal authority to do so absent a referral related to the Linnik family specifically. Insofar as DSHS lacked that authority, it owed no duty to the plaintiffs as a matter of law. Plaintiffs’ claim against DSHS was properly dismissed.

3. Plaintiffs Failed To Prove Proximate Cause

Not only have plaintiffs failed to establish the existence of a duty owed, plaintiffs also failed to establish that a breach of any such duty was the proximate cause of Ms. Linnik’s abduction and murder. “To prevail, the claimant must prove that the allegedly faulty investigation was the proximate cause of the harmful placement.” *Petcu v. State*, 121 Wn. App. 36, 56, 86 P.3d 1234 (2004), citing *M.W.*, 149 Wn.2d at 595. A cause is “proximate only if it is both a cause in fact and a legal cause.” *Gall v. McDonald Industries*, 84 Wn. App. 194, 207, 926 P.2d 934 (1996), *review denied*, 131 Wn.2d 1013 (1997). Proof of both legal cause and cause in fact are absent in this case.

a. There Is No Provable Cause In Fact When Plaintiffs Cannot Demonstrate That A 2004 DSHS Investigation Of A Child Unconnected with Zina Linnik Would Have Prevented Ms. Linnik's Injuries In 2007

Cause in fact refers to the “but for” consequences of an act – the physical connection between an act and an injury. Proximate cause includes two elements: cause in fact and legal cause. “Cause in fact is a jury question, established by showing that “but for” the defendant’s actions, the claimant would not have been injured.” *Petcu*, 121 Wn. App. at 56; *Tyner*, 141 Wn.2d at 82. There must be evidence that some act or omission of the defendant produced injury to the plaintiff in a direct, unbroken sequence under circumstances where the injury would not have occurred “but for” the defendant’s act or omission. *See* WPI 15.01 (6th ed. 2012) and *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Cause in fact “does not exist if the connection between an act and the later injury is indirect and speculative.” *Estate of Bordon v. Dep’t of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004), *review denied*, 154 Wn.2d 1003 (2005).

Speculation is precisely what is required to determine whether a more detailed investigation in February 2004 – more than three years before Adhahn abducted Zina Linnik – would or even could have precluded the injuries here. Plaintiffs provided no evidence, nor could

they, that a 2004 CPS investigation would have rehabilitated Adhahn or changed his behavior in any manner, or whether an investigation of alleged acts relating to a victim unknown to Zina Linnik would have resulted in an arrest, a corresponding conviction, and a sentence that would or could have removed Adhahn from the streets three-and-a-half years later on July 4, 2007. Proof of causation is a legal and practical impossibility under these facts. Plaintiffs' claim against DSHS was properly dismissed.

b. There Is No Provable Legal Cause When Plaintiffs Cannot Demonstrate A 2004 DSHS Referral Was Related In Any Manner To Ms. Linnik's Injuries In 2007

Just as factual causation was not established by plaintiffs in the record below, legal cause is also lacking. The second prong of proximate cause analysis, legal causation, "involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact." *Hartley*, 103 Wn.2d at 779 (emphasis in original). Legal causation "is a legal question involving logic, common sense, justice, policy, and precedent." *Rasmussen v. Bendotti*, 107 Wn. App. 947, 959, 29 P.3d 56 (2001). One of the policy considerations is how far should the consequences of a defendant's acts extend. *Hartley*, 103 Wn.2d at 779. Plaintiffs' claim here falls short in both respects for many reasons.

In point of fact, the 2004 referrals had nothing to do with Zina Linnik or anyone known to her or her family nor did those referrals relate to anything that occurred in 2007. Notwithstanding the obvious lack of temporal proximity, as a matter of policy, DSHS should not be held legally liable for any harm a third party may cause to any child in Washington – the courts have said as much (*supra* at pp. 15-16).

Indeed, the duty of DSHS to investigate an allegation of child abuse or neglect is statutory. It is triggered when CPS receives a referral of child abuse or neglect. This limited duty is only owed to the child who is the subject of that referral and the child's parents. See RCW 26.44.010-.050; *Rodriguez v. Perez*, 99 Wn. App. at 445. This duty is in contravention of the common law where no duty of negligent investigation exists. *M.W.*, 149 Wn.2d at 602. Plaintiffs' proposed broad expansion of the narrow tort duty created by RCW 26.44.050 is therefore contrary to statutory and common law.

Moreover, the extension of tort liability beyond the child who is the subject of the referral, to include any child who is later injured by the alleged abuser, even as in this case for an event that occurs over three years later, defies logic and common sense. Under plaintiffs' theory, the scope of DSHS's duty would not be bound by temporal or spatial proximity and the concept of foreseeability as a limitation on duty is

eliminated. The harm inflicted on Zina Linnik by Adhahn was completely unrelated to the CPS referral three years earlier. Legal causation is lacking and dismissal of the claim against DSHS should be affirmed.

D. Plaintiffs' Negligent Supervision Claim Against DOC Is Unsupported Because They Failed To Prove The Existence Of A Duty Owed To Them By DOC And Because They Failed To Prove That Any Alleged Breach Of A Duty Proximately Caused Their Injuries

Negligent supervision cases such as the plaintiffs claim here are premised on the idea that a duty is created by the “take charge” relationship a supervising agency may have with parolees. *Taggart*, 118 Wn.2d at 218. By its very nature – the “take charge” relationship – the duty has limitations. That is, if the agency has no relationship with the offender, there can be no duty. “DOC owes a duty to those who are injured during an offender’s active supervision, not after it ends.” *Hungerford v. State Dep’t of Corr.*, 135 Wn. App. 240, 258, 139 P.3d 1131 (2006). The termination of DOC’s relationship with Adhahn almost ten years prior to his crime against Zina Linnik is therefore dispositive of plaintiffs’ claims.

1. DOC’s Duty To Plaintiffs Ended With The Court Order Terminating Supervision

“In a negligence action the threshold question is whether the defendant owes a duty of care to the injured plaintiff.” *Schooley v.*

Pinch's Deli Market, Inc., 134 Wn.2d 468, 474, 951 P.2d 749 (1998). Whether a defendant owes a duty of care is a question of law, not a question of fact. *Osborn v. Mason County*, 157 Wn.2d 18, 23, 134 P.3d 197 (2006). When no duty of care exists, a defendant cannot be subject to liability for negligent conduct. *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 438, 874 P.2d 861 (1994). The burden of establishing the existence of a duty is on the plaintiff. *Jackson v. City of Seattle*, 158 Wn. App. 647, 651, 244 P.3d 425 (2010).

Again, the general rule at common law is that a person has no duty to prevent a third person from causing physical injury to another. *Taggart*, 118 Wn.2d at 218. The Washington Supreme Court recognized a narrow exception to this general rule when it held that a parole officer had a duty to control the conduct of a parolee under active supervision based on the “take charge” relationship between the officer and the parolee. The supreme court stated that the duty to prevent crimes by parolees arises from the parolee’s relationship to the parole officer who has the statutory authority to supervise the offender, “within the conditions of a parolee’s release from custody.” *Taggart*, 118 Wn.2d. at 219; *Hertog v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999). Absent this limited duty, DOC owes no duty in common law or statute to persons injured by

offenders under DOC supervision, or by offenders who have been released from DOC supervision.

Plaintiffs seek to extend this narrow exception far beyond the clear limitations set forth in Washington case law. In all cases in which a correctional agency has been held to have a duty to prevent injuries to plaintiffs, the offender was under supervision by the court or the agency at the time the injuries were inflicted. No appellate court has ever concluded that once an offender is under the supervision of a correctional agency, the agency is forever responsible for all crimes the offender commits for the rest of his or her life. Yet, this would be the result if this court were to adopt the rule plaintiffs advance. Instead, the duty is premised on the concurrent existence of a “take charge” relationship and a tortious act. When the legal authority to control the offender’s behavior ends, so, too, ends the duty. *Hungerford*, 135 Wn. App. at 258.

In their opening brief plaintiffs do not even cite to or address *Hungerford*, yet it is controlling here. In *Hungerford*, the estate of Jane Hungerford-Trapp sued DOC alleging it failed to adequately supervise an offender named Cecil Davis. *Id.* at 247. DOC began to supervise Davis in 1990 for felony assault. *Id.* In July 1992, Davis completed his sentence and probation, but still had outstanding legal financial obligations. *Id.* In December 1992, Davis pled guilty to a gross misdemeanor. *Id.* Davis was

sentenced to two years of probation, along with legal financial obligations.

