No. 42774-5-II

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

DEREK E. GRONQUIST,

Appellant/Plaintiff,

V.

DEPARTMENT OF CORRECTIONS,

Respondent/Defendant.

REPLY BRIEF

Derek E. Gronquist
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P.O. Box 888/TRU
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pm 11-9-12

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Appellant Derek E. Gronquist files this reply to Respondent's Brief.

I. THE TRIAL COURT LACKED AUTHORITY TO REDUCE THE PENALTY PERIOD

The Department of Corrections (DOC or Department) does not dispute that the trial court reduced the penalty period from 223 days to 24 in violation of RCW 42.56.550(4) and the Supreme Court's opinion in Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 98 P.3d 463 (2004). Compare Second Amended Opening Brief at 21-22 with Respondent's Brief at 19-23.

Rather than concede error in the face of binding Supreme Court precedent and the mandatory tenants of the statute it interpreted, the Department claims this issue is "moot" because RCW 42.56.565[1] bars Mr. Gronquist "from receiving penalties under the PRA because the trial court found the Department did not act in bad faith . . ." Respondent's Brief at 21. This argument is based upon a fundamental misinterpretation of the statute.

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[1] RCW 42.56.565 did not exist at the time of the trial court's order. The law was signed by the Governor on May 10, 2011. Laws of 2011 c 300. The trial court entered the order at issue on December 18, 2009. CP 134-136.

RCW 42.56.565 prohibits court's from **awarding** penalties to a prisoner in the absence of bad faith. The statute does not authorize courts to **reduce the penalty period** in the absence of a finding of bad faith. DOC has neither appealed nor challenged the trial court's decision to **impose** penalties, and is bound by that ruling. Nothing in RCW 42.56.565 authorizes courts to reduce the penalty period. As such, Yousoufian requires this Court to reverse the trial court and remand for a proper calculation of the penalty period.

The Department falsely claims "that the trial court applied laches" to reduce the penalty period. Respondent's Brief at 22. There is absolutely nothing in the trial court record to indicate that its reduction of the penalty period was based upon the doctrine of laches. Cf. CP 129-131. Indeed, the affirmative defense of laches was never raised in the trial court. See CP 295-317, 328-336 & 430-433. As such, this Court cannot consider the issue for the first time upon appeal. CR 8(c); RAP 2.5(a); Northwest Acceptance Corp. v. Hesco, 26 Wn.App. 823, 826, 614 P.2d 1302 (1980) (holding that appellate

courts will not consider issued "raised for the first time on appeal, particularly when the issues sought to be raised are in the nature of affirmative defenses, the resolution of which requires a factual hearing.").

II. MR. GRONQUIST REQUESTED IDENTIFIABLE PUBLIC RECORDS

DOC admits that Mr. Gronquist's July 30, 2007, public records request provided a reasonable description enabling it to locate the records:

> In order to fulfill his request, the Department would have needed to create a list of all prisoners not citizens of the United State. Next, it would have to determine what prisoners on the list did not have a work visa. Then, it would have needed to cross check the names without work visas with all offenders who work in Class II Industries to determine if there were any prisoners who met the "undocumented alien worker" definition in Mr. Gronquist's PRA request. Finally, it would then have needed to identify any badges/cards or payroll information related to these offenders.

Respondent's Brief at 18.

Despite admitting that Mr. Gronquist's request was specific enough to enable it to locate records if it chose to do so, the Department nevertheless contends that the request was insufficient because the records sought did not contain information that was not requested:

> Mr. Gronquist's request was improper because he failed to request identifiable records because the Department needed to research its records to fulfill his request since the records requested did not readily identify prisoners by citizenship or as an "undocumented alien worker".

Respondent's Brief at 18.

Mr. Gronquist did not request records that identified prisoners by citizenship or as an undocumented alien worker. Rather, he requested the **identification badges** and **payroll records** for undocumented aliens working in Class II Industries. DOC clearly understands that fact, and which records Mr. Gronquist sought. His request, therefore, sought identifiable public records.

III. THE DEPARTMENT FAILED TO CONDUCT A SUFFICIENT SEARCH FOR REQUESTED PUBLIC RECORDS

DOC has not responded to Mr. Gronquist's claim that it failed to conduct an adequate search for requested public records. Compare Second Amended Opening Brief at 29-31 with Respondent's Brief, passim. Rather, DOC attempts to distract the Court from this issue by repeatedly claiming that "records in the form requested did not exist." Respondent's Brief at 12-18. This assertion is factually false and legally

irrelevant.

