

No. _____

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Personal Restraint of

PAUL BUFALINI,

Petitioner.

PETITIONER UNDER RESTRAINT OF A JUDGMENT OF THE
PIERCE COUNTY SUPERIOR COURT,
The Honorable Frank E. Cuthbertson

**PERSONAL RESTRAINT PETITION AND BRIEF IN SUPPORT
OF PETITION**

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I. STATUS OF PETITIONER

A. RESTRAINT

Paul Bufalini is incarcerated at the Washington Corrections Center in Shelton, Washington.

B. PROCEDURAL HISTORY OF PETITIONER'S CONVICTION, HIS DOSA SENTENCE, AND THE ADMINISTRATIVE HEARINGS RESULTING IN REVOCATION OF HIS DOSA BY THE DEPARTMENT OF CORRECTIONS.

In Pierce County Cause No. 13-1-01924-0, Petitioner was charged with ten felony offenses. *Appendix A.*¹ The most serious offense was Identity Theft in the First Degree (Count IV). *Id.*² Petitioner plead guilty to all ten counts. *Appendix B.* On his *Statement of Defendant on Plea of Guilty* form Petitioner was advised that if the sentencing judge imposed a Drug Offender Sentencing Alternative, the Court could modify or revoke that sentence, "If the court finds that I have violated the conditions of the sentence" *Id.*

On January 14, 2015, the Superior Court entered a judgment and sentence. *Id., Appendix C.* The Honorable Frank E. Cuthbertson entered special Drug Offender Sentencing Alternative ("DOSA") sentences on all ten counts. *Id.* The Court imposed a term of 36.75 months on Count IV,

¹ Unless otherwise noted, all references to Appendices are to the Appendices that are attached to the declaration of James E. Lobsenz.

² He was also charged with Possession of Stolen Property in the Second Degree, Forgery, Identity Theft in the Second Degree, Possession of a Controlled Substance, Bail Jumping (3 counts), Vehicle Prowling in the Second Degree, and Unlawful Possession of Payment Instruments. *Id.*

and shorter concurrent DOSA sentences on all the other counts.³ *Id.* The Court also imposed a 36.75 month term of community custody and one of the conditions of his community supervision was that Petitioner could not use or possess any controlled substances. *Id.*

In August of 2016, after serving approximately 17 months in prison, Petitioner was transferred to the Progress House Work Release facility to complete service of his sentence. RP I, 11.⁴

On December 11, 2016, the Department of Corrections (the “DOC”) required Petitioner to take a random drug urinalysis test and the test results allegedly came back positive for the presence of some controlled substance. RP I, 17. Based on this positive test result, Petitioner was taken into custody and imprisoned at the Washington Correctional Center at Shelton, Washington. RP II, 8.

On December 13, 2016, Petitioner was charged by the DOC with an infraction of work release rules. *Work Release Notice of Allegations, Hearing, Rights, and Waiver*, attached as *Appendix D*. He denied the

³ Pursuant to RCW 9.94A.660, when a sentencing court imposes a prison-based DOSA, the sentence consists of a period of imprisonment equal to one-half of the midpoint of the standard range, or two years, whichever is greater. Given Petitioner’s criminal history and offender score, the standard range for his most serious offense (Identity Theft in the First Degree) was 63 to 84 months. The midpoint in that range is 73.5 months. Half of that midpoint is 36.75 months. Therefore, a DOSA sentence for that offense for Petitioner is 36.75 months.

⁴ The transcripts of the various administrative hearings in this case are referred to herein as follows. RP I is the transcript of the *Major Infraction Hearing* held before Hearing Examiner Jackson on December 20, 2016. RP II is the transcript of the hearing held before Hearing Examiner Jeffrey Kasler on January 4, 2017; RP III and RP IV are the transcripts of the hearing held before Hearing Examiner Paul Ockerman on February 22 and March 1 of 2017.

accusation and maintained that he had not ingested any controlled substance. Before any hearing was held on the alleged violation, on December 15, 2016 the DOC administratively terminated Petitioner's participation in his drug treatment program. RP II, 7-8. At a hearing held five days later on December 20, 2016, he was found to have committed the violation. RP I, 20; *Hearing and Decision Summary Report*, attached as *Appendix E*.

Petitioner appealed the violation finding and a DOC Appeal Panel affirmed that finding on January 9, 2017. *Appendix F*. On January 4, 2017, before any decision had been rendered in his appeal of the work release infraction finding, a second administrative hearing was held to determine whether his DOSA sentence had to be revoked. Because he had been administratively terminated from his drug treatment program on December 15, Petitioner's DOSA sentence was automatically revoked by the Department of Corrections (hereafter the "DOC") and Petitioner appealed that decision as well. *Letter of David Bufalini in support of administrative appeal of infraction finding*, dated February 3, 2017, attached as *Appendix G*.

The Administrator of the DOC Hearings Unit responded to Petitioner's second appeal by remanding the case for a new hearing. *Hearings Administrator Remand Letter of 2/8/17* attached as *Appendix H*. Petitioner's father David Bufalini requested permission to participate in the remand hearing. *Letter of David Bufalini to Hearings Administrator Soliz*, dated February 16, 2017, attached as *Appendix I*. The scope of that

remand hearing was unclear and a third hearing was held to determine what was supposed to be decided at the remand hearing, and whether to allow Petitioner to be represented by counsel. The third hearing ended without any decision on either of those issues. At a fourth administrative hearing held on March 1, 2017, Petitioner's request to be represented by counsel was denied and his DOSA was again revoked. RP IV, 5, 50.

Petitioner again appealed the decision to revoke his DOSA. *Appeal of a Department Violation Process*, attached as *Appendix J*. An Appeals Panel affirmed that decision on April 4, 2017. *Appeals Panel Decision*, attached as *Appendix K*.

C. **FIRST PERSONAL RESTRAINT PETITION**

No prior personal restraint petition has ever been filed. The actual prejudice rule of *In re Restraint of Cook*, 114 Wn.2d 802, 792 P.2d 506 (1990) does not apply to this petition.⁵

II. **JURISDICTION**

Petitioner's restraint is unlawful pursuant to RAP 16.4(c)(2). The orders entered by Department of Corrections ("DOC") Hearing Examiners and DOC Appeals Panels (1) finding that Petitioner was guilty of an infraction of the conditions of his DOSA sentence; (2) revoking his DOSA sentence; and (3) affirming those orders; were obtained in violation of

⁵ *In re Restraint of Isadore*, 151 Wn.2d 294, 299, 88 P.3d 390 (2015) ("Where the petitioner has not had a prior opportunity for judicial review, we do not apply the heightened threshold requirements applicable to personal restraint petitions. Instead, the petitioner need show only that he is restrained under RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c).").

both the Constitution of the United States and the Washington Constitution.

III. EVIDENCE RELIED UPON

Petitioner relies upon:

- (1) The accompanying declaration of James E. Lobsenz, counsel for Petitioner, and the Appendices attached thereto.
- (2) The accompanying declaration of Paul Bufalini.
- (3) The accompanying declaration of David A. Bufalini.

IV. CONDITIONAL REQUEST FOR A REFERENCE HEARING

At present, Petitioner believes there is no need for a reference hearing because there are no material facts in dispute. However, with respect to the claim of a due process violation for the failure to preserve material exculpatory evidence – the *Youngblood* claim – it is possible that the Respondent may dispute some facts which might make an evidentiary hearing necessary before that claim could be resolved. And in order to decide whether any “retrial” of the DOSA violation/revocation proceeding is constitutionally permissible, this Court would have to resolve the *Youngblood* due process claim.

Petitioner believes he is clearly entitled to relief on each of his other claims, and that a reference hearing would not be necessary to resolve any of those claims. However, in the event that this Court disagrees and believes that there are disputed material facts which must be resolved before these other claims can be resolved, then Petitioner asks

this Court to order a reference hearing so that a Superior Court can make the findings which this Court believes are necessary.

V. PERTINENT STATUTES

Section (7) of RCW 9.94A.660 provides in pertinent part:

(a) *The court may bring any offender sentenced under this section back into court at any time on its own initiative to evaluate the offender's progress in treatment or to determine if any violations of the conditions of the sentence have occurred.*

(b) If the offender is brought back to court, the court may modify the conditions of the community custody or impose sanctions under (c) of this subsection.

(c) *The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.*

(Emphasis added).

RCW 9.94A.662 provides in pertinent part:

(2) During incarceration in the state facility, *offenders sentenced under this section shall* undergo a comprehensive substance abuse assessment and *receive*, within available resources, *treatment services appropriate for the offender*. The treatment services shall be designed by the division of alcohol and substance abuse of the department of social and health services, in cooperation with the department of corrections.

(3) *If the department finds that conditions of community custody have been willfully violated, the offender may be reclassified to serve the remaining balance of the original sentence. An offender who fails to complete the program or who is administratively terminated from the program, shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court.*

RCW 9.94A.662 (emphasis added).

VI. STATEMENT OF THE CASE

- A. **At the first DOC hearing Petitioner was found guilty of receiving a positive urinalysis test for use of an unauthorized drug. A sanctions order was entered, terminating his work release status and taking away 20 days of good time credit.**

Petitioner Bufalini's first DOC hearing took place on December 20, 2016 before Hearing Examiner Sheryl Jackson. Bufalini was not represented by counsel at that hearing; he represented himself. RP I, 4. The DOC was represented by Community Corrections Officer Loren Shumate. RP I, 4. One day prior to the hearing, Shumate told Petitioner that he did *not* have any right to be represented by counsel at the upcoming infraction hearing. *Declaration of Paul Bufalini*, ¶ 5. During the hearing this erroneous advice was not corrected, and neither Examiner Jackson nor anyone else ever advised Bufalini that in fact he *did* have a qualified right to counsel, and that if he asked for a lawyer his request would be considered.

The Examiner confirmed that Bufalini had been served with notice of the hearing the day before. RP I, 5. The notice identified the following "infraction(s) alleged:"

752 – Receiving a positive test for use of unauthorized drugs, alcohol, or other intoxicants on/before 12/11/16.

Work Release Notice of Allegations, Hearing, Rights, and Waiver (Exhibit D attached to declaration of James E. Lobsenz). The notice described several rights that Bufalini had including the right to be allowed to present

witnesses; to be present; to have the hearing recorded; to have a neutral and detached hearing officer; in the discretion of the hearing officer to confront and cross-examine witnesses testifying at the hearing; and testify at the hearing. But the notice said nothing at all about the right to be represented by a lawyer, or to have the assistance of a lawyer at the hearing on the alleged violation.

Examiner Jackson explained that after the allegation of violation was read to him, Bufalini would be called upon to offer a plea, and after that the Examiner would hear testimony. RP I, 6. Jackson did explain that Bufalini could cross-examine the DOC's witness and could present any evidence that he might have. RP I, 6. She asked him if he wanted to call any witnesses and Bufalini said he thought his father would be a good witness because his father was with him at all times when he was outside the work release facility. RP I, 5-6.

The Examiner explained that the DOC had to prove the allegation by a preponderance of the evidence standard and that hearsay evidence was admissible, but such evidence would have to be substantiated in some way. RP I, 8. The Examiner further explained that the proceedings would occur in two stages:

HEARING EXAMINER: ... In the event you're found guilty of this one particular allegation, we'll then take a look at how well things have gone for you since you were placed there at the work release. And then recommendations are going to be made directly thereafter.

RP I, 8. Nothing was said about the possibility that Petitioner's DOSA might be – or automatically would be – revoked if he was found guilty of the infraction. Bufalini said he understood the process. RP I, 9. He then asked a question about the “dirty UA” charge:

MR. BUFALINI: . . . I just, I, well, yesterday when we went over the allegations, it had stated that I had a dirty UA. But it didn't state what it was dirty for.

RP I, 9. The DOC representative suggested that Bufalini could ask the DOC's witness, Community Corrections Officer (“CCO”) Dean, what substance the UA allegedly found to be present. RP I, 9. The Examiner said once CCO Dean got on the phone to testify, that would be clarified. RP I, 9. CCO Shumate interjected that “on the major infraction report” it said that Bufalini tested positive “for M.O.P.” and when Bufalini asked what that meant, CCO Shumate said the witness would explain. RP I, 10.