Id.

Davis was at-large for approximately one year, before being arrested on suspicion of assault and rape in December 1993. *Id.* Davis remained incarcerated pending trial until February 1995 when he was released from custody. *Id.* at 247-48. Two days following his release from incarceration, DOC reported that Davis had failed to make payments on his misdemeanor legal financial obligations. *Id.* at 248. A warrant was issued for Davis' arrest. *Id.* On June 4, 1995, Davis was arrested for domestic violence assault and on the outstanding warrant. *Id.*

On June 5, 1995, the court held a hearing and found that Davis' failure to pay was not willful and entered an order ending his "direct supervised probation" – but allowed his supervision for purposes of legal financial obligations to continue. *Id.* Like plaintiff here, *Hungerford* argued that alleged negligent acts that allowed supervision to end are a basis for imposing a duty of care for injuries that occur after supervision actually does end. The *Hungerford* court rejected that argument.

Hungerford argues that DOC breached that duty before June 5, 1995, and that this breach caused Hungerford-Trapp's death even though Davis was no longer under direct supervision. Although phrased as a question of proximate cause, Hungerford's argument also asks us to expand DOC's duty to supervise. Hungerford would have us impose a general duty on DOC to report probation

violations and extend probation in order to prevent crimes that may occur after active probation supervision ends. We decline to do so.

Hungerford, 135 Wn. App. at 257 (emphasis added).

That court further stated as follows: “We *hold* that once that special relationship ends, the exception to the public duty doctrine expires. Therefore, DOC did not owe a duty to [plaintiffs] after DOC’s take charge relationship with [the offender] ended.” *Id.* at 258 (emphasis added). Likewise, that holding is derived from prior supreme court precedent, which linked the duty to control an offender’s dangerous propensities with the actual legal authority to do so. *See Taggart*, 118 Wn.2d at 218; *Hertog*, 138 Wn.2d at 276-77. The *Hungerford* court repeated that holding:

We hold that the duty to supervise does not require DOC to prevent future crimes an offender might commit after his supervision ends even when the offender is placed on LFO status. DOC owes a duty to those who are injured during, not after, an offender’s active supervision ends.

Id. at 258 (emphasis added). The court’s decision in *Hungerford* is consistent with prior negligent supervision cases.

In *Couch v. Washington Dep’t of Corr.*, 113 Wn. App. 556, 54 P.3d 197 (2002), *review denied*, 149 Wn.2d 1012 (2003), DOC was supervising the same violent offender who was the assailant in *Hungerford*. The offender murdered Mrs. Couch. The Couch family

claimed that DOC was liable because the offender could have been in jail at the time of the murder if DOC had informed the sentencing court of the offender's failure to report and pay his LFOs.

The *Couch* court held that DOC did not have a duty to prevent the new crime because the agency did not have a "take charge" relationship with the offender as required by *Taggart*. *Couch*, 113 Wn. App. at 569. The court held that the conditions of supervision determined whether DOC had "taken charge" of the offender and had a duty to prevent the crime by the offender. *Couch*, 113 Wn. App. at 565. The court stated:

To determine whether a supervising officer has "taken charge" of an offender within the meaning of *Taggart v. State* and *Restatement* §§ 315 and 319, a court must examine "the nature of the relationship" between the officer and that person, including all of that relationship's "[v]arious features." In most cases, two of the most important features, though not necessarily the only ones, will be the court order that put the offender on the supervising officer's caseload and the statutes that describe and circumscribe the officer's power to act. *A community corrections officer must have a court order before he or she can "take charge" of an offender; and even when he or she has such an order, he or she can only enforce it according to its terms and applicable statutes.*

Couch, 113 Wn. App. at 565 (emphasis added) (footnotes omitted). The *Couch* court further noted, if DOC is not authorized to intervene, it cannot have a duty to do so. *Couch*, 113 Wn. App. at 569; *see also Stenger v.*

State, 104 Wn. App. 393, 404, 16 P.3d 655 (2001) (absent the ability, a defendant does not have the duty to control the conduct of a third person).

Again, the basis for imposing the duty in negligent supervision cases is the courts' perceived ability of the parole officer to control the conduct of the parolee while the parolee is under an agency's supervision. A necessary corollary to that is when the parole supervision terminates, so does the supervising agency's duty inasmuch as the agency no longer has any legal ability to control the parolee.

This same proposition has previously been recognized by the court in *Plotkin v. State Dep't of Corr.*, 64 Wn. App. 373, 826 P.2d 221 (1992).

In *Plotkin*, while discussing the plaintiff's claims, the court stated:

[Plaintiff] did not allege negligent supervision of [the parolee], as opposed to negligent reporting to the Board, and indeed, it appears she could not have done so. [The parolee] was not on active supervision after 1981, and not on any supervision at the time of the assault.

Plotkin, 64 Wn. App. at 376. Without the existence of a court-imposed supervision requirement, there can be no duty to an offender's future victims.

The supreme court agrees: "The mere existence of some ability to control a third party is not the dispositive factor in determining whether a take charge duty exists; rather, the purpose and extent of such control

defines the relationship for purposes of tort liability.” *Sheikh v. Choe*, 156 Wn.2d 441, 453, 128 P.3d 574 (2006), citing *Taggart*, 118 Wn.2d at 220.

This case presents facts even more persuasive than those in the cases cited above. Here, a court order had relieved DOC of all responsibility in supervising Adhahn almost ten years prior to the time he intentionally abducted and killed Zina Linnik (CP 1411). Pursuant to that Order, DOC had no legal ability (or obligation) to control Adhahn in any manner. That is, both legally and practically, DOC had neither the ability nor the duty to control the conduct of Adhahn at the time of his intentional criminal acts. Consequently, there was no duty owed by DOC to plaintiff. Absent such a duty, plaintiff’s claim fails. *See Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990) (DOC not liable for murder committed by former inmate based on a duty to provide mental health treatment in prison to ensure public safety).

Plaintiffs have attempted to reframe this negligence issue by arguing their case is simply founded upon “basic negligence principles.” Basic negligence principles, including that a party is not responsible for harm intentionally caused by a third party, establish that DOC owed no duty to plaintiffs. It is only if they can show an *exception* to basic negligence principles that their claim can stand. As discussed above,

plaintiffs have not shown such an exception, and their claims against DOC were properly dismissed.

Nor is the court's holding in *Hungerford* contrary to *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983),³ as plaintiffs may suggest. *Petersen* involved a psychiatrist's release of a patient while knowing that the patient posed a danger and a resulting accident that occurred only five days after that release. *Petersen*, 100 Wn.2d at 424. *Taggart* addressed both *Petersen* and the *Restatement of Torts* in its discussion on the issue of duty.

In *Taggart*, the court confronted the issue of whether DOC owed a duty of care to members of the public injured by parolees based upon the relationship between a parole officer and the offender under supervision. *Taggart*, 118 Wn.2d at 217. The court began its analysis by noting that the public duty doctrine normally precludes liability for breach of a duty that is owed to the public at large. *Id.*

The court then recognized that exceptions to the public duty doctrine exist and focused its analysis on *Petersen* and the *Restatement of Torts*. *Id.* Ultimately, the court decided to extend the special relationship exception to the public duty doctrine it found in *Petersen* (based upon the

³ Note that "the Legislature statutorily abrogated [the supreme court's] holding in *Petersen* in Laws of 1987, ch. 212, § 301(1) (codified at RCW 71.05.120(1)), with respect to the liability of the State." *Hertog*, 138 Wn.2d at 293 (Talmadge, J., concurring).

Restatement (Second) of Torts § 315) to the situations where DOC is supervising offenders. *Id.* As noted above, in doing so, the State Supreme Court specifically limited the imposition of a duty to cases involving a “definite, established *and continuing relationship between the defendant and the third party [offender].*” *Id.* at 219 (citing *Honcoop v. State*, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988)). Thus, neither *Petersen* nor § 315 of the *Restatement of Torts* support plaintiffs’ argument that a duty of care is owed after active supervision ends. Under *Taggart*, the duty to exercise reasonable care to control a dangerous offender arises under § 319 of the *Restatement of Torts*.

Furthermore, contrary to plaintiff’s assertions, there is no nebulous duty owed by the government to prevent harm to citizens.