First, DOC's claim that it "presented evidence that records regarding "undocumented alien workers" did not exist"", Respondent's Brief at 12, is factually false. At best, the DOC's evidence demonstrates that a single official **told Mr. Gronquist** that records did not exist without conducting an adequate search for them. CP 247-249. Second, any assertion that the records "did not exist" is belied by the Department's own policies requiring the existence of those records. See Second Amended Opening Brief at 24-28. Third, Mr. Gronquist has assigned error to the trial court's finding that records did not exist, as it is unsupported by and contrary to the evidence. Id., at 1 § I(3).

DOC's position is also legally irrelevant. In Neighborhood Alliance v. City of Spokane, 172 Wn.2d 702, 720-721, 261 P.3d 119 (2011), the Supreme Court clearly held that "the focus of the inquiry **is not whether responsive documents do in fact exist**, but whether the search itself was adequate." (Emphasis added). DOC does not even attempt to claim that its conduct constitutes an adequate search, much less than submit the

evidence required by Neighborhood Alliance to prove it. As such, this Court must reverse the trial court and require the Department to conduct an adequate search for responsive records.

IV. THE DEPARTMENT HAS FAILED TO PROVE THAT THE VIDEO SURVEILLANCE RECORDINGS MR. GRONQUIST REQUESTED ARE EXEMPT FROM DISCLOSURE

The core command of the Public Records Act is for records to be disclosed unless specific information **within the record requested** is exempt:

> Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless **the record** falls within the specific exemptions of subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.

RCW 42.56.070(1) (emphasis added).

The Supreme Court has expressly rejected the Department's "blanket approach" in claiming an exemption, and requires the agency to prove that specific information within the record requested falls within an exemption. Prison Legal News v. Department of Corrections, 154 Wn.2d 628, 115 P.3d 316, 324-325 (2005).

The Department has failed to produce any evidence establishing that specific information contained in the video recordings Mr. Gronquist

requested was exempt. In fact, the Department has not even attempted to discuss the contents of those recordings. Absent proof that information contained in the recordings Mr. Gronquist sought is exempt, this Court must reverse the lower court.

Rather than attempt to establish that information contained in the recordings Mr. Gronquist requested is exempt, DOC once again asserts that "all" information created by its surveillance system is exempt under the guise of security. Respondent's Brief at 23-29. As discussed, that approach is incongruous with the Public Records Act. Even within an area of law as watered down as the minimal due process afforded to prisoners in disciplinary hearings, such an approach has been rejected:

> Indiana has not yet asserted that any such risk to prison security would have resulted from allowing [the prisoner] to watch **the tape** of the cell extraction. Rather, in its brief, Indiana simply states that "having the offender excluded from [viewing the surveillance video] is consistent with the Department of Corrections procedure of keeping security tapes confidential." **We have never approved of a blanket policy of keeping confidential security camera videotapes for safety reasons** . . . .

> minimal due process requires that the district court conduct an in camera review . . . to determine whether or not exculpatory information existed. But here, as we have noted previously, the district court did not order the state to submit a copy of the video tape for in camera review. Without some idea of what is on the tape, we cannot evaluate the merits of Piggie's claim that his defense was hampered by not being given access to it.

Piggie v. Cotton,[2] 344 F.3d 674, 679 (7th Cir. 2003) (citations omitted & emphasis added); see also Prison Legal News v. Executive Office for United States, 628 F.3d 1233 (10th Cir. 2011) (affirming release of portions of video recordings depicting the aftermath of a brutal prison murder pursuant to a Freedom of Information Act request).

Piggie is in accord with this Court's decision in DeLong v. Parmelee, 157 Wn.App. 119, 160-162 & 167, 236 P.3d 936 (2010), which held the

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[2] The Department claims that Piggie and Gaither v. Anderson, 236 F.3d 817 (7th Cir. 2000) "recognized that the nondisclosure of prison surveillance videotapes is critical to effective law enforcement in prison . . ." Respondent's Brief at 26-27. This is incorrect. Both cases challenged prison disciplinary proceedings and did not involve the PRA or federal Freedom of Information Act. Moreover, as discussed above, Piggie rejected such a proposition. Gaither held that information contained on a surveillance video recording was not exculpatory under Brady v. Maryland, and the prisoner could not obtain federal habeas corpus relief under the rigorous standard required by the Antiterrorism and Effective Death Penalty Act.

PRA requires courts to secure the record at issue in the court file and to review that record **in camera** prior to making any determination upon a claim of statutory exemption.

In this case, the trial court did not order the Department to produce a copy of the video tape and did not review the tape in camera to determine if it contained exempt information. In addition, the Department failed to produce any evidence establishing that information contained in the recordings requested contained any exempt information. These omissions require reversal of the trial court's order.

