

NO. 45716-4-II

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

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In re Personal Restraint Petition of

JOHN ANDREW STEVENS,

Petitioner.

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**SUPPLEMENTAL BRIEF OF DEPARTMENT OF CORRECTIONS**

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## I. INTRODUCTION

DOC is statutorily authorized to determine its own early release policies in accordance with former RCW 9.94A.728(1). It likewise is authorized to defer to early release policies of the correctional agency having jurisdiction over the offender in cases where the DOC had no knowledge of, or input into, disciplinary actions related to that offender during time served in the other jurisdiction.

Stevens seeks to overturn a long history of case law holding that the correctional agency having jurisdiction over an offender has sole discretion over its early release time policy.<sup>1</sup> Some county jails have early release policies that allow fewer or no early release credits for jail time compared to the policies of other counties or of the Respondent, the Department of Corrections (Department or DOC). When those offenders transferred to DOC, their jail early release credits went with them. The Washington Supreme Court has already held that differences in one inmate's rate of early release credits as compared to the rate given to inmates from other counties does not violate equal protection. Yet Stevens claims a virtually identical situation does violate equal protection.

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<sup>1</sup> This brief uses the phrase "early release time" to refer to time taken off a confinement term for an inmate's good behavior or good performance, as provided by former RCW 9.94A.728(1). The concept is also referred to in various contexts as "early release credits," "good time," "earned release time", "earned time," and "good conduct time."

Just as with jail inmates, Stevens was not within DOC's jurisdiction and control when he was in Idaho. Stevens would have the DOC displace Idaho's control over its own sentencing and prisoners under an erroneous assumption that a prisoner in Idaho who serves a Washington sentence along with an Idaho sentence under the Interstate Agreement on Detainers (IAD) is similarly situated to prisoner who serves solely a Washington sentence in another state under the Interstate Corrections Compact (ICC). Those prisoners are not similarly situated. Idaho has sole authority to grant or deny early release credits for its own prisoner. It is not a violation of equal protection for Washington to decline to calculate early release credits for an Idaho prisoner just because that prisoner, after completing a sentence imposed by an Idaho court, is transferred to Washington to complete a separate sentence imposed by a Washington court.

## **II. ISSUES PRESENTED**

1. Where former RCW 9.94A.728(1) explicitly allocates the authority over early release policies to the agency having jurisdiction over the prisoner, was DOC authorized to defer to Idaho's early release policies?

2. Is an inmate in another state serving a sentence imposed in that state under the IAD not similarly situated to an inmate serving a Washington sentence in another state under the ICC?

3. Where the Idaho Department of Corrections does not give early release credits, is an inmate in Idaho under the IAD not similarly situated to an inmate in a state that does give early release credits?

### **III. STATEMENT OF THE CASE**

Between January 16, 2009, and February 5, 2009, Stevens committed several crimes in Pierce County. Exhibit 1, Judgment and Sentence.<sup>2</sup> Around April 21, 2010, he began serving an unrelated sentence in federal prison. Exhibit 3, Idaho DOC Offender Movement Screen, at 1 (“FED PRISON 04/21/2010”). On March 30, 2011, he was released from the federal prison into the custody of Idaho authorities, at which point he began a prison sentence in Idaho. Exhibit 4, OMNI Chronos, at entry dated 05/09/2013.

Before Stevens finished serving his Idaho sentence, Idaho DOC sent him to Pierce County Jail in November 2011, and he arrived at the jail on November 4, 2011. Exhibit 5, Jail Certification. He was sent pursuant to the Interstate Agreement on Detainers (IAD) so that Pierce County could adjudicate the 2009 identity theft charges. Stevens

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<sup>2</sup> Exhibits in this brief refer to the exhibits attached to the DOC’s original response.

pleaded guilty on March 12, 2012, to the charges and was sentenced to 63 months in prison plus a year of community custody, to run consecutively to the federal sentence and concurrently to the Idaho sentence. Exhibit 1, at 5. The Pierce County Jail sent Stevens back to the Idaho DOC on March 26, 2012. Exhibit 5.

When Stevens finished his Idaho prison term, he was sent to Pierce County Jail on April 30, 2013, and he was sent from there to the DOC on May 3, 2013. Exhibit 4; Exhibit 5; Exhibit 6, OMNI Sentence Information Screen (showing time start date). From March 30, 2011 through May 3, 2013, Stevens was not a Washington state inmate, nor had he been sent to Idaho by the DOC under the Interstate Corrections Compact (ICC) under RCW 72.74.020. *See* Exhibit 2, at 4 (showing release from prison on 08/06/2003; admission to prison and initial classification on 05/03/2013).