Once CCO Dean was on the telephone and sworn on, she read the allegation against Bufalini:

MS. DEAN: *It is a 752 receiving a positive test for use of unauthorized drugs*, alcohol or other intoxicant on or before 12/11/16.⁶

HEARING EXAMINER: Okay. Now, Officer Dean, just before I ask Mr. Bufalini to offer his plea, he was questioning the specific drug that is listed on the actual infraction, what it actually is, M.O.P.?

Ms. DEAN: The M.O.P. is the opiate category. It stands for Morphine or Opiate. So that's going to be your opiates, your heroin. It's the opiate family.

⁶ See Appendix L, *Disciplinary Sanction Table for Prison and Work Release*, at 3.

RP I, 14-15 (emphasis added). Having cleared up this point, the Examiner asked Bufalini, “So how do you plead?” and Bufalini replied by asking: “Whichever way I plead are we going to come up with a result today?” RP I, 15. Instead of answering that question the Examiner chastised Bufalini for departing from the procedure the Examiner wanted to follow, stating that the hearing would proceed “step by step.” RP I, 16. Bufalini said he understood and then plead “Not guilty” to the accusation of receiving a positive test for the use of unauthorized drug, alcohol or other intoxicants on December 11, 2016. RP I, 16.

CCO Dean then gave her testimony. She said Bufalini signed a form on August 11, 2016 acknowledging that he was required to do drug tests when asked to do so by the Department. RP I, 17. She then referred to the “major infraction report” that was written by a Mr. Wayne Brown whom she called a “facility monitor.”

MS. DEAN: ... And it reads as follows: “At 21:29 on 12/11/16, Resident Bufalini, who was notified at control area that he would need to produce a UA. At 21:30, Resident Bufalini informed staff that he was ready to yield a UA. At 21:33, Resident Bufalini yielded UA to Officer Brown, which tested positive for M.O.P.” which is the opiate family. “At 21:34, Officer Fackler was called back to the UA room and verified the result that Resident Bufalini, initialed a security tab, sample was secured and placed in the refrigerator in the UA room.

Resident Bufalini stated he never takes prescribed drugs of any kind. The only ever over the counter he took was Aleve yesterday sometime on 12/10/16.”

RP I, 17-18.

The Examiner then said to Bufalini that she wanted “to hear your side of what happened.” RP I, 18. Bufalini acknowledged that he gave a UA sample and that the cup gave a positive reading, but he said he had no idea why. He said he did not take any drugs; that he had been clean for some time; and that while he “almost” decided to plead guilty to the allegation just to get it over with quickly, he just could not do that because he could not plead guilty to something he did not do:

MR. BUFALINI: Well, I mean, it states what happened. That’s the, that’s the bad part. I mean, the UA cup stated that I yielded a positive UA.

I’ve been incarcerated for almost two years now. I attended the OCC therapeutic community. I passed that. I went to the Progress House. I was there for five months. And regularly had UAs. I have about three weeks remaining on my sentence.

Hearing examiner: Mm-hmm.

MR. BUFALINI: And it would be totally absurd of me to try to use any kind of drugs. I know they’re regularly testing there at all times. It would be, you would think that if I was using drugs it would have come up at a prior time to after being there for nearly five months.

Obviously, the test shows that I yielded a positive UA. So in that aspect I have no answer for that. I don’t know if it was something I ate or something I took. I have no idea. I’m completely, I have, I have struggled with addiction for my whole life. And I’ve actually maintained sobriety now for the longest period in which I’ve ever maintained it. And I’m proud to say that.

And, you know, I almost wanted to come in here and plead a guilty plea just to get this thing over with. That’s why I asked you that. But ***I just refuse to plead guilty on something that I didn’t do.***

RP I, 18-19 (emphasis added).

When asked to respond, CCO Dean said she had nothing to say.
RP I, 19. The Examiner then asked Bufalini if he wanted to call a witness and Bufalini said no because his witness – his father – would not be able to explain why the test was positive either:

MR. BUFALINI: No. I just want to get, I'm just carrying on with this. I'm, it's fine. My dad's not going to put anything into light except what I just stated.

HEARING EXAMINER: Okay. No guesses as to how you could have –

MR. BUFALINI: -- Honestly, honestly, Ms. Jackson, I have no clue. I mean, I, I have, I mean, I don't know. I have no, absolutely no idea, no clue. I don't know if it was, like, a – I have no idea. I have no idea. I have no answer for it.

RP I, 20.

No one raised the possibility that the kit used for the UA analysis simply gave a false positive result and no one suggested any explanation consistent with innocence, so the Examiner found Bufalini guilty of the work release violation:

HEARING EXAMINER: Okay. Well based upon the supporting evidence and again, Mr. Bufalini, what Officer Dean had to do was present more evidence than not, that 51 percent.

MR. BUFALINI: Yeah.

HEARING EXAMINER: And what I have is the actual compliance with the UA policy and process on how the UAs are taken. And it was validated and confirmed by another staff member there.

So what I'll do is find you guilty on reference to testing positive for a unauthorized controlled substance.

RP I, 20.

The Examiner then heard CCO Dean testify regarding Mr. Bufalini's "adjustment" while he was in the work release facility. She testified that he had no prior infractions whatsoever and that she was quite surprised to learn that he had tested positive:

MS. DEAN: Mr. Bufalini arrived on 8/15. He started work at Founder's Choice at 8/23/16 so he went to work right away. He has zero majors. Zero minors. Mr. Bufalini was always please, thank you, turned in all his forms on time. I had no behavior issues with him whatsoever.

In fact, Monday morning you could have told me anybody else on my caseload had a positive UA and I would have believed you before Mr. Bufalini. But the UA proved positive and I can't argue against that. But he was a very good individual on my caseload.

RP I, 20-21.

The Examiner asked Bufalini what he thought a "fair outcome for today's hearing" would be and Bufalini replied, "I don't know, ma'am. That's hard for me to say, because I truly, my -- I didn't do anything wrong." RP I, 22. The Examiner said, "What I hear you saying in essence is consciously you know, if I can take you at your word, consciously nothing happened. What we do have is a positive UA -- . . . that's the only thing that I'm looking at here." RP I, 22-23.

Asked for her recommendation, CCO Dean told the Examiner that Bufalini was serving a DOSA sentence and she recommended loss of 20 days of good time credit and termination from work release. RP I, 23. Dean told the Examiner that a violation of DOC policy 752 carried with it "up to 60 days loss of good time." RP I, 23.

The Examiner then told Bufalini that CCO Dean's recommendation "says to me that it's kind of a matter of fact" and that she had known people who had positive UAs to get higher recommendations, "[b]ut this is merely for the fact that it was positive." RP I, 23. Accordingly, the Examiner followed the recommendation:

HEARING EXAMINER: *So the termination of the work release status* and the 20 days loss of good conduct time, I think, clearly addresses this particular behavior.

RP I, 23-24 (emphasis added).

Finally, at the very end of the hearing, CCO Dean notified Bufalini that there would be a second hearing at a later date, and that at that second hearing the DOC would seek to have Bufalini's DOSA sentence revoked and his drug treatment ended. Bufalini's response shows his concern over this newly disclosed possibility, and the hearing then ended:

MS. DEAN: And I also need to point out, just so you know, *once you have been found guilty at this hearing I have to move forward with a 762 hearing [sic]⁷ and put your DOSA, we have to go for you being terminated from treatment.* So there will be a second hearing following this one. Because I can't do both of them at the same time. So I want you to hear that from me, because that is the next step.

MR. BUFALINI: Okay. *So I'm losing my DOSA?*

MS. DEAN: I can't say that. But we have to have a second hearing to address that 762.

⁷ A review of Attachment 1, the *Disciplinary Sanction Table for Prison and Work Release*, to Department of Corrections Policy No. 460.135, reveals that the number "762" is the number that the DOC gives to the following violation: "Failing to complete or administrative termination from a DOSA substance abuse treatment program." See *Appendix L*.

HEARING EXAMINER: Okay. If there's nothing further. This session is now concluded at 9:35.

RP I, 25 (emphasis added).

- B. **At a DOC Hearing held on January 4, 2017, the Hearing Examiner agreed with Petitioner Bufalini that making DOSA revocation automatic was unjust, and that his urine sample should have been retested. But he also said that “the RCW” required him to revoke his DOSA unless the earlier finding of a positive UA test was reversed on appeal.**

On January 4, 2017, Bufalini had a second administrative hearing regarding whether to revoke his DOSA sentence. Jeffrey Kasler, the Hearing Examiner at this hearing, explained that the issue at this hearing was whether or not Bufalini had been terminated from his DOSA substance abuse treatment program on December 15, 2016. RP II, 7.

Once again, CCO Kelly Dean was the only witness for the Department. She testified that Bufalini had entered a substance abuse treatment program when he signed a DOSA letter on August 31, 2016, and that he had been terminated from the treatment program on December 15 2016:

MS. DEAN: So I did a [sic] initial serious infraction report. It's written by myself. It reads as follows: “On 8/10/16, Bufalini, Paul, DOC No. 306464 arrived at Progress House work release. On 8/15/16, Resident Bufalini attended his CD assessment appointment with Jason Lewis. See attached e-mail. Resident Bufalini signed a substance abuse use disorder [sic], treatment participation requirements and indicated outpatient treatment on Wednesdays and Fridays, 5:00 to 7:00 p.m. Resident Bufalini also signed substance use disorder prison DOSA agreement. See attached.

On 8/17/16, Resident Bufalini started CD treatment. On 8/31/16, Resident Bufalini signed DOSA letter. See attached. On 12/11/16,

Resident Bufalini provided UA sample that tested positive for opiates.

On 12/12/16, resident Bufalini was taken into custody and transported to WCC. On 12/21/16 [sic], DOC hearing was held at WCC. Resident Bufalini was found guilty of positive UA on 12/11/16 and was sanctioned to 20 days loss of good time.

On 12/21/16, I, CCO Dean, received Resident Bufalini's discharge summary from CDP Aplin. See attached. ***Resident Bufalini was terminated from court-ordered CD treatment on 12/15/16.***

RP II, 7-8 (emphasis added).

Thus, CCO Dean's testimony established that ***5 days before Bufalini's first administrative hearing had been held*** (on December 20th), he had ***already*** been terminated from his chemical dependency treatment program on the basis of his positive UA test result.

Dean also read into the record from the DOSA letter that Bufalini signed back on August 31, 2016, and drew the Examiner's attention to the fact that that letter stated that if he were ever terminated from the DOC's treatment program, he would ***automatically*** be subject to mandatory revocation of his DOSA sentence:

MS. DEAN: [And] his DOSA letter acknowledging that he could [⁸] have his DOSA revoked if he was terminated from treatment. And it says that, "This letter is to inform you of change of ***department's required response to noncompliance related to*** your substance – or ***your sentence under*** the Prison DOSA Offenders Sentencing Alternative ***DOSA. Effective immediately, if you*** fail to complete or ***are administratively terminated from your court-ordered substance abuse treatment, you will be subject to***

⁸ The transcript shows that Dean used the word "could" here, and it is unclear whether that transcription is accurate or not. But in any event, seconds later she read the language of the letter stating that termination of treatment made Bufalini subject to "mandatory revocation" of his DOSA sentence.

mandatory revocation to complete the unexpired term of your Prison DOSA sentence, RCW 9.94A.662(3).

RP II, 9 (emphasis added). Dean testified that she had discussed this letter with Bufalini when he signed it on August 31, 2016, and that the provision for automatic termination from treatment in the event of any infraction has been explained to him:

When Mr. Bufalini signed this letter we had a long conversation on the importance of doing his DOSA treatment while here at Progress House work release. It was made very clear to Bufalini that *any infraction at Progress House work release would then terminate him from treatment. Which would then bring up the 762.* Bufalini signed that letter understanding that that was the expectation.

RP II, 9 (emphasis added).