DOC also takes issue with the Supreme Court's determination that the internal operation of a prison does not constitute "law enforcement" under RCW 42.56.240(1) in Prison Legal News, 115 P.3d at 323-324. But this Court is bound by the decision of the Supreme Court, and cannot overrule it, especially based upon nothing but conjecture, speculation, and hyperbole. It is important to remember that DOC has never explained how concealing evidence of its officers involvement in the brutal beating of a prisoner can be "essential to" **effective** law enforcement.

V. THE DEPARTMENT' CENSORSHIP OF PUBLIC RECORDS VIOLATES ARTICLE I, SECTION 5, OF THE WASHINGTON STATE CONSTITUTION

DOC claims Mr. Gronquist "did not raise", "abandoned", and failed to "identify a restriction that prohibited future speech" in his Article I, Section 5, challenge to its censorship of public records. Respondent's Brief at 29-34. Each of these claims are false.

Mr. Gronquist did not "abandon" his **facial** Article I, Section 5, challenge to the Department's censorship of public records. The First Amended Complaint alleged that DOC's censorship of requested public records violated Article I, Section 5, of the Washington State Constitution. CP 319-325. The Department filed a CR 12(b) motion to dismiss this claim. CP 118-123. The superior court granted the motion in part (dismissing the facial challenge) and denied it in part (letting the "as applied" challenge stand). CP 98-99.[3] Subsequently, Mr. Gronquist

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[3] The trial court's order, drafted by DOC's attorney, is not a model of clarity. However, Mr. Gronquist's Motion for Reconsideration clarifies that "[t]he court granted [DOC's] motion to dismiss, in part, by dismissing Mr. Gronquist's claim that DOC's censorship of public records was unconstitutional **on its face** under Article I, Section 5, of the Washington State Constitution. CP 100 (emphasis added).

informed the court that his **as applied** challenge was moot, because he had received copies of the records at issue from the Department in an unrelated case. CP 468-474. This action in no way effected the **facial** challenge to the Department's authority to censor public records sent through the mail. As such, Mr. Gronquist has not "abandoned" his facial Article I, Section 5, challenge to the Department's censorship of requested public records.

Mr. Gronquist's Article I, Section 5, challenge was properly raised in the superior court. DOC admits the First Amended Complaint alleged violation of Article I, Section 5, "based upon the Department's alleged acts of intercepting his public records request and withholding part of the records from him." Respondent's Brief at 30. Mr. Gronquist's claim therefore embraced everything related to DOC's conduct. It was DOC who brought up -- at a later date in a CR 12(b) motion to dismiss -- that RCW 72.09.530 authorized its conduct. At that most preliminary stage in the proceedings, Mr. Gronquist could not, and **should not**, be expected to challenge every aspect of the Department's wrongdoing. The only question

before the trial court was whether Mr. Gronquist's Article I, Section 5, challenge stated a claim sufficient to permit further prosecution of the action. It clearly did, and that claim embraced the constitutionality of RCW 72.09.530. Moreover, Mr. Gronquist's response to the CR 12(b) motion clearly **did** argue that Article I, Section 5, gave prisoners greater protection than the First Amendment **and** that DOC's conduct constituted a prior restraint. CP 109-127.

Even if the constitutionality of RCW 72.09.530 was not raised below, the issue constitutes a manifest constitutional error that may be raised for the first time on appeal -- especially in the face of an improper CR 12(b) dismissal. RAP 2.5(a)(3); see Parmelee v. O'Neel, 145 Wn.App. 223, 186 P.3d 1094 (2008) (addressing constitutionality of libel statute not challenged below that was subject to a CR 12(b) dismissal by the Clallam County Superior Court). The Court may reach the merits of this issue.

DOC also contends that its interception of public records and refusal to permit Mr. Gronquist to receive or read those records does not constitute a "prior restraint" on speech. This is

incorrect. The term "prior restraint" "describe[s] administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." Alexander v. United States, 61 U.S. 4796, 125 L.Ed.2d 441, 113 S.Ct. 2766 (1993). "[C]ommunication by letter is not accomplished by the act of writing words on paper. Rather, it is effected **only when the letter is read by the addressee**." Procunier v. Martinez, 416 U.S. 396, 408, 40 L.Ed.2d 224, 94 S.Ct. 1800 (1974) (emphasis added).

DOC does not dispute that it issued an order forbidding Mr. Gronquist from receiving and reading the records in advance of his actual inspection of those records. Such conduct is not a mere "regulation of access to information" akin to permitting a journalist to view an execution but not videotape it in Halquist v. DOC, 113 Wn.2d 818, 783 P.2d 1065 (1989), or a single library's installation of internet filters on its computer system in Bradburn v. North Central Regional Library, 168 Wn.2d 789, 231 P.3d 166 (2010). To the contrary, DOC perpetually enjoined Mr. Gronquist from receiving, reading, and

broadcasting true information contained in public records. That is a prior restraint in its purest form.