After Stevens arrived at the DOC, records staff calculated the amount of credit for time served and early release credits he was entitled to on his Pierce County sentence. The judgment and sentence ordered credit for 348 days, which represents the time spent in the Idaho DOC starting March 30, 2011, to the date of sentencing for the Pierce County cause on March 12, 2012. Exhibit 7, at 6. The jail certification indicates that the amount of time spent solely in the Pierce County Jail was 146

days, representing the periods from November 4, 2011, to March 26, 2012 (143 days), and from April 30, 2013, to May 3, 2013 (3 days). Jail good time at a rate of 33 percent of the sentence is 73 days if the time served is 146 days.<sup>3</sup> Hence, the DOC credited Stevens's sentence with 73 days of jail good time. Exhibit 6 (showing "Cause ERT Credit").

As for Idaho time, the DOC calculated 219 days spent in Idaho DOC prior to sentencing on the Pierce County cause, and 400 days spent after sentencing on the Pierce County cause. Exhibit 4, at entry dated 05/09/2013. Adding those periods to the 146 days of jail time, Stevens had spent a total of 765 days in custody on the Pierce County cause prior to arriving at the DOC. Exhibit 6 (showing "Cause Credits"). Thus, the DOC credited his sentence with 765 days of time served. *Id.* The DOC has not calculated any good time credits for the time spent in the Idaho DOC because Idaho DOC does not give good time. Exhibit 4, at entry dated 05/09/2013.

#### **IV. STANDARD OF REVIEW**

A petitioner who challenges a decision from which he has had "no previous or alternative avenue for obtaining state judicial review" must show that he is under restraint and the restraint is unlawful. *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994); RAP 16.4(a), (c).

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<sup>3</sup> Jail good time at a rate of 33 percent of the total jail sentence (i.e., the combined good time and time served) always equals 50 percent of the time served.

Under RAP 16.4, a petitioner may obtain relief by showing either a constitutional violation or a violation of state law. RAP 16.4(c)(2), (6); *see Cashaw*, 123 Wn.2d at 148. Further, in challenges to a prison's time-credit calculations, it is a petitioner's burden to show that the DOC's actions were so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding so as to work to the offender's prejudice. *Cf. In re Grantham*, 168 Wn.2d 204, 292, ¶ 13, 227 P.3d 285 (2010) (declining to reverse a prison discipline decision involving a loss of good time credit).<sup>4</sup>

A petitioner must set forth a statement of “the facts upon which the claim of unlawful restraint of petitioner is based and the evidence available to support the factual allegations, . . . [and] why the petitioner’s restraint is unlawful for one or more of the reasons specified in rule 16.4(c).” RAP 16.7(a)(2). However, bare assertions and conclusory allegations of constitutional violations are insufficient to support a personal restraint petition. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

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<sup>4</sup> Stevens argues that *Grantham* applies only to prison disciplinary proceedings and not to cases involving early release credits. Supp. Brief of Stevens, at 11. But in *Grantham*, the inmate’s early release credits were in fact at issue. *Grantham*, 168 Wn.2d at 207 (“Based on the investigative report, the hearing officer found Grantham guilty of both counts. He was sanctioned with 25 days disciplinary segregation and a loss of both 90 days good time credit and 7 days of yard privileges.” (Emphasis added)).

## V. ARGUMENT

### A. Early Release Time Has Long Been Under The Sole Discretion Of The Correctional Agency Having Jurisdiction

The issue in this case is whether the DOC's policy pursuant to former RCW 9.94A.728(1) as applied to IAD inmates violates equal protection. The DOC's policy under that statute as applied to jail inmates who come from counties with differing jail early release rates has already been found constitutional. The policy as applied to Stevens does not violate equal protection any more than does the DOC's policy for inmates transferred from county jails.

The early release statute in effect when Stevens committed his crime provides in part:

[T]he term of the sentence of an offender committed to a correctional facility operated by the department may be reduced by earned release time *in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction in which the offender is confined*. The earned release time shall be for good behavior and good performance, *as determined by the correctional agency having jurisdiction*.