Dean read into the record the treatment discharge summary written by CDP Aplin on December 15, 2016 (five days before his infraction hearing). RP II, 10. She also read from Aplin's summary that Bufalini "is disputing the validity of the UA as of 12/15 and has not been found guilty at a DOC hearing." RP II, 10. CCO Dean went on to state that "since then" – since December 15th – "he has been found guilty on 12/21⁹ at the DOC hearing." RP II, 10.

Bufalini's father David Bufalini then testified by telephone. RP II, 12-16. He explained that he regularly had Saturday and Sunday visits with his son Paul; that for each visit he would pick him up from Progress House, drive him to his home where their visits would take place, and then

⁹ This date is not correct. He was found guilty of an infraction on December 20th, not December 21st.

drive him back to Progress House after each visit. RP II, 12-13. The essence of his testimony that was that his son Paul never left the Bufalini home during any of those visits, and thus had no opportunity to take any drugs:

Paul was always in my custody and presence. We went straight from Progress House to our home in University Place each time. We never left the home during any of those visits. Paul and I spent all that time together, typically watching football. Or baseball during that season.

But we never had any visitors to our home when Paul was there. Paul never left our home when he was there. I never took him anywhere after arriving at our home, except to drive back to Progress House at the designated time. And frequently we were a little bit early each of those times.

RP II, 13.

David Bufalini further testified that his son had been completely infraction free until the supposedly positive December 11, 2016 UA test, and explained how irrational it would be for Paul Bufalini to deliberately consume a controlled drug when he had so little time left to serve on his DOSA sentence:

As far as I know, and I'll stand corrected if there's evidence to the contrary, during Paul's entire periods of incarceration at various facilities, he's been most recently at Olympic Correction Center, as far as I know he never had any violations or any reason to impose sanctions of any kind. As far as I know, he was cooperative. He met his obligations there.

I guess most disappointing we have the prospect of him losing the DOSA sentencing alternative here is that he was so close to completion. I believe he had attended, attended 30 or so of the mandatory and I've heard different numbers, 32 classes or 36 classes. But regardless, he never missed a class.

Our entire conversations when we were together with him and we've suffered through a long history of addiction with Paul. And seen this issue from the inside. He was gainfully employed. He was earning an income. He was abiding by the rules of Progress House. He spoke constantly of the date of his release from Progress House. Which, ironically, would have been today. And tomorrow is Paul's birthday and we had spoken a lot of being able to go out to dinner and really for the first time celebrate his birthday with him in an unrestricted environment.

It's unfathomable to me that Paul would act in a way that would jeopardize something that he had worked several years to get to that point. . .

RP III, 13-14.

David Bufalini said that his son was not able to get a retesting of his urine sample even though he requested it; that he had been told the tested sample had been destroyed; and that this type of over-the-counter drug testing kit was known to be susceptible to giving false-positive results:

He didn't have access to, I've heard different results. I'm not quite sure what he tested positive for, or what the test result read as positive. *I have been told, and again, I don't know if this is true or not, that Number One, a request to retest simply is denied. And secondly, that the sample that this hearing and possible sanctions are based on, is no longer available for testing.* And I don't know if that's true or not.

If that is true, given the consequences of a positive test result, I think and I'm not going to go off on some constitutional law argument,^[10] but I would simply suggest that due process should allow the accused the right and the ability to have a full blown lab workup done of the sample to determine whether or not this was actually an accurate, positive reading from that test.

¹⁰ David Bufalini, petitioner's father, is a lawyer.

As I understand it, the test is really an over-the-counter test that's available to anybody. *And false positives cannot be ruled out, I don't think, based on that test.*

RP II, 14-15 (emphasis added).

Finally, David Bufalini told the Examiner that even "if the test is assumed to be accurate," given his son's good behavior up until December 11, 2016, revocation of his DOSA sentence and remitting him to prison to serve the remainder of his standard range sentence would not benefit anyone. RP II, 15. He asked the Examiner to seriously consider a lesser sanction. RP II, 15-16.

CCO Dean had no questions of David Bufalini and no comment to make about his testimony. Paul Bufalini then testified and he endorsed and confirmed his father's testimony that he had been doing extremely well at Progress House and would never have dreamed of violating his treatment conditions since he had worked so hard to be completely drug free and was so close to his release date. RP II, 19. He also testified that he had "begged" the work release people to give him another urinalysis test so that they could see that the test that was supposedly positive was a *false* positive result:

Again, I was at work release for roughly about five months. You know, at work release you pretty much know you're getting UA'd on a weekly basis, so for me to use any kind of drugs would have been, I mean, absurd for me. Right off the bat, I know this is kind of prior. I don't even know if this is any kind of, if this helps me whatsoever. But instantly I asked for another UA. I immediately begged them. I told them I'd pay for it. Because every single UA I've taken – well, that's kind of exaggerated, but a lot of the UAs you take, the lines on the cup are very faded. And they sometimes

have to get a second opinion on whether or not they see a line on the cup.

So it's somewhat a little bit, it's scary, because a lot's on the line for me there with the cup and such. So, you know, immediately when I got to Shelton I asked for a UA. I've been asking if I could take a UA for quite some time just to show that I, in fact, was not dirty for opiates. I, I have been sitting, today is my release day. I have been, I have been battling this thing for two years. ***And I can sit here and honestly say to you that I did not use drugs at all. And I mean that. Because I'm proud of that.*** It's been a battle for me. It's been a lifelong battle for about sixteen years that I've struggled with.

RP II, 19-20 (emphasis added).

The Hearing Examiner asked if he had appealed the determination made by the first Hearing Examiner at the December 20th hearing and Bufalini said that he had. RP II, 20. He asked if he had "heard anything back" in response to his appeal and Bufalini said he had not. RP II, 20. The Examiner then told Bufalini that there was nothing he could do as long as that prior determination stood, because the decision that he had a positive UA test simply made it automatic that his DOSA sentence would be revoked. RP II, 21. Bufalini asked why the DOC even bothered to have a hearing if revocation of his DOSA was automatic and the Hearing Examiner agreed with him that the DOC's procedure made no sense:

HEARING EXAMINER: Okay. So what I've got to say is that everything hinges on that [Bufalini's appeal from the determination of the major infraction] right now. ***I don't have any alternative except to do what I'm told to do through the RCW and what the Department directs me to do.*** So any outcome of this hearing today is going to be solely based on that. And nothing personal from me.

MR. P. BUFALINI: There's nothing that, there's, it's just like, *why do you even have the hearing if it's an automatic DOSA revoke?*

HEARING EXAMINER: *I hear you.*

RP II, 21 (emphasis added).

Bufalini told the Hearing Examiner (twice), "I'm sitting here telling you the honest to God truth." RP II, 21. The Hearing Examiner did not make any comment indicating he did not believe him and replied simply "Well, I can't retry what you already did." RP II, 21. Of course what was already "tried" and determined was that the UA test gave a positive result, but there was no finding made that the UA test result was accurate. Bufalini protested that his urine sample should have been retested and again the Hearing Examiner did not disagree with him:

MR. P. BUFALINI: Well, I pleaded not guilty, you know, I mean, *you would think that that would be a mandatory thing to send that into a laboratory.* These cups actually state on there –

HEARING EXAMINER: -- *I understand exactly what you're saying.* I deal with this for the last 15 years.

MR. P. BUFALINI: So *what was the point of even going through this hearing?*

HEARING EXAMINER: I understand. I know.

Mr. P. BUFALINI: *Why? If it was already predetermined that I'm losing my DOSA, why?*

HEARING EXAMINER: *I agree.*

RP II, 21-22 (emphasis added).

Bufalini also protested (correctly) that the applicable RCW did not say that revocation of his DOSA was required:

MR. P. BUFALINI: *And it doesn't, and it says on the RCW I may be subject to.* [¹¹] That's not binding. That's not about "You are going to be." I mean, there's been instances where I know people haven't been revoked. I had two, or I had a few classes remaining. I would never have jeopardized that.

HEARING EXAMINER: Mm-hmm.

MR. P. BUFALINI: I am going through hell right now.

HEARING EXAMINER: Mm-hmm.

MR. P. BUFALINI: My mom has leukemia. Now I'm going to get two years and lose my mom over something I did not do. Because they wouldn't, they, why would I beg them to put it in another cup? Why? Immediately, I said, "Please, use another cup." Please."

HEARING EXAMINER: Mm-hmm.

MR. P. BUFALINI: Why would I do that? There's no reason I would do that.

HEARING EXAMINER: Mm-hmm. *Best of all worlds it would have been sent to a lab.*

MR. P. BUFALINI: Well, yeah, you'd think so based on what the situation is now. Send it to a laboratory. My father actually asked for them to. He'll pay for it. Why not? They put it into a baggie and seal it up. Why would they do that?

RP II, 22 (emphasis added).

Bufalini protested that the automatic revocation of his DOSA meant that he was going to have to serve two more years in prison "for something I did not do, sir." RP II, 23. The Hearing Examiner expressed sympathy for Bufalini: "I realize I'm not in your seat, but I can empathize

¹¹ RCW 9.94A.662 says in part: "*If* the department finds that conditions of community custody have been willfully violated, *the offender may be reclassified* to serve the remaining balance of the original sentence." (Emphasis added).

with your situation.” RP II, 23. Bufalini said, “This just crazy,” and the Hearing Examiner interrupted him, stating again that a statute required him to revoke the DOSA:

HEARING EXAMINER: -- Whoa, whoa, whoa, whoa, whoa, whoa. Hold on. Hold on. *It's an RCW.*

RP II, 23 (emphasis added). Bufalini replied that revocation and sending him back to prison for two years was not going to help him, and that it was especially unfair since he was not guilty of anything. Bufalini then commented that it said right on the urinalysis test kit that sometimes the tests gave inaccurate results:

MR. P. BUFALINI: . . . At least send it to a laboratory. There's no need for those, *those cups specifically state that they're not 100 percent accurate. It says that on there.* There's a reason why they send a bag, what do they say, send to the lab if it comes up positive. False negatives. That's a term that's real. False positive or whatever, you know. This is absurd.

RP II, 24 (emphasis added).

Bufalini said that it was “absolutely unfair” that he had to sit through a hearing waiting for a result – revocation – that was predetermined, and the Hearing Examiner explicitly *agreed* with him. The Hearing Examiner revealed that until quite recently, he did have the discretion to decide not to revoke a DOSA, but that discretion was taken away from him when he received a “notice” of some kind from the Attorney General’s office instructing him that the applicable RCW mandated revocation in all such cases:

MR. P. BUFALINI: . . . But now I have to sit here for three weeks in the R units and sit here and wait for a hearing that's already

predetermined? How is that fair? *There's no fairness to that whatsoever. Absolutely not.*

HEARING EXAMINER: *I agree.*

Mr. P. BUFALINI: *Absolutely not fair.* I mean, you know –

HEARING EXAMINER: *I agree 100 percent.* I do. I mean *until whenever this notice came out, we didn't have to revoke.*

MR. P. BUFALINI: Yeah.

HEARING EXAMINER: *We could have taken some good time or something like that and called it good. But the AG's Office said, "You're not abiding by the RCW. And this is what you're going to do." I'm sorry. I mean, I can't help that.* You know, the only thing I can say is that you've got some good support from him out there.

RP II, 25 (emphasis added).

Bufalini said that making any kind of legal challenge seemed pointless and the Hearing Examiner responded by telling him not to give up. RP II, 25. When Bufalini again said it was unfair the Hearing Examiner again agreed with him but said that if he did not revoke Bufalini's DOSA he would lose his job and he was not going to do that:

MR. P. BUFALINI: This is so unfair to me.

HEARING EXAMINER: I understand.

MR. P. BUFALINI: Absolutely unfair.

HEARING EXAMINER. *I think it's unfair to you. But I, you know, I don't do it, I lose my job.* You know? I'm not going to lose –

RP II, 25-26 (emphasis added).