Assuredly, Mason County has a “duty” to protect its citizens in a colloquial sense, but it does not have a *legal* duty to prevent every foreseeable injury An “action for negligence does not lie unless the defendant owes a duty of care to the plaintiff,” . . . , and “a broad general responsibility to the public at large rather than to individual members of the public” simply does not create a duty of care.

Osborn v. Mason County, 157 Wn.2d 18, 28, 134 P.3d 197 (2006) (citations omitted). *Osborn* presented a more direct relationship in terms of proximity in time and control than the one presented here.

Nevertheless, the supreme court affirmed summary judgment in favor of Mason County. Plaintiffs' "basic negligence" argument is unsupported.

Despite these holdings, plaintiffs request that this court unilaterally expand the duty of DOC (and every other municipality in Washington that supervises offenders) to face legal liability in perpetuity for every bad act a former offender may commit. Plaintiffs' invitation to expand "negligent supervision" duty should be rejected.

2. The Plaintiffs Failed To Establish That The Breach Of A Duty By DOC Was The Factual Or Legal Cause Of Zina Linnik's Injuries When DOC's Supervision Of Her Assailant Ended Almost Ten Years Prior To Her Injuries

Even if this court were to find that DOC owed a duty to plaintiffs, their claim would still fail because they did not establish that a breach of the duty had proximately caused their injuries. "A plaintiff in a negligent parole supervision action must prove the inadequate supervision proximately caused the complained-of injuries." *Bell v. State*, 147 Wn.2d 166, 169, 52 P.3d 503 (2002). A cause is "proximate only if it is both a cause in fact and a legal cause." *Gall v. McDonald Indus.*, 84 Wn. App. 194, 207, 926 P.2d 934 (1996), *review denied*, 131 Wn.2d 1013 (1997).

Cause in fact refers to the "but for" consequences of an act – the physical connection between an act and an injury. There must be evidence that some act or omission of the defendant produced injury to the plaintiff

in a direct, unbroken sequence under circumstances where the injury would not have occurred “but for” the defendant’s act or omission. See WPI 15.01 (6th ed. 2012); *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Cause in fact “does not exist if the connection between an act and the later injury is indirect and speculative.” *Estate of Bordon v. State, Dep’t of Corr.*, 122 Wn. App. at 240. It is reversible error to deny summary judgment when speculation is required to find factual causation. See *Rasmussen v. Bendotti*, 107 Wn. App. at 959.

The second prong of proximate cause analysis, legal causation, “involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact.” *Hartley*, 103 Wn.2d at 779 (emphasis in original). Legal causation “[is] a question of law” for the court (*McCoy v. Am. Suzuki Motor Corp.*, 136 Wn.2d 350, 359, 961 P.2d 952 (1998)) and involves “logic, common sense, justice, policy, and precedent.” *Rasmussen*, 107 Wn. App. at 959. One of the policy considerations is how far the consequences of a defendant’s acts should extend. *Hartley*, 103 Wn.2d at 779. Plaintiffs’ claims here fall short in both respects for many reasons including the simple fact that Adhahn left DOC supervision almost ten years before he committed the intentional criminal acts against Zina Linnik.

a. Plaintiffs Did Not Prove That Adhahn Would Have Been In Jail Or Deported If DOC Had Supervised Adhahn Differently And Thus Failed To Establish Factual Causation

Cause in fact exists if a plaintiff's injury would not have occurred "but for" the defendant's negligence. *Walker v. Transamerica Title Ins. Co., Inc.*, 65 Wn. App. 399, 403, 828 P.2d 621 (1992). There is no cause-in-fact if the connection between an act and the later injury is indirect and speculative. *See Walters v. Hampton*, 14 Wn. App. 548, 555, 543 P.2d 648 (1975). Plaintiffs' causation theory here is apparently that closer or different supervision would have prevented Adhahn from committing further crimes almost ten years after the supervisory relationship ended. That same theory was rejected in *Bell*, 147 Wn.2d 166, and *Estate of Bordon*, 122 Wn. App. at 240 (see discussions below). More particularly, plaintiffs have no evidence to support that theory, the theory is entirely speculative, and therefore fails.

A plaintiff must prove two elements to establish a negligent supervision case. First, the plaintiff must demonstrate that there was a violation of the conditions of supervision by the offender that was not reported to the court. *Kelley v. State*, 104 Wn. App. 328, 336-37, 17 P.3d 1189 (2000). Second, the plaintiff must prove that if the violation had been reported to the court, the offender would have been incarcerated up

to and including the date that the plaintiff was injured. *Bell*, 147 Wn.2d at 179. Therefore, even in a case where there is evidence that the offender violated conditions of supervision, the plaintiffs must still prove that reporting the violation would have prevented the offender from being able to harm Zina Linnik.

In *Bell*, a woman claimed she had been sexually assaulted by an offender on parole supervision for a prior conviction of kidnapping and rape. *Bell*, 147 Wn.2d at 170. The plaintiff alleged in *Bell* that the offender would not have had the opportunity to attack her because adequate supervision would have discovered parole violations by the offender that would have justified restrictive measures to limit his freedom. *Bell*, 147 Wn.2d at 171-72. In other words, plaintiff contended the offender's parole would have been revoked and the offender would have been in prison on the day he assaulted plaintiff. While the jury found DOC breached its duty to supervise the offender, the jury also concluded the plaintiff failed to prove negligent supervision was a proximate cause of her injuries. *Bell*, 147 Wn.2d. at 183.

On appeal, the plaintiff contended that the jury should have been instructed as to the burden of proof at a parole revocation hearing. *Bell*, 147 Wn.2d. at 175-79. The court disagreed and held that the standard of proof at a revocation hearing was irrelevant to the issue of causation

(1) Plaintiffs Cannot Prove That If DOC Reported Violations To The Sentencing Court, Adhahn Would Have Been In Jail On The Day He Assaulted Zina Linnik

Plaintiffs offered no admissible evidence that Judge Strombom, the sentencing judge, would have revoked Adhahn's 14 month suspended sentence based on the alleged supervision violations. In other words, regardless of the number and quality of the violations plaintiffs could have established Adhahn committed during his period of supervision, plaintiffs failed to establish that Adhahn would have been in jail as a result of those parole violations at the time he murdered Zina Linnik in 2007, when Adhahn's supervision ended in 1997.⁴

Regardless of whether the misdemeanor intimidation charge in 1992 was reported to the court as a violation, the most that could have happened was that Adhahn's SSOSA sentence could have been revoked by the court and the remainder of the 14 month suspended incarceration

⁴ Plaintiffs' so-called expert, William Stough, states repeatedly that had the sentencing court knew certain things "Adhahn's SSOSA would be revoked on the spot" (CP 339 ll. 23-24; *see also* CP 341 ll. 8-9; 337 ll. 16-21) and opines that Adhahn "would never have been on the street at the time of the brutal rape and murder of Zinaida [Linnik]." CP 340, ¶ 12. However, there are no set of circumstances under which Adhahn could have been incarcerated for the 1990 incest conviction during the period encompassing Ms. Linnik's murder in 2007. Of course, Mr. Stough's opinions about what a judge would have done have been previously ruled inadmissible by this court in any event. *Bordon*, 122 Wn. App. at 246-47 ("The trial court was thus well within its discretion when it refused to allow Stough to testify about what a judge would have done in the SRA violation hearing if the CCO had reported Jones' driving condition violation to the court. This testimony would clearly have been beyond his expertise and merely speculative."). Mr. Stough's opinions are inadmissible and his declaration was the subject of defendant DOC's motion to strike in the matter below. CP 596-608, 1762-74.

time imposed. If those things were to happen, Adhahn still would not have been incarcerated at the time he murdered Zina Linnik. That is, had Adhahn's SSOSA been revoked following the 1992 misdemeanor conviction, his supervision time would have been shorter than the nearly seven years it did last and would have ended well before Adhahn's assault on Ms. Linnik. Revocation of Adhahn's suspended sentence of 14 months incarceration was the most serious sanction available to the court. Consequently, Adhahn would have been in jail until, at most, 12 months⁵ after September 9, 1992 (the date he was convicted of the intimidation with a weapon charge).