Former RCW 9.94A.728(1) (2008).<sup>5</sup>

The Washington Supreme Court in *In re Williams*, 121 Wn.2d 655, 661, 853 P.2d 444 (1993), interpreted language that was substantively the

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<sup>5</sup> This same language was preserved in the current codification of the early release statute as well. *See* RCW 9.94A.729(1)(a).

same in the statute's former codification of RCW 9.94A.150(1) (1989).<sup>6</sup> The Court held that under that language, the correctional agency with jurisdiction over the offender "retains complete control over the good-time credits granted to offenders within its jurisdiction." *Williams*, 121 Wn.2d at 665; *accord State v. Donery*, 131 Wn. App. 667, 673, 128 P.3d 1262 (2006).

Because former RCW 9.94A.728(1) allocates authority over early release time to the correctional agency with jurisdiction over an inmate, the DOC was within its discretion to defer to Idaho DOC's early release policies, which utilize a parole process rather than early release credits.<sup>7</sup>

Furthermore, the Supreme Court has considered an issue substantially the same as that presented in this case and has found that it

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<sup>6</sup> Former RCW 9.94A.150(1) (1989) provided in part:

[T]he terms of the sentence of an offender committed to a county jail facility or a correctional facility operated by the department, may be reduced by earned early release time *in accordance with procedures that shall be developed and promulgated by the correctional facility* in which the offender is confined. The earned early release time shall be for good behavior and good performance, *as determined by the correctional facility*.

Former RCW 9.94A.150(1) (1989) (emphasis added). Chapter 9.94A RCW was reorganized by Laws of 2000, ch. 28, and by Laws of 2001, ch. 10, § 6, which resulted in RCW 9.94A.150 being recodified as RCW 9.94A.728 without substantive changes.

<sup>7</sup> Stevens does not dispute that he already received the benefit of Idaho's own version of early release, by virtue of his being paroled before his maximum term expired on his Idaho sentence. *See* Idaho Code § 20-223 (parole rules). He was paroled on April 22, 2013 from Idaho DOC. Exhibit 3, upper right ("Status Type: Parole"; "Status Date: 04/22/2013"). Without such parole, he apparently would have been held in Idaho DOC until April 17, 2014. *Id.* ("Inst. Disch: 04/17/2014").

does not violate equal protection for the DOC to defer to the early release policies of the correctional agency having jurisdiction over the inmate. In *In re Fogle*, 128 Wn.2d 56, 904 P.2d 722 (1995), inmates claimed county jails' policies of giving a lower rate of early release than DOC resulted in longer sentences for presentence detainees than for prisoners spending their entire sentences in a DOC facility. The Court held that the policies of the Clark County Jail and the Pierce County Jail were consistent with the statutory grant of authority and that the "state's substantial interest in maintaining prisoner discipline, particularly by preventing flight from prosecution and preserving local control over jails, justifies disparate treatment to overcome [the petitioner's] equal protection challenge." *Fogle*, 128 Wn.2d at 63.

As the Washington Supreme Court recently reiterated, the Equal Protection Clause absolutely bars the legislature from distinguishing between rich defendants and poor defendants "for the purpose of credit for time served, but the legislature remains free to draw many other distinctions." *State v. Medina*, 180 Wn.2d 282, 292-93, 324 P.3d 682 (2014) (interpreting *Reanier v. Smith*, 83 Wn.2d 342, 346, 517 P.2d 949 (1974)), and holding that the legislature made a rational distinction when it decided to allow nonviolent offenders to receive credit for non-confinement pretrial time, while denying such credit for violent

offenders). This Court is bound by *In re Fogle* and should adhere to the principle that equal protection does not require DOC to disregard the early release policies of other correctional agencies with jurisdiction over the inmates they control.

**B. The Constitution Does Not Require DOC To Give Early Release Time To Inmates Over Whom It Has No Control**

Stevens, who was in Idaho under the Interstate Agreement on Detainers (IAD), was not under the DOC's jurisdiction while he was in Idaho, unlike offenders under the Interstate Corrections Compact (ICC). Therefore, while a prison receiving an inmate sentenced in Washington is required under the ICC to report to the sending prison on the inmate's conduct, DOC had no way to require Idaho DOC to do the same in Stevens's case. The IAD simply does not require it.