The Hearing Examiner said he was powerless to retry what's already been tried. RP II, 26. It had already been determined at the earlier

hearing that Bufalini had a positive UA test, and on the basis of that finding Bufalini's participation in the drug treatment program had already been terminated. Therefore, under the Attorney General's recently expressed view of the applicable RCW, revocation of the DOSA was required and there was nothing the Hearing Examiner could do about that. RP II, 26. The Hearing Examiner said he was going to "enter a finding of guilt," but then he asked Bufalini's CCO to tell him how Bufalini had performed while in the work release facility. RP II, 26-27. Just as she had done at the previous hearing in December before a different Hearing Examiner, CCO Dean again testified that Bufalini had never had any infractions before, that she had never had a behavior issue with him, that he always went to his treatment classes, said please and thank you, and turned his paperwork on time. RP II, 27-28.

The Hearing Examiner asked CCO Dean for her recommendation and she replied:

MS. DEAN: Per the statute, I have to ask, *I have to ask for DOSA revoke.*

HEARING EXAMINER: *Because of the RCW?*

MS. DEAN: Yes.

RP II, 28 (emphasis added).

The Hearing Examiner then announced that he was going to defer making any decision until the appeals panel considering Bufalini's appeal from the finding made in the first hearing had issued its ruling. RP II, 29. Stating that he could not base any sanction on a finding that was currently

under appellate review, the Hearing Examiner said that he was simply going to wait to see the outcome of the administrative appeal from the finding of a major infraction. RP II, 29-30.

C. **On January 9, 2017, a DOC Appeals Panel affirmed the finding of an infraction of work release rules.**

On January 9, 2017, a two-person appeals panel issued a decision rejecting Bufalini's appeal of the positive UA test finding made on December 20, 2016. In the section entitled "Comments" the Appeals Panel rejected Bufalini's contention that he should have been given the opportunity to have an additional test performed on his urine sample.

Comments: Mr. Bufalini, you appealed your hearing on the adverse finding. You argue you are not guilty, the cup is not 100% accurate and imply it should be sent to the lab. Further you have not been in trouble for two years so why would someone jeopardize their sentence with two weeks left. Your remedy is to maintain your [DOSA] sentence.

In reviewing the evidence and recording, the panel found that the Hearing Officer acted in a fair and impartial manner when entering your finding. The Hearing Officer appropriately weighed the evidence provided and contrary to your plea, the most persuasive evidence was the urinalysis test collected which resulted in a positive test for a controlled substance. The evidence supports the proper protocol and policy along with a witness observation validated the result. ***There was no requirement for further testing as existing policy regarding the accuracy of the urinalysis test supports this finding.*** The appeal panel affirms the finding and subsequent sanction as it was within the disciplinary sanction guidelines.

Appeals Panel Decision, dated 1/9/17 (emphasis added).

- D. **At a January 31, 2017 Hearing Petitioner Bufalini was advised that his DOSA had been revoked based upon the affirmance of the infraction finding made on December 20, 2016 and affirmed on January 9, 2017. Petitioner appealed his revocation to an Appeals panel of the DOC.**

On January 31, 2017, Bufalini appeared briefly before a Hearing Officer who simply advised him that his DOSA had been revoked because on January 9th an Appeals Panel had affirmed the infraction finding made on December 20th, and given that finding revocation of his DOSA was automatic.

Bufalini responded by filing another administrative appeal. In this one he appealed the decision to revoke his DOSA sentence. See *Appeal of a Department Violation Process* dated 1/31/17. In support of this appeal, he submitted a letter from his father David Bufalini that recited the somewhat tortured procedural history of the DOC hearings that had taken place in his son's case. In that same letter, David Bufalini asserted that his son's due process right to the assistance of counsel had been violated. He quoted the following language from this Court's opinion in *Grisby v. Herzog*, 190 Wn. App. 786, 805, 362 P.3d 763 (2015):

The rationale of *Scarpelli* is not that an attorney becomes valuable only in a hearing that focuses on the offender's potential for rehabilitation. Under *Scarpelli*, if a convicted offender faces an allegation that might result in a return to prison after he has been released to the community, the hearing authority *must* evaluate a request for counsel on a case-by-case basis. The case-by-case evaluation requirement is imposed because there are occasions when, by virtue of the offender's individual circumstances, he would be deprived of procedural due process if counsel were not appointed to present his case. See *Scarpelli*, 411 U.S. at 783-85, 93 S.Ct. 1756 (discussing rehabilitation), 786-90, 93 S.Ct. 1756 (discussing case-by-case evaluation).

Letter of David Bufalini to Deputy Secretary of the Department of Corrections, dated 2/3/17.

E. In a Letter dated February 8, 2017, The Hearing Administrator Remanded Petitioner's case for "a new hearing."

In response to David Bufalini's letter of February 3rd, Hearing Administrator Dominga Soliz ordered Paul Bufalini's appeal remanded for a new hearing. Soliz's letter stated: "I've reviewed Paul's hearing and sanction imposed on January 31, 2017. His hearing is remanded. A new hearing will be scheduled immediately and he will be notified." *Soliz Letter of 2/8/17*. On February 16, 2017, David Bufalini wrote to Soliz and requested permission to participate in the remand hearing. *David Bufalini Letter of 2/16/17* attached as *Appendix I*.

F. Remand Hearing of February 22, 2017. Because the scope of the remand was unclear, the Hearing Examiner continued the remand hearing in order to consult with Hearings Administrator Soliz.

Soliz's remand letter caused much confusion. A hearing was held before Hearing Examiner Paul Ockerman on February 22, 2017. Since Examiner Ockerman had not presided at any of the previous hearings, he was unfamiliar with the case and was predictably confused as to the purpose and the scope of the remand hearing. Early in the hearing Bufalini asked when he could request representation by counsel and the Examiner replied, "first of all, we have to decide what I'm hearing today." RP III, 6. He informed Bufalini that *if* he decided "to allow you to be

represented” then he would continue the case so that the attorney could participate. RP III, 6-7.

The Hearing Examiner expressed confusion as to “[w]hether or not the first hearing or the second hearing was remanded.” RP III, 9. He explained that he was going to have to make a phone call to Soliz to ask her what she intended when she remanded the case because her letter “doesn’t specify” whether he is to re-determine whether there was a infraction of the work release rules (the first hearing) or whether the DOSA sentence should be revoked, or both. RP III, 10. Petitioner Bufalini told the Hearing Examiner that his father had spoken to Soliz and that he thought that the remand was to re-determine everything. RP III, 10. In response to the Hearing Examiner’s questions, he explained that he had appealed both the decision entered in the first hearing and the decision ultimately entered after the second hearing. RP III, 14. He explained that his father got the remand letter from Soliz in response to his letter sent in support of the second administrative appeal. RP III, 15. The judge then took a recess in order to telephone Soliz to ask her to define for him the scope of the remand hearing. RP III, 17.

After a short recess, the Hearing Examiner resumed the hearing and stated that he had spoken with Soliz and she told him that his understanding was correct: the remand hearing was just to consider the 762 question (whether to revoke the DOSA). RP III, 17.

Turning his attention to Bufalini’s request for representation by counsel, he asked Bufalini a series of questions to ascertain whether

Bufalini had the intelligence to understand the nature of the hearing. RP III, 23. Asked if he understood what a 762 hearing was, Bufalini replied he was “a little bit of foggy at the whole idea,” but that he understood it was a DOSA revocation hearing. RP III, 24. Eventually the Hearing Examiner concluded that Bufalini did not have any “acuity” issues and that he was able to defend himself. RP III, 29. He then moved to the separate question of whether there were any unusually complex issues, which made it appropriate to “appoint” counsel for him. RP III, 29.¹² Bufalini told him that there were complex due process issues and issues regarding how the evidence was handled in his case. RP III, 30.

MR. P. BUFALINI: Just the laws and the due process laws. I don't understand them completely. According to my dad, they were completely broken. I can't sit here and describe to you why. But he is very familiar with the law and he informs me that there is many different arguments that we can make that are justifying why my being not guilty.

¹² Neither Petitioner Bufalini nor his father ever actually requested the “appointment” of counsel, and neither ever specifically asked for a lawyer to be paid at public expense. Since Petitioner's father was a lawyer, and since he was ready, willing and able to represent his son, there was no need to ask the Hearing Examiner to “appoint” some other attorney or to direct that any attorney be paid to represent Petitioner. Nevertheless, perhaps because the conventional Sixth Amendment argot tends to use the terms “appointed” and “retained” counsel to differentiate between the two ways in which attorneys are paid to represent accused persons, the Hearing Examiner occasionally referred to a request “to appoint counsel” for Petitioner. See, e.g. RP III, 29. Notwithstanding the use of this word, it seems clear that the Hearing Examiner knew that Petitioner was not asking the Hearing Examiner to appoint any lawyer who was to be paid and that he was simply asking that his father, a licensed attorney, be allowed to represent him. See RP III, 35: “I haven't been faced with this situation having I guess a dad attorney on the phone.” When David Bufalini got on the phone the Hearing Examiner told him, “your son, Paul . . . he's called you as a witness.” RP III, 37

RP III, 30. Bufalini asked whether the Hearings Administrator had explained why she remanded the case and the Hearing Examiner said that Soliz indicated that “the attorney issue, of whether or not you get the ability to request one,” was one of the reasons she remanded the case. RP III, 32. Bufalini asked if Soliz had suggested that he should have been offered an attorney before and the Hearing Examiner replied, “I really don’t know what her thought process was in the course of my conversation.” RP III, 33. Bufalini asked if he had the right to know why his case was remanded and the Hearing Examiner said, “I don’t know. I don’t know if you do or not.” RP III, 33.

The Hearing Examiner then decided he would allow Bufalini to call his father as a witness so that the father could explain why he thought there were complex issues that justified the appointment of counsel for his son. RP III, 35. The Hearing Examiner telephoned David Bufalini’s office and got the father on the line. RP III, 37. David Bufalini informed the Hearing Examiner, “I was just talking to Dominga Silva [sic],” the Hearing Administrator. RP III, 37. David Bufalini said he called the Administrator for the same reason that the Hearing Examiner called her: “to get clarification to determine, to try to understand the scope of today’s hearing that she was indicating in her February 8th letter.” RP III, 39.

David Bufalini’s conversation with Soliz left him with a different understanding than the Hearing Examiner got from his conversation with Soliz. David Bufalini testified:

And she confirmed for me that this, she's asked for a remand that goes all the way back to the urine test that determined the violation. And that was how I read her letter. But you know, sometimes letters can be read two ways.

And so I called her specifically to get clarification on the scope of the remand that she was ordering by this letter. And she said what it says, to go back and review the circumstances leading to his incarceration, which was the urine test. As well as the revocation of his DOSA.

And she said no, I wanted to go back to look at the circumstances of his incarceration. And then moving forward from there looking at everything that happened after that.

RP III, 39-40.

The Hearing Examiner responded that he got a different clarification from Soliz. RP III, 41. David Bufalini suggested that he call Soliz back for more clarification, and then he proceeded to explain why he thought the case was unusually complex. RP III, 41. He also alerted the Hearing Examiner to the fact that a new case, *In re Restraint of Schley*, had just been decided by the Washington Court of Appeals.

Number One, I've gotten conflicting messages about what happened to the urine. I mean, the urine is the evidence that is being used to incarcerate Paul for another two years. ***There was a Court of Appeals decision that was published yesterday that Ms. Soliz had read that I have printed and read that speaks to this exact situation.***

And the decision was driven primarily by the fact that that petitioner, Mr. Schley, was facing an additional 2.5 years of incarceration. And under the circumstances would be entitled to counsel on that basis.

And to speak more directly to the issue that you're talking about, there are complicated due process, constitutional right issues here.

...

If DOC, *if the people in possession of the urine* that is being used as the basis to incarcerate him for two or more years *have destroyed that evidence, then clearly there's a violation of constitutional due process rights, because the evidence itself is gone.* It can't be recreated. It was in the exclusive control of DOC. And there's an inference that arguably the evidence may have been favorable to his position.

You know, I think he has a right to have that urine tested at a lab. So we've been told it was preserved and put in a freezer. And we've been told it was discarded. At this point, I don't know if it exists. But I would suggest if it doesn't exist, if they've destroyed it, that there's a serious constitutional violation issue here that no non-lawyer is likely to be able to conceptualize or know where to go to get information to support his argument.