State v. Onefrey, 119 Wn.2d 572, 835 P.2d 213 (1992), demonstrates how entirely speculative plaintiffs' claim is. In *Onefrey*, our supreme court allowed a defendant to appeal his standard range sentence to argue that the trial court erroneously interpreted SSOSA to preclude him from eligibility. *Onefrey*, 119 Wn.2d at 573-74. The trial court had determined that Onefrey would benefit from treatment and that a prison sentence would not benefit society. But, because the treatment provider recommended a treatment term of ten years, the court found that it could not order community supervision for enough time to treat Onefrey

⁵ Plaintiff had already served 60 days of his sentence in confinement in the Pierce County Jail, which would have been credited against the 14 month incarceration period. CP 1416.

successfully because SSOSA did not provide for an exceptional sentence at that time. *Onefrey*, 119 Wn.2d at 573-74. The supreme court agreed. *Onefrey*, 119 Wn.2d at 577. The supreme court held that “Under SSOSA, the trial court is not permitted to fashion conditions such that the length of time spent in treatment exceeds that provided for in the statutory language.” *Onefrey*, 119 Wn.2d at 576.

At the time Adhahn committed the crime for which he was under supervision, former RCW 9.94A.120(7)(a), provided that “the court may suspend the execution of the sentence and place the offender on community supervision for *up to two years*.” See Appendix, Attachment A (emphasis added). Therefore, Adhahn’s sentencing court did not have the authority to impose an exceptional sentence of five years supervision and treatment. In other words, because Adhahn’s treatment requirement was “60 months” (five years), as a matter of law he did not qualify for the SSOSA sentence combined with an “exceptional sentence” as ordered in 1990. See CP 1414. As the supreme court in *Onefrey* noted: “If Onefrey could not be treated within the requisite 2 years, then he was outside the population that the Legislature intended to be eligible for SSOSA.” *Onefrey*, 119 Wn.2d at 577.

The result of those legal restrictions here are dispositive of plaintiffs’ claims because they conclusively establish that Adhahn could

not have been incarcerated on July 4, 2007, for any violations relating to his 1990 Incest conviction. This factual and legal reality is best illustrated as follows: Adhahn was sentenced on September 4, 1990. CP 1416. The sentencing court imposed a term at the top end of the standard range of 14 months. *See* CP 1414 and 1416. By statute, the sentencing court could only impose a supervision and treatment term of two years. Former RCW 9.94A.120(7)(a) (1989); *Onefrey*, 119 Wn.2d at 577. Had a two year supervision term been imposed and all other sentence provisions remained the same, the supervision term would have expired on November 4, 1992 (two years plus two months tolling while Adhahn was confined in the Pierce County Jail). Assuming for purposes of this illustration that the sentencing judge learned of the intimidation charge and then imposed the maximum sanction provided by law – revocation of the suspended sentence – Adhahn would have been confined for 12 months (14 months minus the two months [60 days] already spent in confinement),⁶ Adhahn would have been relieved of all legal obligations relating to his 1990 incest charge by approximately the end of 1993.

The above illustration is applicable to plaintiffs' case in at least three ways. First, it demonstrates that, as a matter of law, there was at a minimum, 14 years of time that Adhahn could not have been supervised or

⁶ Note that this calculation does not include any "good time" credit, which is likely in almost all cases.

incarcerated by DOC before he committed his assault on Zina Linnik.

That is, just as the court stated in *Couch*:

The judge sentenced Davis to the maximum allowed by law, so even if he had known more, he could not have done more; and if he could not have done more, the alleged failure to inform him bears no causal relation whatever to the harm later suffered by Couch.

Couch, 113 Wn. App. at 573. Second, any violations alleged (but unproven) by plaintiffs beginning in 1994 are wholly irrelevant to the negligent investigation claim. Third, the illustration demonstrates how completely speculative plaintiffs' liability claim is. There are simply no facts that can show that Adhahn would have been in jail on July 4, 2007, for anything related to his 1990 conviction – the only crime for which DOC ever supervised Adhahn.

(2) Plaintiffs Cannot Prove That If DOC Had Done Something Differently Adhahn Would Have Been Deported And Out Of The United States On The Day He Assaulted Zina Linnik

In an apparent concession that the laws and facts relating to supervision do not support that Adhahn would have been in jail on the day he committed his assault on Zina Linnik, plaintiffs attempt to argue that, had DOC done *its* job, Adhahn would have been deported. However, DOC clearly has no legal ability or authority to deport (remove) anyone from the United States. Rather, such proceedings necessarily are governed

by federal laws, instituted by federal agencies, and decided upon by federal courts.

Plaintiffs' legal theory here is very different from "negligent supervision" cases examined by Washington courts where DOC is alleged to have failed to arrest for or report violations of an existing judgment and sentence.⁷ Instead, plaintiffs attempt to expand DOC's duty by asking this court to now require DOC to not only report all crimes to, presumably, the Immigration and Customs Enforcement (ICE), but also to ensure that the offender is thereafter deported or removed from the United States by that or another federal agency. Plaintiffs' proposition is preposterous and unworkable.

Contrary to plaintiffs' assertions, DOC has no legal *duty* to report an offenders' immigration status as a matter of law. By statute, when an offender like Adhahn is not committed to DOC custody, DOC has no duty to inquire or report that offender's status to a United States immigration officer. RCW 10.70.140. Even if there were a duty owed to them as individuals rather than to the public in general, plaintiffs could not

⁷ Plaintiffs' deportation/removal argument is unsupportable also as a matter of policy. Plaintiffs cite *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992), for the proposition that an agency must supervise an offender so as to protect others from the risk of harm from the offender. *See* Appellant's Opening Brief at 31. However, deportation – unlike incarceration – protects no one other than potential victims in the jurisdiction from which the offender may be removed. Such a proposition is contrary to the premise of negligent supervision liability as it is generally applied in this State.

establish causation because the uncontested facts demonstrate that a United States immigration officer knew of Adhahn's arrest in 1992 for the misdemeanor intimidating offense but the federal agency chose to not act. CP 2034-35.

Similarly, plaintiffs cannot establish that a failure by DOC to report Mr. Adhahn's status to a United States immigration officer in 1990 or 1992 contributed in any manner to Ms. Linnik's injuries in 2007. As our supreme court recently noted:

Even if an *undocumented* immigrant is apprehended, removal from the United States is not a foregone conclusion. The immigrant still faces removal proceedings in front of an immigration judge. Even if an immigrant is deportable, removal can still be canceled in some cases.

Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 670, 230 P.3d 583 (2010) (emphasis added, citations omitted). It is even more speculative here that Adhahn would have been deported because, as a legal resident, there were more opportunities for Adhahn to avoid removal. *See* CP 3196-3202.

Perhaps more illustrative than the supreme court's comment in *Salas* that the certainty of deportation is tenuous at best, is that same court's recognition that "The Department of Homeland Security (DHS) estimates there were 11.6 million unauthorized immigrants residing in the United States as of January 2008." *Salas*, 168 Wn.2d at 669-70. Thus, plaintiffs have no factual basis to opine whether Adhahn would have been

in Tacoma, Washington on a particular day fifteen years after a theoretical 1992 deportation was possible. *See Bordon*, 122 Wn. App. at 246-47.

Furthermore, the record below demonstrates the speculative nature of plaintiffs' "deportation" argument given Adhahn's citizenship and the unlikely impact his crimes may have had on his status. As a matter of law, "Adhahn's incest conviction would not have been a conviction that would subject Adhahn to *deportation proceedings*, much less *mandatory deportation*." CP 3199. Also, "even if Mr. Adhahn had been convicted of failure to register [as a sex offender] during the 1990 to 2007 period, the conviction, or even multiple convictions for this offense would not have constituted the second CIMT [(crime of moral turpitude)] conviction, which would have made Adhahn subject to deportation/removal proceedings." CP 3199.