**1. The IAD**

The Interstate Agreement on Detainers, codified in this state at RCW 9.100.010, creates a comprehensive and uniform set of procedures for resolving the untried charges underlying prisoners' detainers. *Alabama v. Bozeman*, 533 U.S. 146, 148, 121 S. Ct. 2079, 2082, 150 L. Ed. 2d 188 (2001).<sup>8</sup> The IAD is a congressionally sanctioned interstate compact

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<sup>8</sup> "A detainer is a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent." *Carchman v. Nash*, 473 U.S. 716, 719, 105 S. Ct. 3401, 3403, 87 L. Ed. 2d 516 (1985). The IAD

within the meaning of the Compact Clause of the United States Constitution, art. I, § 10, cl. 3, and is therefore a matter of federal law and subject to federal construction. *New York v. Hill*, 528 U.S. 110, 111, 120 S. Ct. 659, 145 L. Ed. 2d 560 (2000); *State v. Morris*, 126 Wn.2d 306, 313, 892 P.2d 734 (1995). It has been adopted by 48 other states, the District of Columbia, Puerto Rico, the Virgin Islands, and the federal government. *Carchman v. Nash*, 473 U.S. 716, 719, 105 S. Ct. 3401, 187 L. Ed. 2d 516 (1985).

Where the United States Supreme Court has ruled on a particular provision of the IAD, that Court's interpretation is the governing interpretation. *Cuyler v. Adams*, 449 U.S. 433, 442, 101 S. Ct. 703, 708-09, 66 L. Ed. 2d 641 (1981); *State v. Welker*, 157 Wn. 2d 557, 564, 141 P.3d 8 (2006). "The IAD's purpose—providing a nationally uniform means of transferring prisoners between jurisdictions—can be effectuated only by nationally uniform interpretation." *Reed v. Farley*, 512 U.S. 339, 348, 114 S. Ct. 2291, 2297, 129 L. Ed. 2d 277 (1994).

Under the IAD, when a charging jurisdiction lodges a detainer against a prisoner who is incarcerated in another state, the prisoner must be promptly notified of the detainer and his right to demand final

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governs detainees based on *untried* charges only; it cannot be used for resolving sentencing or probation violation detainees. *Id.* at 726; *State v. Barefield*, 110 Wn.2d 728, 731-32, 756 P.2d 731 (1988).

disposition of the underlying charges. RCW 9.100.010, Article III(c). There are two ways for the new charges to be resolved under the IAD in the receiving state. First, the prisoner can initiate the process by filing a request for disposition. The receiving state must then bring him to trial within 180 days. *See* RCW 9.100.010, Article III(a). The 180-day time period commences when the prisoner's request for final disposition has been actually delivered to the appropriate trial court and prosecuting official in the receiving state. *Fex v. Michigan*, 507 U.S. 43, 52, 113 S. Ct. 1085, 1091, 122 L. Ed. 2d 406 (1993); *State v. Bishop*, 134 Wn. App. 133, 137, 139 P.3d 363 (2006).

The second way to resolve charges under the IAD is for the prosecutor to initiate it by asking the sending state to send the prisoner to the receiving state. In that case, the prosecutor must bring the prisoner to trial within 120 days after the prisoner's arrival in the receiving state. *See* RCW 9.100.010, Article IV(c); *Reed*, 512 U.S. at 342. Failure to hold a trial within these time periods will result in dismissal of the charge unless the court grants a continuance or the prisoner fails to object. RCW 9.100.010, Articles IV(e), V(c); *Reed*, 512 U.S. at 352.

Following trial and sentencing in the receiving state, the prisoner must be immediately returned to the sending state to complete any remaining sentence to be served in that state. In that regard, Article V

addresses the nature of the receiving state's temporary custody of the prisoner, emphasizing that the receiving state's custody is for a limited purpose and must be truly *temporary*. Article V(d) provides that "[t]he temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges" underlying the prisoner's detainer. Article V(e) requires that "[a]t the earliest practicable time consonant with the purpose of this agreement, the prisoner shall be returned to the sending state." Article V(g) states that "[f]or all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state . . . ." RCW 9.100.010, Article V(g).

"Temporary custody" does *not* include imprisonment in the receiving state for the newly adjudicated charges: "The 'temporary custody' allowed under Article V(d) does not expressly, or by implication, indicate custody for the purpose of service or execution of sentence in the receiving State. Indeed, nowhere in the Act does it suggest this type of transfer of permanent custody." *State of New York by Coughlin v. Poe*, 835 F. Supp. 585, 591 (E.D. Okla. 1993); *see also State ex rel. Pharm v. Bartow*, 298 Wis. 2d 702, 719, 727 N.W.2d 1 (2007) ("temporary custody [under the IAD] does not include custody for the purpose of subsequent

incarceration in a receiving state.”); *accord, Merchant v. Wyoming Department of Corrections*, 168 P.3d 856, 2007 WY 159 (Wyo. 2007).<sup>9</sup>

Because Stevens was in Idaho under the IAD, the DOC did not have jurisdiction over him. It did not receive information on his conduct while he was there, and it could not dictate that he be disciplined with an infraction hearing.