. . . And I would submit to you that Paul is not qualified or trained to make those arguments and support his position constitutionally. And it certainly would require the assistance of counsel to get the full measure of that argument . . .

RP III, 41-43.

The Hearing Officer expressed concern about whether he could “rehear the facts of the case” that an earlier Hearing Examiner had already decided. RP III, 44. Eventually the Hearing Examiner said that he was going to have to re-contact Soliz and get some more direction as to “how far back” he was supposed to go in re-deciding the case, because he needed to understand the scope of the hearing he was to conduct. RP III, 46-47. David Bufalini told the Hearing Examiner that Soliz “recognized that [there were] serious issues that needed to be resolved” that went “back to the violation stage,” including whether the urine was disposed of or whether it was preserved. RP III, 52. After the telephone call to David Bufalini ended, the Hearing Examiner stated that “for me it all depends on

the scope of what I can consider. If I go back that far, then, you know, he makes a compelling argument.” RP III, 54.

The Hearing Examiner then continued the hearing for a week so that he could re-contact Soliz. He did not make any decision regarding appointment of counsel. RP III, 57-58. He said he would decide that question at the next hearing. RP III, 63.

G. **Hearing of March 1, 2017. The Hearing Examiner ruled that he was forbidden to reopen the inquiry into whether the infraction was committed and was limited to determining whether to appoint counsel to represent him at a DOSA revocation hearing where the only issue was whether Petitioner had been terminated from the drug treatment program. He declined to appoint counsel and revoked Petitioner’s DOSA.**

The Second DOSA revocation hearing took place on March 1, 2017 before Hearing Examiner Ockerman. Examiner Ockerman reminded Petitioner that he previously “continued this hearing so that I could have a consult with the hearing administrator, Ms. Dominga Soliz.” RP IV, 4. He informed petitioner that he had spoken with Soliz and she told him that her remand was solely for the purpose of redoing the revocation hearing, and that “this hearing was not reaching back to the first hearing that you had.” *Id.* Again acknowledging that there were come “compelling arguments” as to why he should “reach back” and redo the infraction hearing portion of the case, Examiner Ockerman said he had confirmed that Soliz’s remand order was *not* for that purpose. *Id.*

Examiner Ockerman concluded that since revocation of a DOSA was virtually automatic once a DOSA defendant was terminated from a

drug treatment program, and since there was nothing complex about the question of whether a person had been terminated from such a program, he saw no reason to appoint counsel to represent Petitioner Bufalini. RP IV, 4.¹³ Examiner Ockerman said since the remand was for a limited purpose, there simply was no reason to appoint counsel:

I have direction from the Department to follow the current process. Okay? So do you understand my decision? So I'm not going to appoint an attorney. I'm denying your request.

RP IV, 5.

Petitioner asked why the case had been remanded at all, and the Examiner replied “it was remanded based on the, you weren’t notified that, ahead of time about your right to and the eligibility to request to be . . . [t]o be screened for an attorney.” RP IV, 5. Bufalini pointed out that he was not notified of that right at the first hearing either. RP IV, 5. The Examiner responded, “So that’s a whole separate issue . . .” because the Hearing Administrator “remanded the last hearing” but not the initial hearing. RP IV, 6.

Having denied Petitioner’s request for counsel at the remanded revocation hearing, the Examiner proceeded to conduct a new revocation hearing (a .762 hearing). CCO Dean read the allegation into the record, stating that this was a “762, failing to complete or administrative termination from DOSA sentence of treatment program on or about

¹³ “. . . I believe the record would reflect . . . I said [at the preceding hearing] if I’m not going back into that other hearing, then it’s not really complex . . .” RP IV, 4.

12/15/16.” RP IV, 14. She also read into the record the August 31, 2016 letter that Bufalini had signed when he started the drug treatment program. RP IV, 14. She read the following portion of the letter that said that DOSA revocation was automatic if he was terminated from the treatment program:

This letter is to inform you of a change in the Department’s required response to noncompliance related to your sentence under the Prison Drug Offender Sentence Act, or DOSA. Effective immediately, if you fail to complete or are administratively terminated from your court-ordered substance abuse treatment, you will be subject to mandatory revocation to complete the unexpired term of your prison DOSA sentence.

RP IV, 14.

CCO Dean also read into the record from documents which recorded the fact that Bufalini “was found guilty of positive UA on 12/11/6 and sanctioned to 20 days loss of good time.” RP IV, 15, 17. Finally, she recited that on December 21 she received a “discharge summary” from a corrections chemical dependence provider named Alpin which reported that “Resident Bufalini was terminated from court-ordered CD treatment on 12/15/16.” RP IV, 15.

Petitioner again called his father as a witness, and his father argued to the Hearing Examiner that the .762 hearing was simply a sham because the result of the hearing – revocation – was automatic given that it was indisputable that Paul Bufalini had been terminated from the treatment

program. RP IV, 23.¹⁴ The Hearing Examiner replied that he was simply “hearing whether or not he was terminated.” RP IV, 24. Petitioner interjected, That’s the thing. You know I was terminated.” RP IV, 24. The Examiner refused to “reach back into an old hearing” and acknowledged that the only evidence before him was that petitioner had been terminated from the treatment program. RP IV, 24.

Petitioner complained that he had immediately asked for his urine sample to be retested and he had been told that the DOC simply did not do that. RP IV, 26. He told the Hearing Examiner that he had been “clean and sober” for the last 26 months, that he did not take any drugs, and that he was telling the truth. RP IV, 29. The Hearing Examiner responded that the accusation of giving a positive UA and the accusation of being terminated from treatment were “two distinct actions” and he was only looking at the latter. RP IV, 35.

The Examiner permitted Petitioner’s father to testify, and the father testified that he never saw Petitioner use drugs during his visit to the father’s home, that he didn’t believe Petitioner did use any drugs, and that he didn’t see how it was even possible for him to have gotten access to any drugs during his home visit. RP IV, 41-42. When he argued again

¹⁴ “[T]his seems to be proforma [sic] to me. And I’m not trying to be contentious here. But if this is simply did, in light of the confirmation that there was a violation, based on the statement that the sample was dirty, without the actual evidence itself. And now the question is, “Well, was there justification for revocation of his DOSA?” My understanding is once there’s proof of a violation, DOSA revocation is automatic. That there’s no discretion involved. And so my son’s facing two years of prison time based on an allegation that he gave a dirty UA. And best I can tell, the sample is gone.”

that the urine sample should be sent off to a lab for retesting the Examiner cut him off saying that issue was not before him, but he also said that insofar as the father had testified to what he had observed in his son's behavior, "I will tell you that I find your testimony believable and credible." RP IV, 43.

The Examiner found that Petitioner "committed the 762 by failing to complete or were administratively terminat[ed] from DOSA substance abuse treatment program on or about 12/15/16." RP IV, 47. He asked for the CCO's recommendation and CCO Dean replied, "Per policy and procedure I have to recommend his DOSA be revoked." RP IV, 48-49. The Hearing Examiner noted that DOC's policy "clarification" was a clarification of the applicable statute, and that the statute never changed. RP IV, 50. He then ruled, "I'm going to revoke your DOSA." RP IV, 50.

H. On April 4, 2017, an Appeals Panel affirmed the revocation of Petitioner's DOSA sentence.

Petitioner Bufalini appealed the revocation of his DOSA sentence and on April 4, 2017 an Appeals Panel affirmed that revocation. In its decision the panel held that the remand hearing was properly limited to the question of whether Bufalini had been administratively terminated from the drug treatment program, and since he had in fact been so terminated DOSA revocation was simply automatic under RCW 9.94A.662(3):

The scope of your hearing was determined to look at the DOSA revocation that took place on 1/14/17. At the conclusion of your 3/1/17 remanded hearing, the Hearing Officer made the decision to revoke the DOSA based on RCW 9.94A.662(3). According to RCW 9.94A.662(3), "an offender who fails to complete the

program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court”. *If someone is terminated from DOSA chemical dependency treatment, revocation of the DOSA is mandatory per the previously stated RCW.*

Appeals Panel Decision dated April 4, 2017, attached as *Appendix K* (emphasis added).

VII. GROUNDS FOR RELIEF

1. Petitioner was twice denied his Fourteenth Amendment due process right to be represented by counsel.
 - a. Petitioner was denied his Fourteenth Amendment due process right to counsel at his “752” infraction hearing on the “charge” of having received a positive urinalysis test.
 - b. Petitioner was denied his Fourteenth Amendment due process right to counsel at his “762” DOSA revocation hearing on the “charge” of having been terminated from a drug treatment program operated by the Department of Corrections (“DOC”).
2. The DOC exceeded its statutory authority by revoking Petitioner’s DOSA sentence without making any finding that he committed a “willful” violation of a work release rule as required by RCW 9.94A.662(3).
3. The DOC violated Petitioner’s Fourteenth Amendment due process rights by revoking his DOSA sentence based upon a finding of fact which was supported only by unreliable scientific testing evidence, which is not generally accepted as accurate by the scientific community, the manufacturer of the test, or the courts.
4. Petitioner was denied his Fourteenth Amendment due process right to the preservation of evidence which the DOC knew might well show that the Petitioner did not commit

any violation of work release rules, because it is well known that urinalysis tests often produce false positive results.

5. RCW 9.94A.662(3) violates the doctrine of separation of powers. Since revocation of a probationary-type sentence is a judicial function, only a court can revoke a DOSA sentence, and any legislative attempt to vest an executive department with the power to revoke such a sentence is unconstitutional.

VIII. ARGUMENT IN SUPPORT OF PETITION

A. **The Department of Corrections violated Petitioner's Due Process right to be represented by counsel at the Initial December 20, 2016 hearing on the Accusation that he committed an infraction by violating a work release rule.**

1. **The right to appointed counsel must be considered on a case by case basis whenever a person serving the community custody portion of a DOSA sentence faces the possibility of DOSA revocation and return to prison based on an alleged infraction.**

“After conviction, an individual who does not have a Sixth Amendment right to counsel may invoke the due process clause of the Fifth Amendment to obtain procedural protection when facing a loss of liberty.” *Grisby v. Herzog*, 190 Wn. App. 786, 796-97, 362 P.3d 763 (2015). *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) held that these procedural due process protections included the right to be represented by appointed counsel in some cases. Whether the right to appointed counsel exists depends upon the need for skills that a probationer or parolee is unlikely to have. *Grisby*, at 798, citing *Scarpelli*, 411 U.S. at 786.

A greater degree of due process protection extends to a person

living in the community under supervision than to a prisoner living behind bars. *ID.* at 800. The Petitioner in *Grisby* and the Petitioner in this case were *both* “serving the community custody portion of a drug offender alternative sentence” when an accusation was brought regarding a urinalysis test. Bufalini was accused of “receiving a positive” UA test for drugs; Grisby was accused of “trying to alter” his urinalysis test. *Id.* at 791. In both cases the defendants were found “guilty” of an infraction, and this finding led to a second hearing to determine whether or not to revoke their community custody status. In both cases their DOSA sentences were revoked and they were returned to prison to serve the remainder of a standard range prison sentence. *Id.* at 791.

In *Grisby* this Court affirmed a Superior Court decision issuing a writ of mandamus. The Superior Court’s order stated that “the Department was obligated to conduct a case-by-case determination of the need for appointed counsel – not only in Grisby’s case, but in all similar cases when a request for a lawyer is made by a person subject to a community custody violation hearing.” *Id.* at 794.

Here, as in *Grisby*, the DOC was obligated to consider the appointment of counsel to represent Bufalini at his initial infraction hearing and failed to do so. Although Bufalini was given notice of his rights before the infraction hearing, the notice he received did not tell him that he had any kind of right to be represented by counsel, either appointed or retained, and did not tell him that he could request one. On the contrary, although the notice mentioned the right to have an “advisor”

appointed if he had “a language or communication barrier,” it said nothing at all about the right to have counsel to represent him, and nothing about his right to request the appointment of counsel.¹⁵ Moreover, prior to the hearing CCO Shumate specifically told him that he did *not* have a right to counsel. *Declaration of Paul Bufalini*, ¶ 5.