Plaintiffs' deportation argument rests on a series of speculative and unpredictable variables. In addition, that argument is based on a flawed understanding of immigration law. CP 3196-3202. For plaintiffs' deportation argument to withstand any level of scrutiny, the record would have to demonstrate that: (1) Adhahn would have been subject to mandatory detention *if* he was apprehended for, and/or convicted of, any of the crimes which plaintiffs assume would have resulted in conviction, and (2) those crimes would have been reported to ICE, and (3) removal

proceedings would be initiated against Adhahn, and (4) the removal proceedings would have been successful, and (5) those removal proceedings would not have been overturned on appeal, and (6) the removal would not have been cancelled by the United States Attorney General,⁸ and (7) Adhahn would have left the United States, and

⁸ Recently, the United States Supreme Court in *Holder v. Gutierrez*, 566 U.S. ___, ___ S. Ct. ___, (May 21, 2012) (Opinion of the Court attached to Appendix as Attachment B for Court's ease of reference), noted:

The immigration laws have long given the [United States] Attorney General discretion to permit certain otherwise-removable aliens to remain in the United States. See *Judulang v. Holder*, 565 U.S. ___, ___, 132 S. Ct. 476, 479–481, 181 L. Ed. 2d 449 (2011). The Attorney General formerly exercised this authority by virtue of § 212(c) of the Immigration and Nationality Act (INA), 66 Stat. 187, 8 U.S.C. § 1182(c) (1994 ed.) But in 1996, Congress replaced § 212(c) with § 1229b(a) (2006 ed.). That new section, applicable to the cases before us, provides as follows:

“(a) Cancellation of removal for certain permanent residents

“The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

“(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

“(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

“(3) has not been convicted of any aggravated felony.” *Ibid.*

Holder v. Gutierrez, 566 U.S. at ___ (Appendix, Attachment B at p. 2). Because Adhahn had been living in the United States since 1976 (CP 2676), lived continuously in the United States for more than 7 years (CP 2627-28), and was not convicted of an aggravated felony (CP 3198-99), the United States Attorney General could have permitted Adhahn to remain in the United States regardless of any removal proceedings that may have occurred. See CP 3200, ¶ 9. The record is silent as to whether the exercise of this discretionary authority by the Attorney General was improbable or likely and

(8) Adhahn would not have returned to the United States prior to his assault on Zina Linnik. Given the pure conjecture inherent in each of these steps, plaintiffs failed to meet the burden of proving that DOC's actions caused, in fact, their injury. See *Walters v. Hampton*, 14 Wn. App. 548, 555, 543 P.2d 648 (1975) ("too many gaps in the chain of factual causation" prevents the issue of proximate cause from reaching the jury).⁹

Again, regardless of the number of violations that may or may not have occurred during Adhahn's supervision period from 1990 to 1997, taken together or separately, there is no admissible evidence that can demonstrate Adhahn would have been taken into custody, whether a court would have imposed any jail sanction, what the duration of a theoretical jail sanction would have been, whether the timing of any jail sanction would have been coincident with the murder of Zina Linnik; whether any of those crimes were "removable" offenses; if the crimes were removable offenses, that ICE would have decided to pursue removal; that the removal proceedings would have been successful; that the removal proceedings would not have been overturned on appeal; and that even if he were

anything else is pure speculation. *Id.* Thus, proximate cause necessarily fails under this analysis alone.

⁹ Importantly, the court in *Walters* stated: "It would require a high degree of speculation for the jury or the court to conclude that some sort of prosecutorial action by the police against Hampton in September 1970 would have prevented plaintiff's injuries at Hampton's hands in February 1972." *Walters*, 14 Wn. App. at 555. The amount of time passed in that case was 17 months, whereas the span of time here was 38 months (DSHS) at the earliest, and just four days shy of 120 months (DOC) at the latest.

removed, that Adhahn would not have returned legally or illegally prior to the date of his assault on plaintiff.

Proof of the precise alignment of all the necessary variables that must have occurred to support plaintiffs' deportation or negligent supervision claim requires "rank speculation" and is insufficient to withstand summary judgment. *See Hungerford*, 135 Wn. App. at 258. Proof of causation is a legal and practical impossibility under these facts. Plaintiffs' claim against the defendant DOC was properly dismissed.

b. Policy And Precedent Dictate That DOC Was Not The Legal Cause Of Plaintiffs' Injuries Because The Connection Between DOC's Alleged Failures And Plaintiffs' Injuries Is Too Remote

Even if DOC owed a duty to plaintiffs, and even if plaintiffs could somehow prove factual causation, plaintiffs cannot show legal causation. Legal causation is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Schooley v. Pinch's Deli Market*, 134 Wn.2d at 478. The focus is on whether as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or unsubstantial to impose liability. *Id.* A determination of legal liability will depend upon "mixed considerations of logic, common sense, justice, policy and precedent." *Hartley*, 103 Wn.2d at 779.

In *Hartley*, the court held that the State was not liable to the estate of a person killed by a drunk driver whose license was renewed when there was clearly cause for revocation due to numerous drunk-driving arrests. *Id.* at 770. The court concluded that “the failure of the government to revoke Johnson’s license [was] too remote and insubstantial to impose liability for Johnson’s drunk driving.” *Hartley*, 103 Wn.2d at 784. The court went on to state:

While a license is necessary for anyone wishing to drive an automobile legally in this state, a license does not grant authority to disobey the law. [citations omitted.] The failure to revoke Johnson’s license (even assuming that Johnson would have honored the revocation and not driven) is simply too attenuated a causal connection to impose liability.

. . . Public policy considerations also dictate against liability in this case. The government would be open to unlimited liability were we to hold potentially liable every decision by a prosecutor of the DOL to delay proceedings [to revoke a license].

Id. at 785.

Similarly, the connection between DOC’s conduct in this case – the alleged failure to properly supervise Adhahn – and the plaintiffs’ injuries are simply too remote to impose liability as a matter of common sense or policy. The speculative opinions of plaintiffs’ experts – which defendant DOC moved to strike for that and other reasons (CP 596-608; 1762-74) – cannot carry a case to the jury. *Melville*, 115 Wn. 2d at 41

(Expert testimony must be based on facts in the case, not speculation or conjecture). Prior cases in which liability has been asserted against the State based on negligent supervision of an offender have involved offenders who were under supervision at the time of the alleged injurious acts.

These cases establish a limited exception to the general principle of negligence that a person is not responsible for the intentional acts of a third party, and the requirement that the offender must be under DOC supervision at the time of the offense establishes an outer boundary of where State liability ceases. Plaintiffs' theory in this case, like the one rejected in *Hartley*, places no limit whatsoever on potential State liability for acts committed by offenders who have been released from DOC supervision. Here, not only was Adhahn not under DOC supervision, his supervision ended almost ten years prior to his criminal assault of Ms. Linnik.

Moreover, the significant passage of time between DOC's alleged negligence and Adhahn's intentional, criminal acts shows a lack of legal causation. In a case regarding liability for the criminal acts of a third party, the Washington Supreme Court discussed approvingly a New York decision: "At a minimum, the remoteness in time between the criminal act and the injury [was] dispositive to the question of legal cause in [that]

case.” *Kim v. Budget Rent-A-Car Sys. Inc.*, 143 Wn.2d 190, 205, 15 P.3d 1283 (2001). In that case, the supreme court cited *Devellis v. Lucci*, 266 A.D.2d 180, 697 N.Y.S.2d 337, 339 (App. Div. 1999), for the proposition that the “passage of 24 days between the theft of the vehicle and the injury-producing event vitiated any proximate cause between the purported negligence and the accident as a matter of law.” *Kim*, 143 Wn.2d at 205. The supreme court in *Kim* also noted – at least in cases where defendants have allowed keys to be left in their vehicles’ ignitions – that one “should not be ‘answerable in perpetuity for the criminal and tortious conduct of others’” *Id.* The same analysis applies here.

Here, not only was Adhahn off DOC supervision at the time he assaulted Zina Linnik, that supervision had ended nearly ten years prior by order of Adhahn’s sentencing court.¹⁰ The temporal proximity between the alleged failures on the part of DOC and the much later intentional criminal acts of Adhahn, militate against finding legal cause in this case. Similarly, plaintiffs’ deportation argument requires too many variables and affirmative acts by federal agencies and courts over whom defendants have no control or influence. For all these reasons, as a matter of policy,

¹⁰ Again, after the supreme court’s decision in *Onefrey*, the law clearly limited the period of Adhahn’s community supervision to two years, which would have required that sentence to be complete after a maximum of 38 months (two years supervision and 14 months confinement), or by November 4, 1993.

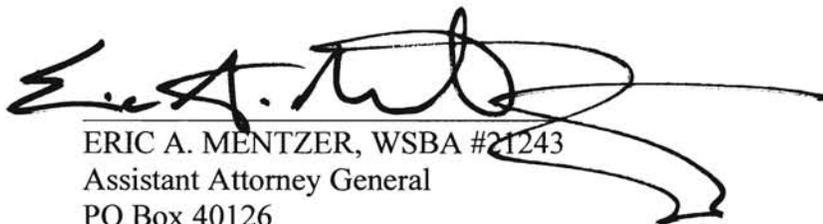
the connection between the ultimate result and the act of the defendants is too remote or unsubstantial to impose liability.