## **2. The ICC**

Interstate transfer of prisoners under the ICC is markedly different from interstate transfers under the IAD. Under the ICC, a state's department of corrections may place an offender in an out-of-state prison for service of his sentence. RCW 72.74.020. While the prisoner is serving the sentence in the other state (the receiving state), the originating state (the sending state) retains control over him or her. (Washington would have been the sending state in this case if it had transferred Stevens to Idaho under the ICC to serve his Washington sentence). Prisoners are “at all times . . . subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, . . . or for any other purpose permitted by the laws of the sending state . . . .” RCW 72.74.020(4)(c); *see also* RCW

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<sup>9</sup> A prisoner's request for final disposition under Article III is deemed a waiver by the prisoner of extradition to the receiving state for purposes of trial, as well as a future waiver of extradition to the receiving state to serve his receiving state sentence *after* completing his term of imprisonment in the sending state. *See* Article III(e).

72.74.020(4)(d) (requiring receiving state prison to provide regular reports of the prisoner's conduct to the sending state); RCW 72.74.020(4)(e) ("The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state"); RCW 72.74.020(4)(g) (prisoner shall be returned to sending state for release); RCW 72.74.020(5)(b) (prisoner who escapes is deemed a fugitive of both the sending state and the receiving state); RCW 72.74.020(4)(f) (if the sending state's laws entitle the offender to a hearing, the receiving state shall allow the hearing in the receiving state, consistent with the laws of the sending state).

If Stevens had been sent to Idaho under the ICC, Idaho would have functioned as an agent of Washington and would have been required to report regularly on Stevens's conduct and status. Additionally, Stevens would have been entitled to early release time:

Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state.

RCW 72.74.020(4)(h). If Stevens had had disciplinary problems that required deduction of early release credits, he also would have been entitled to a hearing. RCW 72.74.020(4)(f).

In contrast, under the IAD, Washington DOC had no control over Stevens's location and circumstances while he was in Idaho's prison system. It had no statutory or legal authority to require Idaho DOC to assist it in monitoring Stevens's conduct, awarding early release credits, or holding violation hearings on Washington DOC's behalf. Furthermore, during Stevens's incarceration in Idaho, he was uncontestably Idaho's prisoner and not Washington's prisoner. Washington DOC had no legal authority to require Idaho DOC to calculate or award early release credits for Idaho's own prisoner.

**C. IAD Offenders Are Not Similarly Situated To ICC Offenders Or To IAD Offenders Who Are Imprisoned In States That Give Early Release Time**

Stevens argues that the Equal Protection Clause requires the DOC to give him early release time, just as the DOC gives early release time to ICC offenders or to IAD offenders imprisoned in states that give early release time. But as demonstrated above, he is not similarly situated to ICC offenders because the DOC had no jurisdiction over him when he was in Idaho, while the DOC retains jurisdiction over ICC offenders while they are in other states. And he is not similarly situated to IAD offenders in

states that give early release time because the giving of early release time on those states itself communicates to the DOC whether an inmate's conduct was good or bad. Stevens's problem is not that DOC has denied him equal protection; it is that Idaho does not award early release time in the same manner as Washington.

The Equal Protection Clause of the Fourteenth Amendment requires that all persons similarly situated be treated alike. *F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989 (1920); *Plyler v. Doe*, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982). The aim of equal protection is "securing equality of treatment by prohibiting undue favor" or "hostile discrimination." *Andersen v. King County*, 158 Wn.2d 1, 15, 138 P.3d 963 (2006). A necessary element for a violation of equal protection is that the person be "similarly situated" to others receiving different treatment. If the complainant is not similarly situated, there is no violation of equal protection. *Powell v. Ducharme*, 998 F.2d 710, 716 (9th Cir. 1993).

When he was in Idaho DOC, Stevens was not similarly situated to inmates serving Washington sentences in Idaho DOC pursuant to the ICC (RCW 72.74.020). If the DOC transfers a prisoner to another state to serve his or her Washington sentence under the ICC or under a contract to reduce overcrowding (*see* RCW 72.68.010), that prisoner remains a

Washington inmate and is still subject to the DOC's control and jurisdiction pursuant to RCW 72.74.020(4).