Here, as in *Grisby*, the DOC violated Petitioner’s due process right to have the DOC consider the appointment of counsel to represent him at the infraction hearing. As a consequence, the finding of the infraction, the termination of drug treatment based solely upon that infraction, and the revocation of the DOSA sentence based solely upon termination from the treatment program, must all be set aside.

2. **The due process violation was not cured by the remand hearing. The Hearing Officer only considered whether to appoint counsel to represent Petitioner at a new 762 hearing and refused to consider appointment of counsel to represent Petitioner at a new infraction hearing. Recently, in *In re Restraint of Schley*, this Court held that this procedure does not cure the due process violation.**

According to Hearing Examiner Ockerman, Bufalini’s case was remanded to him solely for the purpose of redoing the 762 DOSA revocation hearing, and he was not allowed to “reach back” further to the initial 752 hearing on the allegation that Bufalini violated a work release

¹⁵ By way of contrast, the notice did tell Petitioner that he could “request” that persons be present at the hearing as witnesses, and that such a request would be granted if the hearing officer decided that granting such a request would not be hazardous to the facility’s safety. See *Appendix D*, second diamond after the words, “You have the following rights:”.

rule by receiving a positive UA. RP IV, 4. Since only the 762 hearing was at issue in the remand hearing, the Hearing Examiner considered whether to appoint counsel to represent Bufalini in the 762 hearing on whether to revoke DOSA. Thus, the Hearing Examiner took the position that any earlier error committed by not considering the appointment of counsel to represent Bufalini at the 752 hearing was something that could only be considered by a DOC Appeals Panel. After he revoked Petitioner's DOSA, however, the Appeals Panel which reviewed that decision did not consider the failure to consider appointment of counsel at the 752 hearing. So the issue was simply never considered. The DOC simply took the position that any error committed in the first hearing had no effect upon and no relevance to, the revocation decision. This position, however, is in direct conflict with this Court's decision in *In re Restraint of Schley*, 197 Wn. App. 862, 392 P.3d 1099 (2017).

In *Schley*, as in this case, a prisoner filed a personal restraint petition challenging the DOC's revocation of his DOSA sentence. This prisoner had been found guilty of committing the infraction of "fighting." That finding was made using the "some evidence" standard that courts had approved for use in prison disciplinary proceedings in which an inmate stood to lose good time credit or other prison privileges. *See, e.g., In re Restraint of Grantham*, 168 Wn.2d 204, 227 P.3d 285 (2010). Based upon the finding that he was guilty of fighting, Schley was terminated from his drug treatment program. That termination led to the "automatic" revocation of Schley's DOSA sentence because the DOC had decided that

the pertinent statute required it to revoke a DOSA sentence in every case where the accused had been terminated from his drug treatment program.

In *In re Restraint of McKay*, 127 Wn. App. 165, 168-70, 110 P.3d 856 (2005), this Court held that a convicted defendant serving the community custody portion of his DOSA has a greater liberty interest at stake than a prison inmate facing a disciplinary sanction. Therefore, due process requires that the predicate facts for a DOSA revocation must be proved by a preponderance of the evidence. *Id.* Since the preponderance of the evidence standard was not used at Schley's infraction hearing, it was simply irrelevant that the preponderance of the evidence standard was used at the later revocation hearing: "We conclude that the Department violated Schley's due process rights by using facts proved by 'some evidence' at his infraction hearing to establish his DOC revocation by a preponderance of the evidence." *Schley*, 197 Wn. App. at 870.

The DOC argued that the DOSA revocation was based upon the finding that Schley had been terminated from his drug treatment program, and that since that termination was proved by a preponderance of the evidence there was no constitutional infirmity in the second hearing and the DOSA revocation could be affirmed. This Court disagreed holding that since the "inexorable result" of the infraction finding was termination from the treatment program which led to automatic DOSA revocation, the error committed at the initial infraction hearing tainted the subsequent DOSA revocation and necessitated setting aside the DOSA revocation:

While bifurcating the infraction and DOSA revocation hearings

appears to comply with our holding in *McKay*, in fact it turns the DOSA revocation proceeding into a mere formality. At that hearing, the Department bore the burden of proving by a preponderance of the evidence a fact that was utterly indisputable: that Schley had been terminated from treatment. It is a pretense to suggest that such a hearing provides due process protections that attach to the liberty interest at risk in a DOSA revocation proceeding. We hold that under *McKay*, proof of a fact that necessarily results in revocation of a DOSA sentence must be by a preponderance of the evidence.

Schley, 190 Wn. App. at 870. *Accord Schley* at 868.¹⁶

The same analysis applies to the present case. While the constitutional violation is of a different species, the principle is the same. In *Schley* the due process violation was committed by using an insufficiently rigorous burden of proof standard at the 752 infraction hearing. In this case, the due process violation was the failure to consider the appointment of counsel (or representation by retained or pro bono counsel) at the 752 infraction hearing. In both cases, “The DOSA hearing officer limited [his or] her finding to whether chemical dependency treatment was terminated. The essential fact for DOSA revocation was

¹⁶ “Here the Department bifurcated Schley’s hearings process, considering the infraction at one hearing and the DOSA revocation at a later hearing. But the inevitable result of a finding of guilt at Schley’s infraction hearing was revocation of his DOSA. First, Schley was found guilty of a fighting infraction based on a ‘some evidence’ burden of proof. The inescapable result of that finding was Schley’s termination from his chemical dependency treatment program. Termination from the chemical dependency program led to a DOSA revocation hearing at which revocation of Schley’s DOSA sentence was the only possible outcome. . . .

“The DOSA revocation hearing did not resolve any genuine issue of fact by a preponderance of the evidence. The DOSA hearing officer limited her finding to whether chemical dependency treatment was terminated. The essential fact for DOSA revocation was resolved at the infraction hearing for fighting. Schley’s DOSA was functionally revoked once he was found guilty of fighting by ‘some evidence’ at the infraction hearing.”

resolved at the infraction hearing . . . [Bufalini's DOSA, just like] Schley's DOSA was functionally revoked once he was found guilty of [the charged infraction: fighting in Schley's case and receiving a positive UA in this case]." *Id.* at 868.

In this case, the Hearing Examiner was told at the February 22, 2017 hearing that the *Schley* case had been decided the previous day. RP III, 41-43. But there is nothing in the record of either that hearing or the following final hearing of March 1st to indicate that the Hearing Examiner ever read the *Schley* opinion.¹⁷ Clearly, even if he did read it, he did not understand the principle it endorsed. Thus, contrary to this Court decision in *Schley*, the DOC Hearing Examiner held that the due process violation committed at the infraction hearing was not relevant to the DOSA revocation hearing. Thus the Hearing Examiner erroneously refused to "go back" to the issues of whether any infraction was ever committed and whether he should allow Bufalini to be represented by counsel at a new hearing to decide that question.

¹⁷ The record does show that the Hearing Examiner asked David Bufalini, "What is that Schley case? Is that a Washington Court of Appeals?" and David Bufalini answered that it was. RP III, 43.

3. **If Bufalini had known that he had the right to have the Hearing Examiner consider appointing counsel for him, he would have asked the Hearing Examiner to do that. Given the Hearing Examiner’s concession on the record that there were “compelling reasons” to appoint counsel to represent Bufalini at the initial infraction hearing, it is virtually certain that the Hearing Examiner would have granted a request for counsel had such a request been made.**

In *Schley* this Court agreed with the Petitioner that his due process rights were violated when the DOC failed to inform him that he could request the appointment of counsel. This Court rejected the contention that since Schley never made any such request the DOC was not required to consider the possibility of appointing counsel: “We reject this argument because, as Schley points out, we will not presume waiver of a constitutional right where the State cannot show it was made knowingly, intelligently, and voluntarily.” *Id.* at 871. Here, the error is even more egregious. Not only does the record show that Bufalini was never informed of his right to request counsel; in this case a DOC officer erroneously told Petitioner he had no right to counsel at all. *Declaration of Paul Bufalini*, ¶ 6.

In addition, the record also clearly shows that Bufalini was unaware that a guilty finding on the 752 allegation of a positive UA test would lead inexorably to revocation of his DOSA. It was not until *after* he had been found guilty of the 752 that he was informed that the Hearing Examiner was required “to move forward with a 762 hearing and put your DOSA, we have to go for you being terminated from treatment.” RP I, 25. Only then did it begin to dawn on Petitioner that the finding of an

infraction might lead to revocation of his DOSA, and only at the next hearing was Bufalini told by the CCO that he would be subject to “mandatory revocation” of his DOSA if he was terminated from his drug treatment program. RP I, 25; RP II, 9.

Petitioner Bufalini, unlike 99% of all other DOSA participants, had the good fortune to have a father who was a lawyer.¹⁸ The record shows that as soon as his father was acquainted with what had occurred at the initial infraction hearing, he assisted his son with an administrative appeal, and in that appeal, on behalf of his son, he raised the issue of the failure to consider the appointment of counsel at the infraction hearing. *Letter of David Bufalini* dated 2/16/17 (Appendix I). He said that he wanted to act as his son’s attorney at the DOSA revocation hearing that was at that time scheduled for February 21, and explained that he had a scheduling conflict that made it impossible for him to attend a hearing on that date. The hearing was reset to February 22. At that hearing, Petitioner explicitly requested that he be allowed to have counsel to represent him:

Mr. P. BUFALINI: Yeah. So at what point do I request this [hearing] to be continued *so I can have counsel here?*”

HEARING EXAMINER: Okay, so if, first of all we have to decide what I’m hearing today.

* * *

¹⁸ As Petitioner stated at the third hearing, “my dad has talked to Ms. Soliz. He’s an attorney. He’s waiting for the phone call . . . he can explain to you exactly what I’m trying to explain to you.” RP III, 5.

HEARING EXAMINER: And then once I decide that you made a request. *That's the other thing that you noted* when I noticed the recorder wasn't on, *that you want to be represented.*

MR. P. BUFALINI: Yes, sir.

HEARING EXAMINER: *I'll make the determination on whether or not I'm going to allow you to be represented* during the, if we proceed with this hearing today. During the course of this hearing today.

RP III, 6 (emphasis added).

MR. P. BUFALINI: And *I really was hoping that you would grant me*, I know that a lot of people ask for that, but *to have counsel for this. Because there's a lot of circumstances* –

HEARING EXAMINER: -- Okay. There's a process for that . . .

See also RP III, 11 (emphasis added).

The Hearing Examiner began to take that request under consideration, and got “part way through” the process for deciding that issue. RP III, 60. Ultimately, however, he decided “that there is good cause to continue this hearing to continue attorney screening process.” RP III, 62. Thus, the hearing was continued to March 1.

At the final March 1 hearing, the Hearing Examiner formally denied Bufalini's request for “appointment” of counsel to represent him at the 762 DOSA revocation hearing. RP IV, 5. He refused to allow David Bufalini to act as his son's counsel at the March 1 DOSA revocation hearing. RP IV, 32. He also refused to consider anything that happened at the initial 752 infraction hearing. RP IV, 24. He ruled that the “previous hearing of committing an infraction . . . was already done,” that there was an appeal process for that hearing, and the ability to file a PRP regarding

the outcome of that hearing. RP IV, 33. The Hearing Examiner said he was confining his inquiry to the 762 question of whether Paul Bufalini had been terminated from a drug treatment program. RP IV, 33.

In sum, it is clear that:

- had Petitioner known he could request representation by counsel at the initial hearing he would have done so.
- Had he made such a request, it is indisputable that it would have been granted. The record shows that at the third and fourth hearings the Hearing Examiner stated on the record – *twice* – that Petitioner’s father had presented “compelling arguments” as to why the case was complex and why the assistance of counsel was necessary. RP III, 54 (“If I can go back that far, then, you know, he makes a compelling argument.”); RP IV, 4 (“your dad made some compelling arguments for me to revisit that.”).
- Since the DOC should have informed petitioner of his right to request to allow an attorney to represent him, and since that request would have been made, and would have been granted, it is clear that a due process violation occurred.