V. CONCLUSION

Defendants Washington State Department of Corrections and Washington State Department of Social and Health Services (Children's Protective Services) respectfully request that this court affirm the trial court's dismissal of plaintiffs' claims on each of the grounds discussed above.

RESPECTFULLY SUBMITTED this 25 day of May, 2012.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Eric A. Mentzer", is written over a horizontal line. The signature is stylized and extends to the right of the line.

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

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APPENDIX

criminal history shall be decided at the sentencing hearing. [1981 c 137 § 10.]

Effective date—1981 c 137: See RCW 9.94A.905.

9.94A.110 Sentencing hearing—Time period for holding—Presentence reports—Victim impact statement and criminal history—Arguments—Record. Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. The sentencing hearing shall be held within forty court days following conviction. Upon the motion of either party for good cause shown, or on its own motion, the court may extend the time period for conducting the sentencing hearing. The court shall order the department to complete a presentence report before imposing a sentence upon a defendant who has been convicted of a felony sexual offense. The department of corrections shall give priority to presentence investigations for sexual offenders. The court shall consider the presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed. If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record. Copies of all presentence reports presented to the sentencing court and all written findings of facts and conclusions of law as to sentencing entered by the court shall be sent to the department by the clerk of the court at the conclusion of the sentencing and shall accompany the offender if the offender is committed to the custody of the department. Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys. [1988 c 60 § 1; 1986 c 257 § 34; 1985 c 443 § 6; 1984 c 209 § 5; 1981 c 137 § 11.]

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 17-35: See note following RCW 9.94A.030.

Severability—Effective date—1985 c 443: See notes following RCW 7.69.010.

Effective dates—1984 c 209: See note following RCW 9.94A.030.

Effective date—1981 c 137: See RCW 9.94A.905.

9.94A.120 Sentences. (Effective until July 1, 1990.) When a person is convicted of a felony, the court shall impose punishment as provided in this section.

(1) Except as authorized in subsections (2), (5), and (7) of this section, the court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.

A sentence outside the standard range shall be a determinate sentence.

(4) An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years. An offender convicted of the crime of assault in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years. An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than three years, and shall not be eligible for furlough, work release or other authorized leave of absence from the correctional facility during such minimum three year term except for the purpose of commitment to an inpatient treatment facility. The foregoing minimum terms of total confinement are mandatory and shall not be varied or modified as provided in subsection (2) of this section.

(5) In sentencing a first-time offender the court may waive the imposition of a sentence within the sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may also include up to two years of community supervision, which, in addition to crime-related prohibitions, may include requirements that the offender perform any one or more of the following:

(a) Devote time to a specific employment or occupation;

(b) Undergo available outpatient treatment for up to two years, or inpatient treatment not to exceed the standard range of confinement for that offense;

(c) Pursue a prescribed, secular course of study or vocational training;

(d) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(e) Report as directed to the court and a community corrections officer; or

(f) Pay a fine and/or accomplish some community service work.

(6) If a sentence range has not been established for the defendant's crime, the court shall impose a determinate sentence which may include not more than one year of confinement, community service work, a term of community supervision not to exceed one year, and/or a fine. The court may impose a sentence which provides more than one year of confinement if the court finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(7) (a) When an offender is convicted of a sex offense other than a violation of RCW 9A.44.040 or RCW 9A.44.050 and has no prior convictions for a sex offense or any other felony sexual offenses in this or any other state, the sentencing court, on its own motion or the

motion of the state or the defendant, may order an examination to determine whether the defendant is amenable to treatment.

After receipt of the reports, the court shall then determine whether the offender and the community will benefit from use of this special sexual offender sentencing alternative. If the court determines that both the offender and the community will benefit from use of this provision, the court shall then impose a sentence within the sentence range and, if this sentence is less than six years of confinement, the court may suspend the execution of the sentence and place the offender on community supervision for up to two years. As a condition of the suspended sentence, the court may impose other sentence conditions including up to six months of confinement, not to exceed the sentence range of confinement for that offense, crime-related prohibitions, and requirements that the offender perform any one or more of the following:

- (i) Devote time to a specific employment or occupation;
- (ii) Undergo available outpatient sex offender treatment for up to two years, or inpatient sex offender treatment not to exceed the standard range of confinement for that offense. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment;
- (iii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;
- (iv) Report as directed to the court and a community corrections officer;
- (v) Pay a fine, accomplish some community service work, or any combination thereof; or
- (vi) Make recoupment to the victim for the cost of any counseling required as a result of the offender's crime.

If the offender violates these sentence conditions the court may revoke the suspension and order execution of the sentence. All confinement time served during the period of community supervision shall be credited to the offender if the suspended sentence is revoked.

(b) When an offender is convicted of any felony sexual offense committed before July 1, 1987, and is sentenced to a term of confinement of more than one year but less than six years, the sentencing court may, on its own motion or on the motion of the offender or the state, order the offender committed for up to thirty days to the custody of the secretary of social and health services for evaluation and report to the court on the offender's amenability to treatment at these facilities. If the secretary of social and health services cannot begin the evaluation within thirty days of the court's order of commitment, the offender shall be transferred to the state for confinement pending an opportunity to be evaluated at the appropriate facility. The court shall review the reports and may order that the term of confinement

imposed be served in the sexual offender treatment program at the location determined by the secretary of social and health services or the secretary's designee, only if the report indicates that the offender is amenable to the treatment program provided at these facilities. The offender shall be transferred to the state pending placement in the treatment program. Any offender who has escaped from the treatment program shall be referred back to the sentencing court.

If the offender does not comply with the conditions of the treatment program, the secretary of social and health services may refer the matter to the sentencing court. The sentencing court shall commit the offender to the department of corrections to serve the balance of the term of confinement.

If the offender successfully completes the treatment program before the expiration of the term of confinement, the court may convert the balance of confinement to community supervision and may place conditions on the offender including crime-related prohibitions and requirements that the offender perform any one or more of the following:

- (i) Devote time to a specific employment or occupation;
- (ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;
- (iii) Report as directed to the court and a community corrections officer;
- (iv) Undergo available outpatient treatment.

If the offender violates any of the terms of community supervision, the court may order the offender to serve out the balance of the community supervision term in confinement in the custody of the department of corrections.

After June 30, 1993, this subsection (b) shall cease to have effect.

(c) When an offender commits any felony sexual offense on or after July 1, 1987, and is sentenced to a term of confinement of more than one year but less than six years, the sentencing court may, on its own motion or on the motion of the offender or the state, request the department of corrections to evaluate whether the offender is amenable to treatment and the department may place the offender in a treatment program within a correctional facility operated by the department.

Except for an offender who has been convicted of a violation of RCW 9A.44.040 or 9A.44.050, if the offender completes the treatment program before the expiration of his term of confinement, the department of corrections may request the court to convert the balance of confinement to community supervision and to place conditions on the offender including crime-related prohibitions and requirements that the offender perform any one or more of the following:

- (i) Devote time to a specific employment or occupation;

(ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(iii) Report as directed to the court and a community corrections officer;

(iv) Undergo available outpatient treatment.

If the offender violates any of the terms of his community supervision, the court may order the offender to serve out the balance of his community supervision term in confinement in the custody of the department of corrections.

Nothing in (c) of this subsection shall confer eligibility for such programs for offenders convicted and sentenced for a sexual offense committed prior to July 1, 1987.

(8) (a) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense, a serious violent offense, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, the court shall in addition to the other terms of the sentence, sentence the offender to a one-year term of community placement beginning either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.150(1). When the court sentences an offender under this section to the statutory maximum period of confinement then the community placement portion of the sentence shall consist entirely of such community custody to which the offender may become eligible, in accordance with RCW 9.94A.150(1). Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(b) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense, a serious violent offense, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, unless a condition is waived by the court, the sentence shall include, in addition to the other terms of the sentence, a one-year term of community placement on the following conditions:

(i) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(ii) The offender shall work at department of corrections-approved education, employment, and/or community service;

(iii) The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

(iv) An offender in community custody shall not unlawfully possess controlled substances; and

(v) The offender shall pay community placement fees as determined by the department of corrections.

(c) The court may also order any of the following special conditions:

(i) The offender shall remain within, or outside of, a specified geographical boundary;

(ii) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(iii) The offender shall participate in crime-related treatment or counseling services;

(iv) The offender shall not consume alcohol;

(v) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

(vi) The offender shall comply with any crime-related prohibitions.