In contrast, the DOC has no authority or control over the location and circumstances of prisoners transferred under the IAD. During the time that prisoners transferred under the IAD are in the sending state (i.e., Idaho in this case), they remain subject to the control of the sending state. Because Stevens was in Idaho under the IAD, he is not similarly situated to Washington inmates in Idaho under the ICC.

Likewise, an inmate under the IAD who is in a state that does award early release time is not similarly situated to Stevens, since he was sentenced and served his sentence in Idaho, which does not award early release time. When states already have early release systems in place, the award or denial of early release time to a particular inmate itself adequately communicates to the DOC whether the inmate behaved well or not while in the other state's custody. In a state like Idaho, which does not award early release time, there is no system in place that DOC can refer to. Therefore, Stevens is not similarly situated to inmates in states that award early release time.

**D. The Court Views Equal Protection Challenges Against Correctional Facilities Under The Rational Basis Test**

Equal protection claims concerning post-conviction sentencing and confinement are reviewed under the rational basis test. *McQueary v. Blodgett*, 924 F.2d 829, 834 (9th Cir. 1991). Prisoners are not a suspect class, nor are they entitled to identical treatment or resources as other inmates simply because they are all inmates. *Hartmann v. California Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1123 (9th Cir. 2013); *see also Norvell v. State of Illinois*, 373 U.S. 420, 83 S. Ct. 1366, 10 L. Ed. 2d 456 (1963).

Even if a person is similarly situated, an equal protection claim “must be rejected unless the [state’s] action is patently arbitrary and bears no relationship to a legitimate governmental interest.” *Vermouth v. Corrothers*, 827 F.2d 599, 602 (9th Cir. 1987). To survive an equal protection challenge, the State need not elect the best means for advancing its goals. *Id.* at 603. As long as the State’s action bears some rational relationship to a legitimate governmental interest, a court cannot “‘sit as a super legislature’ and dictate another [course of action] it believes to be wiser or more equitable.” *Id.* at 604 (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976) (*per curiam*)).

Additionally, “[a] mere demonstration of inequality is not enough; the Constitution does not require *identical* treatment. There must be an allegation of invidiousness or illegitimacy in the statutory scheme before a cognizable claim arises: it is a ‘settled rule that the Fourteenth Amendment guarantees equal laws, not equal results.’” *McQueary*, 924 F.2d at 835 (emphasis in original) (quoting *Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 273, 99 S. Ct. 2282, 2293, 60 L. Ed. 2d 870 (1979)).

It is a primary goal of prison systems to promote a safe and secure environment within the prison for staff, inmates, and community members. *Bell v. Wolfish*, 441 U.S. 520, 546, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). “Maintaining institutional security and preserving internal order and discipline are essential goals that may *require* limitation or retraction of the retained constitutional rights of . . . convicted prisoners . . . .” *Id.*, 441 U.S. at 521.

To maintain order and discipline, state prison administrators have adopted policies allowing offenders to earn early release credits while under the DOC's jurisdiction. Former RCW 9.94A.728(1) provides that the DOC may reduce a prisoner's sentence by early release time “in accordance with procedures that shall be developed and adopted by the correctional agency having jurisdiction in which the offender is confined.”

Former RCW 9.94A.728(1). This statute gives the DOC the authority to create policies regarding early release time. Pursuant to that authority, the DOC has a policy that allows ICC offenders to earn early release time while in another state, but it does not allow IAD offenders to earn early release time in another state unless the other state's own prison awards them early release time. *See* Exhibit 7, Kiosk Message (“We are not able to give you good time on the time from Idaho because they informed us that they do not give good time . . .”).

The Constitution does not require identical treatment of Stevens as compared to ICC offenders or as compared to IAD offenders in states with early release systems. The DOC had no legal jurisdiction over him when he was in Idaho. It received no updates on his conduct and retained no right to require Idaho DOC to return him to Washington. And Stevens was not *statutorily* entitled to the benefits he would have received in a Washington prison.

The DOC’s policy is consistent with the statutory grant of authority. And the DOC’s “substantial interest in maintaining prisoner discipline,” and in deferring to local control of other jurisdictions’ early release policies “justifies disparate treatment to overcome [the petitioner’s] equal protection challenge.” *Fogle*, 128 Wn.2d at 63.

Furthermore, the Equal Protection Clause of the Fourteenth Amendment prohibits only purposeful discrimination. *Washington v. Davis*, 426 U.S. 229, 239-40, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976). “‘Discriminatory purpose,’ we said, ‘implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.’” *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271-272, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979)).