Here, as in *Schley*, the Petitioner “is entitled to a new revocation hearing at which the factual issues underlying the [positive UA] allegation will be determined” in a hearing at which Petitioner will be represented by counsel.

- 4. While this Court may not need to resolve the issue, there is the additional question of whether a defendant facing DOSA revocation has the right to be represented by either pro bono counsel or retained counsel.**

In some cases, one possible reason that might be advanced as the justification for *not* appointing counsel to represent a DOSA defendant is that such an appointment costs the State money. In *Grisby* this Court

found it unnecessary to decide whether the State is required to permit a DOSA defendant to be represented by retained counsel. *Grisby*, 190 Wn.2d at 813-14. In this case, Petitioner maintains that he is constitutionally entitled to be represented by counsel at all stages of the infraction/DOSA revocation process. He maintains that the State must appoint counsel for him, but if it won't do that then at the very least it must allow him to be represented by retained counsel or by pro bono counsel.¹⁹ If for some reason, this Court were to decide that Petitioner is not entitled to representation by an attorney appointed by the State and paid by the State, then this Court would have to decide whether Petitioner had, and has, a constitutional due process right to be represented by retained counsel. As noted in *Grisby*, the only Court to decide this question decided that there is such a constitutional right. *Grisby* at 814, citing *State v. Young*, 122 Idaho 278, 282-83, 833 P.2d 911 (1992). Petitioner submits that *Young* was correctly decided, and if this Court finds it necessary to reach that question, it should follow *Young*.

B. Petitioner was never found guilty of “willfully violating” any condition of his DOSA. He was only accused of having a positive UA test result, and that is all the Hearing Examiner ever found. Properly construed, under RCW 9.94A.662(3) absent a finding of willfulness there can be no termination of his participation in his drug treatment program and no revocation of his DOSA sentence.

¹⁹ In Petitioner's view, counsel willing to undertake representation on a pro bono basis falls within the class of attorneys referred to as “retained counsel.” Regardless of the terminology employed, however, Petitioner submits the State cannot have any plausible objection to being relieved of a monetary burden to pay for counsel and thus cannot maintain any rational objection to representation by pro bono counsel.

Although RCW 9.94A.662(3) is not a model of clarity and seems to conflict with RCW 9.94A.660(7), nevertheless it clearly requires a finding of a *willful* violation before any adverse action can be taken against a DOSA sentence recipient who is serving the community custody portion of his sentence. RCW 9.94A.662(3) *begins with one sentence* that references a willful violation and is *followed by a second sentence* which refers to an administrative termination from a drug treatment program²⁰:

If the department finds that conditions of community custody have been willfully violated, the offender may be reclassified to serve the remaining balance of the original sentence. An offender who fails to complete the program or who is administratively terminated from the program, shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court.

RCW 9.94A.662(3) (emphasis added).

The first sentence begins with a statement of a *condition* that must be satisfied before an offender can be reclassified to serve the remaining balance of his sentence. Moreover, the first sentence uses the permissive word “*may*.” This shows that while a willful violation is a necessary precondition that must be met before “reclassification” can be ordered, even when this precondition is met “reclassification” is not mandatory.

The second sentence also refers to events that trigger a “reclassification.” This sentence mentions two triggering events and the

²⁰ The word “program” in subsection (3) refers back to the requirement set forth in subsection (1) that every DOSA sentence shall include “appropriate substance abuse treatment in a program that has been approved by the division of alcohol and substance abuse of the department of social and health services.”

second one is an administrative “termination” from “the program.” This second sentence, however, unlike the first, states that “reclassification” “*shall*” occur if one of triggering events has occurred.

The record of this case shows that the Department changed its views about how these two sentences should be interpreted. For years the DOC operated under the assumption that it had the discretion to revoke a DOSA sentence in the event of an administrative termination. In Petitioner Bufalini’s case, however, the Department notified him by letter of a change in its policy – a change to a policy of mandatory DOSA revocation in all cases of program termination. Bufalini’s CCO read this letter into the record of this case:

“This letter is to inform you of change of *department’s required response to noncompliance related to* your substance – or *your sentence under* the Prison DOSA Offenders Sentencing Alternative *DOSA. Effective immediately, if you* fail to complete or *are administratively terminated from your court-ordered substance abuse treatment, you will be subject to mandatory revocation* to complete the unexpired term of your Prison DOSA sentence, RCW 9.94A.662(3).”

RP II, 9 (emphasis added).

This Court’s prior decision in *In re McKay*, 127 Wn. App. 165, 110 P.3d 856 (2005), recognized that the DOC was taking the position that it was *not* required to revoke a DOSA in this situation, but that it might. In *McKay* the letter given to the DOSA defendant said:

If you fail to successfully complete the requirements set forth in the [judgment and sentence] and/or conditions imposed by the DOC, you will be subject to administrative sanctions by the DOC.

The DOC *may* reclassify you and impose the unexpired term of the original sentence, as imposed by the Court.

McKay, 127 Wn. App. at 169 n. 12 (emphasis added). The *McKay* opinion also explicitly states: “[f]or certain violations, DOC has the authority to administratively terminate the offender from the program, in which case the offender *may* be reclassified to serve the unexpired term of his or her sentence in custody.” *Id.* at 168.

Sometime in 2016, the DOC *changed* its position and began construing RCW 9.94A.662(3) as *mandating* DOSA revocation in all cases of program termination. RP II, 9. Given the use of the word “shall” in the second sentence, it is conceivable that subsection (3) could be read in this fashion. But if it is read in this fashion, such a construction leads to absurd and unconstitutional results.

For example, suppose a DOSA treatment program participant was found “guilty” of the infraction of “fighting” with a second program participant on the basis of a record that consisted solely of testimony that a treatment program employee discovered the two program participants fighting. Suppose further that the first participant testified that he was the victim of an unprovoked attack and that he never made any decision to enter into a fight; he merely tried to defend himself by warding off kicks and blows from the other participant. Suppose the second fight participant said the opposite and claimed that he was the victim of an unprovoked attack. Suppose further that a finding was made at an infraction hearing that the first participant was discovered “fighting” and therefore was “guilty” of the infraction of fighting. Finally, suppose that solely on the

basis of this limited infraction finding, the first participant was “administratively terminated” from the treatment program.

Consider the DOC’s application of the statute to this hypothetical under its current construction of the statute. Under the current approach, since the first participant has been administratively terminated from the treatment program, reclassification, revocation of the unexpired portion of the DOSA sentence and a return to prison to serve that portion of the sentence *would be mandatory*. Such a result, however, would be absurd, and the Legislature could not conceivably have intended such a result. As *McKay* recognizes:

DOSA sentences reduce drug and felony recidivism and thus benefit rehabilitated individuals and society as a whole, through reduced crime and lower costs. There are important benefits, implicating a state interest in ensuring that DOSA revocations are founded upon verified facts and accurate knowledge.

McKay, 127 Wn. App. at 170. It would be utterly absurd to conclude that the Legislature was mandating the revocation of a DOSA whenever a DOSA treatment program participant had the misfortune to be the victim of an unprovoked attack by another person.

Courts routinely construe statutes so as to avoid such an absurd result. *State v. Ervin*, 169 Wn.2d 815, 823, 239 P.3d 354 (2010). In this case an alternate construction of the statute is clearly available and preferable. The first sentence requires a finding of a “willful violation” of a condition of the DOSA sentence. A program participant who is the victim of an unprovoked attack and then defends himself has not

“willfully” violated the rule against fighting. Therefore, *the first sentence* of RCW 9.94A.662(3) dictates that he may *not* “be reclassified to serve the remaining balance of the original sentence.” The DOC’s current interpretation of the statute posits that while he *may not* be reclassified pursuant to *the first sentence*, he *must* be reclassified *pursuant to the second sentence* if his *non-willful* “violation” of the rule against fighting leads to the administrative termination of his participation in the treatment program.

Since reading the two sentences in this fashion leads to the absurd result of punishing the assault victim for being a victim of an unprovoked attack and deprives both society and the defendant of the benefits of DOSA sentences recognized in *McKay*, the better construction of the statute is to read the willfulness requirement of the first sentence as also applying to the second sentence. In other words, unless there is a finding of a willful violation, there cannot be a legally valid administrative termination from a DOSA treatment program. After all, why would the Legislature want to terminate the drug treatment of a program participant who had not done anything wrong? It makes far more sense to read the willfulness requirement as applying to both sentences, and such a construction is consistent with the general maxims that statutes should be read as a whole, with a view towards harmonizing their provisions.

If RCW 9.94A.662(3) is read in this fashion, then the absence of any finding of “willfulness” on petitioner Bufalini’s part makes the revocation of his DOSA sentence illegal because it contravenes the statute.

In the present case, Petitioner was neither charged nor found guilty of *willfully* ingesting drugs. And he was neither charged nor found guilty of *willfully* receiving a positive urinalysis test. Absent any finding of willfulness, he is in the same position as the hypothetical program participant who had the misfortune to be the innocent victim of an unprovoked assault. Petitioner Bufalini testified that he did nothing wrong – that he is innocent – that he never took any drugs. RP II, 19-20. His testimony is that he is the innocent victim of a false positive urinalysis test result, who begged to have his urine retested but who was told that simply was not going to happen. The Hearing Examiner did *not* find his testimony unbelievable and did *not* find his father's testimony unbelievable. On the contrary he conceded that false positive UA test results do occur, and that the urine should have been retested by a lab. Thus, no finding was ever made that Petitioner Bufalini *willfully* violated any work release rule.

Petitioner respectfully submits that under his proposed construction of the statute, the failure to make such a finding of willfulness precludes his termination from the treatment program and precludes the revocation of the unexpired portion of his DOSA sentence. Accordingly, Petitioner's revocation must be vacated and he must be reinstated to complete the last two weeks of his treatment program.

C. **The revocation of the unexpired portion of Petitioner’s DOSA sentence based upon scientific test evidence that is admitted to be unreliable, and which even the manufacturer of the test concedes should *not* be relied upon, violated Petitioner’s due process right to an accurate determination of the facts.**

In *McKay* this Court recognized that the benefits of a DOSA sentence to both the individual and to society as a whole “implicat[e] a state interest in ensuring that DOSA revocations are founded upon verified facts and accurate knowledge.” *McKay*, 127 Wn. App. at 170. In other contexts, courts have recognized that subverting or undermining the ability to have guilt determined accurately can rise to the level of a due process violation. For example, in *Manson v. Braithwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the Supreme Court recognized that suggestive identification procedures can so taint eyewitness identification testimony as to preclude the admission of such evidence and require the reversal of convictions based upon such unreliable procedures. The Court held that “reliability” is the “linchpin” for determining whether a due process violation has occurred. If an improperly suggestive identification procedure gives rise to a “substantial likelihood” of misidentification then a due process violation occurs. *Id.* at 136.

In this case, the “identification” at issue is the identification of a controlled drug (an opiate of some kind according to statements made at the initial infraction hearing). It is indisputable that a substantial probability of a mistaken identification of a controlled substance can occur when this particular over the counter drug testing kit is used. As Petitioner testified at the hearing, without contradiction, the manufacturer of the UA

test acknowledges on the product container its test is not 100% accurate; that it sometimes produces false positives; and that the urine sample should be “sen[t] to the lab if it comes up positive.” RP II, 24.

Petitioner acknowledges that the Washington Supreme Court has held the use of a single positive urinalysis test is sufficient to meet the minimum due process requirements applicable in the context of prison disciplinary sanctions where inmates face the loss of good time credits. But because this case does *not* involve prison disciplinary sanctions, and involves instead a revocation of community custody which results in sending a person to prison to serve a lengthy period of incarceration, Petitioner submits that case is not controlling.