(d) Prior to transfer to, or during, community placement, any conditions of community placement may be removed or modified so as not to be more restrictive by the sentencing court, upon recommendation of the department of corrections.

(9) If the court imposes a sentence requiring confinement of thirty days or less, the court may, in its discretion, specify that the sentence be served on consecutive or intermittent days. A sentence requiring more than thirty days of confinement shall be served on consecutive days. Local jail administrators may schedule court-ordered intermittent sentences as space permits.

(10) If a sentence imposed includes a fine or restitution, the sentence shall specify a reasonable manner and time in which the fine or restitution shall be paid. Restitution to victims shall be paid prior to any other payments of monetary obligations. In any sentence under this chapter the court may also require the offender to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary (a) to pay court costs, including reimbursement of the state for costs of extradition if return to this state by extradition was required, (b) to make recoupment of the cost of defense attorney's fees if counsel is provided at public expense, (c) to contribute to a county or interlocal drug fund, and (d) to make such other payments as provided by law. The offender's compliance with payment of monetary obligations shall be supervised by the department. The rate of payment shall be determined by the court or, in the absence of a rate determined by the court, the rate shall be set by the department. All monetary payments ordered shall be paid no later than ten years after the most recent of either the last date of release from confinement pursuant to a felony conviction or the date the sentence was entered. Nothing in this section makes the department, the state, or any of its employees, agents, or other persons acting on their behalf liable under any circumstances for the payment of these financial obligations. If an order includes restitution as one of the monetary assessments, the county clerk shall make disbursements to victims named in the order. The restitution to victims named in the order shall

be paid prior to any payment for other penalties or monetary assessments.

(11) Except as provided under RCW 9.94A.140(1), a court may not impose a sentence providing for a term of confinement or community supervision or community placement which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

(12) All offenders sentenced to terms involving community supervision, community service, restitution, or fines shall be under the supervision of the secretary of the department of corrections or such person as the secretary may designate and shall follow explicitly the instructions of the secretary including reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, and notifying the community corrections officer of any change in the offender's address or employment.

(13) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

(14) A departure from the standards in RCW 9.94A.400(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in subsections (2) and (3) of this section, and may be appealed by the defendant or the state as set forth in RCW 9.94A.210(2) through (6).

(15) The court shall order restitution whenever the offender is convicted of a felony that results in injury to any person or damage to or loss of property, whether the offender is sentenced to confinement or placed under community supervision, unless extraordinary circumstances exist that make restitution inappropriate in the court's judgment. The court shall set forth the extraordinary circumstances in the record if it does not order restitution.

(16) As a part of any sentence, the court may impose and enforce an order that relates directly to the circumstances of the crime for which the offender has been convicted, prohibiting the offender from having any contact with other specified individuals or a specific class of individuals for a period not to exceed the maximum allowable sentence for the crime, regardless of the expiration of the offender's term of community supervision.

(17) In any sentence of partial confinement, the court may require the defendant to serve the partial confinement in work release or in a program of home detention. [1988 c 154 § 3; 1988 c 153 § 2; 1988 c 143 § 21. Prior: 1987 c 456 § 2; 1987 c 402 § 1; prior: 1986 c 301 § 4; 1986 c 301 § 3; 1986 c 257 § 20; 1984 c 209 § 6; 1983 c 163 § 2; 1982 c 192 § 4; 1981 c 137 § 12.]

Reviser's note: This section was amended by 1988 c 143 § 21, 1988 c 153 § 2, and by 1988 c 154 § 3, each without reference to the other. All amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date—Implementation—Application of increased sanctions—1988 c 153: See notes following RCW 9.94A.030.

Applicability—1988 c 143 § 21-24: "Increased sanctions authorized by sections 21 through 24 of this act are applicable only to those

persons committing offenses after March 21, 1988." [1988 c 143 § 25.] Sections 21, 23, and 24 were amendments to RCW 9.94A.120, 9.94A.383, and 9.94A.400, respectively. Section 22, an amendment to RCW 9.94A.170, was vetoed by the governor.

Effective date—1987 c 402: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1987." [1987 c 402 § 3.]

Effective date—1986 c 301 § 4: "Section 4 of this act shall take effect July 1, 1987." [1986 c 301 § 8.]

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 17-35: See note following RCW 9.94A.030.

Effective dates—1984 c 209: See note following RCW 9.92.150.

Effective date—1983 c 163: "Sections 1 through 5 of this act shall take effect on July 1, 1984." [1983 c 163 § 7.]

Effective date—1981 c 137: See RCW 9.94A.905.

9.94A.120 Sentences. (Effective July 1, 1990.)

When a person is convicted of a felony, the court shall impose punishment as provided in this section.

(1) Except as authorized in subsections (2), (5), and (7) of this section, the court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence.

(4) An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years. An offender convicted of the crime of assault in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years. An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than three years, and shall not be eligible for furlough, work release or other authorized leave of absence from the correctional facility during such minimum three year term except for the purpose of commitment to an inpatient treatment facility. The foregoing minimum terms of total confinement are mandatory and shall not be varied or modified as provided in subsection (2) of this section.

(5) In sentencing a first-time offender the court may waive the imposition of a sentence within the sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may also include up to two years of community supervision, which, in addition to crime-related prohibitions, may include requirements that the offender perform any one or more of the following:

(a) Devote time to a specific employment or occupation;

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 10–1542 and 10–1543

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

10–1542

v.

CARLOS MARTINEZ GUTIERREZ

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

10–1543

v.

DAMIEN ANTONIO SAWYERS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[May 21, 2012]

JUSTICE KAGAN delivered the opinion of the Court.

An immigration statute, 8 U. S. C. §1229b(a), authorizes the Attorney General to cancel the removal of an alien from the United States so long as the alien satisfies certain criteria. One of those criteria relates to the length of time an alien has lawfully resided in the United States, and another to the length of time he has held permanent resident status here. We consider whether the Board of Immigration Appeals (BIA or Board) could reasonably conclude that an alien living in this country as a child must meet those requirements on his own, without counting a parent’s years of residence or immigration status. We hold that the BIA’s approach is based on a permissible construction of the statute.

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some other immigration status.¹ (The third paragraph is not at issue in these cases.)

The question we consider here is whether, in applying this statutory provision, the BIA should impute a parent's years of continuous residence or LPR status to his or her child. That question arises because a child may enter the country lawfully, or may gain LPR status, *after* one of his parents does. A parent may therefore satisfy the requirements of §§1229b(a)(1) and (2), while his or her child, considered independently, does not. In these circumstances, is the child eligible for cancellation of removal?

The Ninth Circuit, the first court of appeals to confront this issue, held that such an alien could obtain relief. See *Cuevas-Gaspar v. Gonzales*, 430 F. 3d 1013 (2005). Enrique Cuevas-Gaspar and his parents came to the United States illegally in 1985, when he was one year old. Cuevas-Gaspar's mother was lawfully admitted to the country in 1990, as an LPR. But Cuevas-Gaspar was lawfully admitted only in 1997, when he too received LPR status. That meant that when Cuevas-Gaspar committed a removable offense in 2002, he could not independently satisfy §1229b(a)(2)'s requirement of seven consecutive years of residence after a lawful entry.² (The parties agreed that he just met §1229b(a)(1)'s 5-year status requirement.) The Board deemed Cuevas-Gaspar ineligible for relief on that account, but the Ninth Circuit found that position unrea-

¹The INA defines "admitted" as referring to "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U. S. C. §1101 (a)(13)(A). The 7-year clock of §1229b(a)(2) thus begins with an alien's *lawful* entry.

²The 7-year clock stopped running on the date of Cuevas-Gaspar's offense under a statutory provision known as the "stop-time" rule. See §1229b(d)(1) ("For purposes of this section, any period of continuous residence . . . in the United States shall be deemed to end . . . when the alien is served a notice to appear . . . or . . . when the alien has committed an offense . . . that renders the alien . . . removable from the United States . . . , whichever is earliest").

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the Ninth Circuit doubled down on its contrary view, declaring the BIA's position unreasonable and requiring imputation under both §§1229b(a)(1) and (a)(2). See *id.*, at 1103 (“[T]he rationale and holding of *Cuevas-Gaspar* apply equally to the five-year permanent residence and the seven-year continuance residence requirements” of §1229b(a)).