There is no discriminatory purpose in this case. The purpose of the DOC policies allowing offenders to earn early release credits while under the DOC’s jurisdiction is to link the award of early release credits to conduct. The DOC’s action of requiring credits to be based on conduct is an action taken *in spite of* its adverse effects on IAD offenders in states like Idaho, not *because of the* adverse effects. There is no purposeful discrimination. Thus, there is no equal protection violation.

**E. Any Equal Protection Claim Requires Application Of The *Turner v. Safley* Four-Part Test**

Because this case involves the policies of a prison, a special standard of review applies to this Court's adjudication of any equal protection claim. It is a relaxed standard as compared to the standards applied in the non-prison context.

In *Turner v. Safley*, 482 U.S. 78, 89-91, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), the Supreme Court defined the test to be applied to all litigation regarding prison regulations that affect a prison inmate's constitutional rights. In *Turner*, the Supreme Court "stated that the proper inquiry turns on whether a prison regulation is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." *In re Parmelee*, 115 Wn. App. 273, 281-82, 63 P.3d 800 (2003) (quoting *Turner*, 482 U.S. at 89-90). Four factors are relevant in determining whether the prison regulation is reasonable. "First, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." Second, a court considers whether there are "alternative means of exercising the [constitutional] right that remain open to prison inmates." Third, a court considers "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the

allocation of prison resources generally.” And fourth, “the absence of ready alternatives is evidence of the reasonableness of a prison regulation.” *Turner*, 482 U.S. at 89-90 (internal quotation marks omitted). “[T]he *Turner* factors concern only the relationship between the asserted penological interests and the prison regulation.” *Shaw v. Murphy*, 532 U.S. 223, 227, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001). The *Turner* test does not accommodate valuations of the content of the prison’s rule. *Id.*

This test was designed by the Court to prevent courts from becoming “the primary arbiters of what constitutes the best solution to every administrative problem, thereby ‘unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.’” *Turner*, 482 U.S. at 89 (citing *Procunier v. Martinez*, 416 U.S. 396, 407, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413-14, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989)). The Court also recognized that “such a standard is necessary if ‘prison administrators, . . . and not the courts, [are] to make the difficult judgments concerning institutional operations.’” *Turner* 482 U.S. at 89 (citing *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 128, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977)).

Under *Turner*, this Court cannot evaluate the content of the DOC’s policy that IAD offenders are not allowed to earn early release credits while

in another state unless the other state awards early release credits. The Court only can evaluate whether the policy is rationally related to the asserted penological interest of maintaining order and discipline.

The DOC's interest in maintaining order and discipline is rationally connected to the DOC's policy of not allowing early release credits for time spent under the IAD in a state that does not give early release credits. The DOC gives early release credits for the sole purpose of motivating good behavior and good performance. The DOC cannot determine whether behavior was good unless it receives information on an offender's conduct. And it cannot deduct early release credits for bad behavior unless the offender is afforded an infraction hearing. If another state's prison system has a program for giving early release credits, the DOC can rely on that system to gauge the offender's conduct while in the other state's prison. But if the other state has no such process and the DOC receives no conduct reports and has no right to require the other state to hold an infraction hearing for behavior violations, the DOC has no way to know whether the early release credits are actually motivating good behavior and good performance. In such cases, there is no ready alternative for the DOC to link early release to the offender's conduct.

Stevens claims the DOC can simply ask the other state for information about the offender's conduct. Supp. Brief of Stevens, at 17. But

because the other state has absolutely no obligation to comply with such a request, this is not a workable solution. Prison employees are often too busy with tasks that are required to get to tasks that are not required. It is not realistic to expect them to take time out of their regular duties to search for information in an offender's often voluminous institutional record to produce a report for someone they do not know in some other state, when there is no duty to do so. Furthermore, expecting DOC to rely on informal communications regarding good behavior could lead to situations in which the staff at the other institution could exaggerate the good or bad behavior of an inmate, based on that staff person's subjective view of or relationship with the inmate. There simply would be no adequate controls in place to prevent such subjectivity.

The DOC's interest in maintaining order and discipline also is rationally connected to the DOC's policy in this case because giving early release credits to an offender who may have been undeserving of them while in the other state's prison could negatively impact other inmates at the DOC because the offender may have developed a sense of impunity or of entitlement that he or she should receive early release credits regardless of his or her behavior in prison. After such offender comes to the DOC, his or her sense of entitlement may result in acting out and harming other inmates. For these reasons, the DOC's policy satisfies the *Turner* test.