Without even responding to Mr. Gronquist's Article I, Section 5, challenge or his Gunwall analysis, DOC asserts that Mr. Gronquist's free speech rights can be extinguished merely because of his status as a prisoner. Respondent's Brief at 33. Article I, Section 5's use of the phrase "every person" to define its scope directly rejects this argument. See Second Amended Opening Brief at 41-43. Even under First Amendment jurisprudence DOC's position has been rejected:

> We reject any attempt to justify censorship of inmate correspondence merely by reference to certain assumptions about the legal status of prisoners.

Procunier, 416 U.S. at 409.

Each case DOC cites in support of this contention involves First Amendment claims -- **not** Article I, Section 5, challenges. The analysis for each is different. Under the First Amendment, federal courts employ a broad "hands off" approach to issues arising within state prisons. Thornburgh v. Abbott, 490 U.S. 401, 414-415, 104 L.Ed.2d 459, 109 S.Ct. 1874 (1989). This

differential standard is based largely upon the principle of Federalism. Procunier, 416 U.S. at 404-406. The First Amendment permits this standard because its provisions **always** involve a balancing of public versus private interests. Cf. Thornburgh, 490 U.S. at 407; Pickering v. Board of Education, 391 U.S. 563, 568, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968). Conversely, Article I, Section 5, emphatically rejects any "balancing of interests" by vesting "every person" with the absolute right to free speech:

> Unlike the United States Supreme Court's interpretation of the First Amendment . . . as requiring a "balancing" and "weighing" of the respective rights of the parties, our state constitution in article I, section 5 speaks in absolutes when it unequivocally declares that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right" . . . . it need only be said that all necessary "weighing" and "balancing" was done in 1889 when this state's constitutional convention adopted our constitution and the people thereafter ratified it.

State v. Rinaldo, 36 Wn.App. 86, 94-96, 673 P.2d 614 (1984).

The vigorous and mandatory provisions of Article I, Section 5, absolutely prohibits the Department from imposing prior restraint censorships upon public records. This Court should enjoin DOC's conduct as a matter of law.

VI. THE TRIAL COURT ERRED IN DENYING MR. GRONQUIST'S MOTION TO VACATE

DOC claims that "Mr. Gronquist's reliance on Olpinski is misplaced because Olpinski addressed the granting of a motion for a new trial under CR 59 and not a request to vacate a judgment." Respondent's Brief at 37. This is incorrect. The factors articulated in Olpinski v. Clement, 73 Wn.2d 944, 951, 442 P.2d 260 (1968) control the determination of a CR 60(b) motion to vacate. Roberson v. Perez, 123 Wn.App. 320, 342, 96 P.3d 420 (2004), aff'd on other grounds 156 Wn.2d 33 (2005).

DOC's remaining contentions relevant to this issue are appropriately addressed by the Second Amended Opening Brief at 50-57 and need not be repeated here.

VII. THE TRIAL COURT ERRED IN DENYING MR. GRONQUIST'S MOTION FOR LEAVE TO AMEND

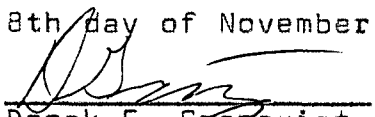
The Department contends that the superior court properly denied Mr. Gronquist's motion to amend as "untimely" because the "second amended complaint did not add any additional claims but sought to add facts to his second PRA claim previously asserted." Respondent's Brief at 40.

This is, once again, false.

Mr. Gronquist's proposed Second Amended Complaint sought to add a newly discovered claim regarding the Department's failure to search for records responsive to his August 9, 2007, public records request. CP 479-482. This claim had absolutely nothing to do with any other previously adjudicated claim.

Finally, DOC claims it will be "prejudiced" by amendment because it would "have to secure evidence more than three years after the complaint was first filed." Respondent's Brief at 40. In other words, DOC asserts that it can refuse to discharge duties mandated by the Public Records Act, lie to a public records requester, and then face no liability for such conduct when it is discovered simply because it would have to "secure evidence" in its possession. Such a proposition is simply outrageous. No case in the history of Washington has ever permitted an agency to so openly thwart the Public Records Act and judicial process through such chicanery. This should not be the first.

Submitted this 8th day of November, 2001.



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DECLARATION OF MAILING

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day I deposited a properly addressed envelope in the internal mail system of the Monroe Correctional Complex, and made arrangements for postage, containing: Reply Brief. Said envelope(s) was addressed to:

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Dated this 8 day of November, 2012.

Derek E. Gronquist