B

Two cases are before us. In 1989, at the age of five, respondent Carlos Martinez Gutierrez illegally entered the United States with his family. Martinez Gutierrez's father was lawfully admitted to the country two years later as an LPR. But Martinez Gutierrez himself was neither lawfully admitted nor given LPR status until 2003. Two years after that, Martinez Gutierrez was apprehended for smuggling undocumented aliens across the border. He admitted the offense, and sought cancellation of removal. The Immigration Judge concluded that Martinez Gutierrez qualified for relief because of his father's immigration history, even though Martinez Gutierrez could not satisfy either §1229b(a)(1) or §1229b(a)(2) on his own. See App. to Pet. for Cert. in No. 10–1542, pp. 20a–22a (citing *Cuevas-Gaspar*, 430 F.3d 1013). The BIA reversed, and after entry of a removal order on remand, reaffirmed its disposition in an order relying on *Escobar*, see App. to Pet. for Cert. in No. 10–1542, at 5a–6a. The Ninth Circuit then granted Martinez Gutierrez's petition for review and remanded the case to the Board for reconsideration in light of the court's contrary decisions. See 411 Fed. Appx. 121 (2011).

Respondent Damien Sawyers was lawfully admitted as an LPR in October 1995, when he was 15 years old. At that time, his mother had already resided in the country for six consecutive years following a lawful entry. After Sawyers's conviction of a drug offense in August 2002, the

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it. The provision calls for “the alien”—not, say, “the alien or one of his parents”—to meet the three prerequisites for cancellation of removal. Similarly, several of §1229b(a)’s other terms have statutory definitions referring to only a single individual. See, e.g., §1101(a)(13)(A) (“The terms ‘admission’ and ‘admitted’ mean, with respect to *an alien*, the lawful entry of *the alien* into the United States” (emphasis added)); §1101(a)(33) (“The term ‘residence’ means the place of general abode; the place of general abode of a person means *his* principal, actual dwelling” (emphasis added)). Respondents contend that none of this language “forecloses” imputation: They argue that if the Board allowed imputation, “[t]he alien” seeking cancellation would “still have to satisfy the provision’s durational requirements”—just pursuant to a different computational rule. Brief for Respondent Martinez Gutierrez in No. 10–1542, p. 16 (hereinafter Martinez Gutierrez Brief); see Brief for Respondent Sawyers in No. 10–1543, pp. 11, 15 (hereinafter Sawyers Brief). And they claim that the Board’s history of permitting imputation under similarly “silent” statutes supports this construction. Martinez Gutierrez Brief 16; see Sawyers Brief 15–16; *infra*, at 10–11. But even if so—even if the Board *could* adopt an imputation rule consistent with the statute’s text—that would not avail respondents. Taken alone, the language of §1229b(a) at least permits the Board to go the other way—to say that “the alien” must meet the statutory conditions independently, without relying on a parent’s history.

For this reason, respondents focus on §1229b(a)’s history and context—particularly, the provision’s relationship to the INA’s former §212(c) and its associated imputation rule. Section 212(c)—§1229b(a)’s predecessor—generally allowed the Attorney General to prevent the removal of an alien with LPR status who had maintained a “lawful unrelinquished domicile of seven consecutive years” in this country. 8 U. S. C. §1182(c) (1994 ed.). Like §1229b(a),

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acquisition of LPR status. In doing so, Congress eliminated the very term—“domicile”—on which the appeals courts had founded their imputation decisions. See *supra*, at 8. That alteration dooms respondents’ position, because the doctrine of congressional ratification applies only when Congress reenacts a statute without relevant change. See *Jama v. Immigration and Customs Enforcement*, 543 U. S. 335, 349 (2005).³ So the statutory history here provides no basis for holding that the BIA flouted a congressional command in adopting its no-imputation policy.

Nor do the INA’s purposes demand imputation here, as both respondents claim. According to Martinez Gutierrez, the BIA’s approach contradicts that statute’s objectives of “providing relief to aliens with strong ties to the United States” and “promoting family unity.” Martinez Gutierrez Brief 40, 44; see Sawyers Brief 37. We agree—indeed, we have stated—that the goals respondents identify underlie or inform many provisions of immigration law. See *Fiallo v. Bell*, 430 U. S. 787, 795, n. 6 (1977); *INS v. Errico*, 385 U. S. 214, 220 (1966). But they are not the INA’s only goals, and Congress did not pursue them to the *n*th degree. To take one example, §1229b(a)’s third paragraph makes aliens convicted of aggravated felonies ineligible for

³Sawyers contends that §1229b(a)(2)’s replacement term—“resided continuously”—is a “term of art” in the immigration context which incorporates “an intent component” and so means the same thing as “domiciled.” Sawyers Brief 25–26 (emphasis deleted). Thus, Sawyers argues, we should read §1229b(a) as reenacting §212(c) without meaningful change. See *id.*, at 25. But even assuming that Congress could ratify judicial decisions based on the term “domicile” through a new statute using a synonym for that term, we do not think “resided continuously” qualifies. The INA defines “residence” as a person’s “principal, actual dwelling place in fact, *without regard to intent*,” 8 U. S. C. §1101(a)(33) (emphasis added), and we find nothing to suggest that Congress added an intent element, inconsistent with that definition, by requiring that the residence have been maintained “continuously for 7 years.”

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(“the immigrant”) and says nothing about imputation. But the BIA has consistently imputed a parent’s knowledge of inadmissibility (or lack thereof) to a child. See, e.g., *Senica v. INS*, 16 F. 3d 1013, 1015 (CA9 1994) (“Therefore, the BIA reasoned, the children were not entitled to relief under [§1182(k)] because [their mother’s] knowledge was imputed to them”); *In re Mushtaq*, No. A43 968 082, 2007 WL 4707539 (BIA, Dec. 10, 2007) (*per curiam*); *In re Ahmed*, No. A41 982 631, 2006 WL 448156 (BIA, Jan. 17, 2006) (*per curiam*).

Similarly, the Board imputes a parent’s abandonment (or non-abandonment) of LPR status to her child when determining whether that child can reenter the country as a “returning resident immigran[t]” under §1181(b). See *Matter of Zamora*, 17 I. & N. Dec. 395, 396 (1980) (holding that a “voluntary and intended abandonment by the mother is imputed” to an unemancipated minor child for purposes of applying §1181(b)); *Matter of Huang*, 19 I. & N. Dec. 749, 755–756 (1988) (concluding that a mother and her children abandoned their LPR status based solely on the mother’s intent); *In re Ali*, No. A44 143 723, 2006 WL 3088820 (BIA, Sept. 11, 2006) (holding that a child could not have abandoned his LPR status if his mother had not abandoned hers). And once again, that is so even though neither §1181(b) nor any other statutory provision says that the BIA should look to the parent in assessing the child’s eligibility for reentry.

But *Escobar* provided a reasoned explanation for these divergent results: The Board imputes matters involving an alien’s state of mind, while declining to impute objective conditions or characteristics. See 24 I. & N. Dec., at 233–234, and n. 4. On one side of the line, knowledge of inadmissibility is all and only about a mental state. See, e.g., *Senica*, 16 F. 3d, at 1015; *In re Ahmed*, 2006 WL 448156. Likewise, abandonment of status turns on an alien’s “intention of . . . returning to the United States” to live as a

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tional requirements. See 24 I. & N. Dec., at 235. But the Board also explained that “there [was] no precedent” in its decisions for imputing status or residence, and distinguished those statutory terms, on the ground just explained, from domicile or abandonment of LPR status. *Id.*, at 234; see *id.*, at 233–234, and n. 4. And the Board argued that allowing imputation under §1229b(a) would create anomalies in administration of the statutory scheme by permitting even those who had not obtained LPR status—or could not do so because of a criminal history—to become eligible for cancellation of removal. See *id.*, at 234–235, and n. 5. The Board therefore saw neither a “logical” nor a “legal” basis for adopting a policy of imputation. *Id.*, at 233. We see nothing in this decision to suggest that the Board thought its hands tied, or that it might have reached a different result if assured it could do so. To the contrary, the decision expressed the BIA’s view, based on its experience implementing the INA, that statutory text, administrative practice, and regulatory policy all pointed in one direction: toward disallowing imputation. In making that case, the decision reads like a multitude of agency interpretations—not the best example, but far from the worst—to which we and other courts have routinely deferred. We see no reason not to do so here.

Because the Board’s rejection of imputation under §1229b(a) is “based on a permissible construction of the statute,” *Chevron*, 467 U. S., at 843, we reverse the Ninth Circuit’s judgments and remand the cases for further proceedings consistent with this opinion.

It is so ordered.