Stevens claims that the *Turner* test is inapplicable because he is not asking this Court to determine whether DOC's policy is reasonable on its face (i.e., a facial challenge), but rather he is asking this Court to find that the policy is unreasonable as applied to him (i.e., an "as-applied" challenge). Supp. Brief of Stevens, at 13. He cites *McNabb v. Dep't of Corr.*, 163 Wn.2d 393, 405, 180 P.3d 1257 (2008), for this proposition. But *McNabb* did not so much as reject *Turner* for an as-applied challenge as it incorporated it. *McNabb* explained that "[t]he twin principles set forth in *Turner* do inform the disposition of this case by identifying an additional state interest that should be considered . . . ." *McNabb*, 163 Wn.2d at 405. *McNabb* noted that under *Turner*, courts must give "judicial deference to the decisions of prison administrators in light of their unique interest in maintaining security and day-to-day order." *Id.* *McNabb* recognized that Washington courts "have adopted this basic premise" for facial challenges to prison policies, and that the principle should be adopted as well for that case, which involved an as-applied challenge to a prison policy. *Id.* at 405-06.

Thus, under *McNabb*, this Court must consider the "unique demands of prison administration [that] warrant judicial deference to prison administrative decisions." *McNabb*, 163 Wn.2d at 406.

**F. The DOC Respectfully Contends That *In Re Salinas* Should Not Be Relied Upon As Sound Precedent**

*In re Salinas*, 130 Wn. App. 772, 124 P.3d 665 (2005), involved an offender who served time in South Dakota under the IAD. Like Idaho, South Dakota had no early release program for prison inmates. *See Salinas*, 130 Wn. App. at 779. The Court in *Salinas* held that it violated equal protection to not give Salinas early release credits for his time in South Dakota. *Salinas*, 130 Wn. App. at 778.

But the Court in *Salinas* did not have the information it needed to make an informed decision. As a result, it did not address or cite the IAD. Hence, it did not distinguish between the control that the DOC has over inmates under the ICC as compared to the lack of control the DOC has over inmates under the IAD. As such, the *Salinas* Court's equal protection analysis was incomplete, and its holding should not be replicated in this case.

The Court in *Salinas* also distinguished *Williams* and *Fogle* by reasoning that “*Williams* and *Fogle* challenged different treatment by different authorities--the Department of Corrections and the county jails. Here, Mr. Salinas challenges the Department's disparate treatment of him in relation to other offenders.” *Salinas*, 130 Wn. App. at 780. DOC respectfully disagrees with the *Salinas* Court's description of those two

cases. *Williams* and *Fogle* unquestionably involved challenges to the disparate treatment of offenders. *See Fogle*, 128 Wn.2d at 61 (“At the heart of this case, Defendants raise an equal protection challenge against the disparate treatment of presentence detainees.”); *Williams*, 121 Wn.2d at 666 (“Allowing the Department to give legal force to a [jail time credit] certification which is based on an error of law would magnify rather than alleviate disparities in treatment.”). *Williams* and *Fogle* are on point in this case, and the Court is bound by them.

Moreover, the court in *Merchant v. State of Wyoming Department of Corrections*, 168 P.3d 856 (Wyo. 2007), was critical of the decision in *Salinas* and correctly concluded that offenders under the IAD are not similarly situated to offenders under the ICC, and thus, equal protection is not violated by the denial of early release time. *Merchant*, 168 P.3d at 867 (“Without significant discussion, the court concluded that Mr. Salinas was similarly situated to other inmates who did receive earned early release credit”).

Consistent with the Washington Supreme Court’s decisions in *Williams* and *Fogel* and with the Wyoming Supreme Court’s decision in *Merchant*, this Court should hold that the Equal Protection Clause does not require Stevens to receive early release credits in Washington for the time he spent incarcerated in Idaho.

**VI. CONCLUSION**

Because Stevens is not entitled to early release credits for his time in the Idaho DOC, Respondent respectfully requests that this Court deny his personal restraint petition with prejudice.

RESPECTFULLY SUBMITTED this 2nd day of January, 2015.

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

DATED this 2nd day of January, 2015, at Olympia, WA.

s/ Hilary Sotomish  
HILARY SOTOMISH  
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**WASHINGTON STATE ATTORNEY GENERAL**

**January 02, 2015 - 8:33 AM**

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