In *In re Restraint of Johnston*, 109 Wn.2d 493, 495, 745 P.2d 864 (1987) ten prisoners challenged prison disciplinary sanctions ranging from the loss of 15 to 30 days of good time credits, and in some cases segregation time in prison. In five of the ten cases sanctions were imposed based upon findings that a single uncorroborated EMIT test indicated that the inmate had used marijuana. *Id.* In the other five cases the finding of marijuana use was based upon a positive EMIT test plus other corroborating evidence. The Supreme Court held that for purposes of prison disciplinary sanctions, the State only needed to present “some evidence” of violation of a prison rule, and that a single positive urinalysis test constituted “some evidence.” *Id.* at 497-500.

Johnston recognized that the requirements of due process vary depending upon the liberty interest involved, and limited its holding to

sanctions imposed upon people who were already incarcerated in prison. The court held that the prisoner's liberty interest had to be evaluated "in the distinctive setting of a prison . . ." *Id.* at 497, citing *Superintendent v. Hill*, 472 U.S. 445, 454, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985). Given the prison context, the majority held that a single positive urinalysis test met the applicable "some evidence" due process standard. Two justices dissented, opining that such evidence did not even meet that low standard.

The present case is not a prison disciplinary sanction case, and this Court has already held that the "some evidence" standard is *not* applicable to DOSA revocations. *McKay*, 127 Wn. App. at 168-70, *Schley*; 197 Wn. App. at 870. Since a much greater liberty interest is at stake, a much stricter procedural due process standard applies. Accordingly, Petitioner submits that this case presents an issue not decided by – and not even considered by – the Court in *Johnston*.

Petitioner respectfully submits that a single positive urinalysis test made using a product that even its manufacturer concedes routinely produces false positive results, violates procedural due process for two separate reasons. First, it violates the due process rule of *Manson* that any test or procedure that creates a substantial likelihood of misidentification violates due process. Second, a DOSA revocation based solely on a single positive urinalysis test conducted with an over the counter drug testing kit is not sufficient to prove the presence in a person's urine of a controlled drug by a preponderance of the evidence. For both of these reasons,

Petitioner submits that his infraction finding, his treatment program termination, and his DOSA revocation, must all be set aside.

D. Due process violation. Failure to preserve evidence that obviously had potential to exculpate the DOSA program participant.

Government's failure to preserve materially exculpatory evidence violates due process when the evidence possesses an exculpatory value that was apparent before it was destroyed and the evidence is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994).

In this case, Petitioner suspects, but does not actually know, that his urine sample was destroyed long ago. David Bufalini testified that he had been told that his son's urine sample "was no longer available" for testing. RP II, 14-15. On the other hand, he testified he had also been told that the urine sample was frozen and preserved. RP III, 42. Assuming that the urine sample was actually destroyed, this case presents a classic example of a due process violation for failure to preserve constitutionally material exculpatory evidence.²¹

²¹ Alternatively, if the sample has *not* been destroyed, then petitioner was denied his due process right to present a defense. *See generally, Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); *State v. McNichols*, 128 Wn.2d 242, 250-51, 906 P.2d 329 (1995) (recognizing that statutory right to independent test to obtain evidence with which to impeach the results of a state-administered test is "in keeping with a defendant's constitutional due process right to gather evidence in his own defense."). The *only* evidence which could possibly support his claim of innocence would be a retest of his urine which comes back negative, and yet the DOC refused to permit him to retest his
(Footnote continued next page)

There is no question in this case but that the exculpatory nature of the evidence was apparent to the DOC right from the very start. Petitioner testified without contradiction that when he was told that his urine had tested positive for a controlled substance he “immediately begged” the DOC to do a retest, but he was simply told that the DOC did not do retests. RP I, 19-20; RP IV, 29. He testified that he did not take any drugs. He said he refused to plead guilty to the infraction because he was not guilty. RP I, 19 (“I just refuse to plead guilty on something that I didn’t do.”).

Since the infraction depended upon the allegation that his urine did contain an illegal drug, the *only* evidence that could exonerate him was his urine sample. Destroying the urine sample totally prevented him from proving his innocence. There is no other “reasonably available means” of obtaining “comparable evidence.” When guilt depends on proof that the defendant used a drug and the fluid sample that allegedly contains that drug is destroyed, a due process violation virtually always occurs. *State v. Blackwell*, 245 Ga. App. 135, 537 S.E.2d 457 (2000) (“By destroying the [urine] sample, the State destroyed Blackwell’s ability to meet the prosecution’s proof with evidence of like quality.”)

In this case, evidence was presented that Petitioner’s father gave him an Aleve tablet. RP I, 18. Aleve contains naproxen and naproxen is known to cause false positive test results when urine is tested for the presence of illegal drugs. Vincent, Zebelman & Goodwin, “common

urine even though Petitioner and his father repeatedly said they would pay for the cost of retesting. RP II, 19.

substances can cause false positives on urine screens for drugs of abuse?” 2006 Journal of Family Practice 893-897 (October). *Declaration of David Bufalini*, at ¶ 7. Thus, the record contains evidence to support a highly plausible explanation as to why the DOC’s positive urinalysis test result is incorrect. Retesting of Petitioner’s urine using a more reliable test may show that naproxen is present in Petitioner’s urine but that illegal drug substances are not present.

If the DOC does not present evidence to show that the urine sample still exists and still can be retested, then the proper remedy for the due process violation in this case is dismissal.

If the DOC presents evidence to show that the urine sample has been preserved and is available for retesting, then Petitioner submits that the evidence should be turned over to his expert for retesting at public expense. When the retesting is done, if the retest does not test positive Petitioner’s DOSA revocation should be vacated because it will be apparent that the denial of his right to present such exculpatory evidence constituted a denial of his due process right to present a defense.

E. **Any statute which provides another branch of government the power to veto a judicial sentencing alternative without providing sufficient guidelines as to when to exercise such a veto violates the separation of powers requirement of our state constitution. Therefore, the non-judicial revocation of Petitioner’s DOSA sentence pursuant to RCW 9.94A.662(3) was unconstitutional.**

Beginning with *State ex rel. Schillberg v. Cascade District Court*, 94 Wn.2d 772, 621 P.2d 115 (1980), Washington courts have consistently

recognized that the decision of whether or not to impose a treatment oriented sentence – rather than a “traditional” punishment oriented sentence that relies upon incarceration – is an inherently judicial act. In *Schillberg* the defendant was charged with a DUI offense in Cascade District Court. The court, relying upon the statutes in RCW 10.05.010 et seq., approved a petition for a deferred prosecution.

In a separate case, the defendant was subsequently charged with another DUI offense, and that crime was also referred to the same court that had imposed the deferred prosecution in the first DUI case. The defendant again sought a deferred prosecution. By the time the second case was referred to court the defendant “had already embarked on the outpatient program which had been ordered in the [first] case.” *Id.* at 774. When the defendant sought a second order approving a deferred prosecution in the second case, the prosecuting attorney objected and refused to consent to such action. The prosecutor pointed to the statute which authorized the judge hearing the case to consider a deferred prosecution “with the concurrence of the prosecuting attorney.” *Id.* at 775, citing RCW 10.05.030. The prosecutor argued that he had a statutorily authorized veto over the granting of a petition for a deferred prosecution. The trial court granted the defendant’s request for a second deferred prosecution, stating that if the second deferred prosecution request was not granted “an injustice will result” and that if a second deferred prosecution were not granted the resulting prosecution “would essentially wreck” the [treatment] program [the defendant had already]

entered in the previous case.” *Id.* at 774. The prosecutor appealed and the Snohomish County Superior Court set aside the deferred prosecution on the grounds that the statute expressly conditioned a deferred prosecution on the “concurrence of the prosecuting attorney.” But the Washington Supreme Court reversed the Superior Court and reinstated the deferred prosecution holding that the statute violated the constitution’s separation of powers requirement.

First, the Washington Supreme Court held that the deferred prosecution statute provided judges with a sentencing alternative:

The mere label “deferred prosecution” obscures the characteristics of the process provided for in RCW 10.05 which is ***fundamentally a new sentencing alternative*** of pre-conviction probation, to be added to the traditional choices of imprisonment, fine, and post-conviction probation.

Schillberg, 94 Wn.2d at 779 (emphasis added).

Second, the Court recognized that the choice of what type of sentence to impose was “essentially” a judicial act:

The statute clearly contemplates that the court evaluate the treatment plan and its factual basis and make a disposition based on an analysis of the available evidence. ***These are judicial acts*** for which the prosecuting attorney has no role or responsibility as the statute unambiguously provides.

Schillberg, 94 Wn.2d at 776 (emphasis added).

Third, the Court noted that the deferred prosecution statutes provided no standards to guide the prosecutor in making the decision whether to concur in the decision to grant a deferred prosecution:

Even assuming the decision under review was a prosecutorial [act,] not a judicial one, ***no standards at all*** were evident in the

prosecutor's decision to withhold his consent to the petition seeking a diagnostic evaluation.

Schillberg, 94 Wn.2d at 780 (emphasis added).

Finally, the complete lack of standards to guide the executive branch officer led the Court to conclude that the statutory requirement of prosecutorial consent was unconstitutional because it violated the separation of powers doctrine. Standards, the court stressed, were essential in order to prevent arbitrary action in violation of due process, and to prevent frustration of the legislature's clear desire to promote treatment oriented sentencing alternatives:

The employment of standards to guide a prosecutorial decision minimizes the possibility that the State will act arbitrarily in violation of the due process rights of defendants. ***Where the prosecutor makes an initial eligibility determination based on clear standards, and such determination is subject to judicial review, the risk to a defendant is greatly reduced and the chance enhanced that the legislative purpose of deferred prosecution will be achieved.***

Schillberg, 94 Wn.2d at 779 (emphasis added).

Defendant Schillberg was, in the Supreme Court's view, precisely the type of defendant that would benefit from treatment of his alcohol addiction problem and yet the prosecutor was arbitrarily refusing to approve a deferred prosecution because the defendant had *two* DUI referrals and not just one. In the absence of any legislative standards²² that

²² It was precisely because the Sentencing Reform Act of 1984 (the "SRA") *did* contain standards to guide judges that the SRA was held *not* to violate separation of powers. *State v. Ammons*, 105 Wn.2d 175, 182, 713 P.2d 719 (1986) ("The SRA's structuring of the Court of Appeals review of sentences outside the standard range does not infringe upon the judicial power." In this case, however, since there is *nothing* in the
(Footnote continued next page)

guided or sanctioned such an arbitrary decision, the Supreme Court held the statute unconstitutional:

The separation of powers principle requires that the delegation of legislative power to the executive be accomplished along with standards which guide and restrain the exercise of the delegated authority. [Citation]. If the legislature wishes to make the initial eligibility decision one for the prosecutor . . . then standards for guiding decision making are necessary to prevent an unconstitutional delegation of the legislative authority to alter the sentencing process. Since the current statute permits the prosecutor to arbitrarily “veto” a discretionary decision of the courts, we strike as unconstitutional that portion of RCW 10.05.030 which requires the prosecutor’s consent.

Schillberg, 94 Wn.2d at 781 (emphasis added).

Those portions of the DOSA statutes which govern the revocation of a DOSA sentence suffer from the same constitutional infirmity as the deferred prosecution statutes in *Schillberg*. The deferred prosecution statutes afforded judges a treatment oriented sentencing alternative when a defendant’s wrongful conduct “is the result of or caused by substance use disorders or mental problems for which the person is in need of treatment and unless treated the probability of future reoccurrence is great.” RCW 10.05.020. In words equally applicable to the DOSA statutes, the *Schillberg* Court said:

[I]t is apparent that the legislature has provided for deferred prosecution in courts of limited jurisdiction because of a need for sentencing alternatives which are more appropriate . . . than those available in the traditional criminal process.

DOSA statutes that “structures” the discretion of the DOC, meaningful judicial review of its DOSA revocation decisions is simply impossible.

Schillberg, 94 Wn.2d at 776.

There are two pertinent DOSA statutes. The first one, RCW 9.94A.660, just like the deferred prosecution statutes, authorizes a treatment oriented sentencing alternative for defendants with drug and alcohol problems.²³ In subsection (7) this statute explicitly states that *after* a sentencing court imposes a DOSA sentence the court may bring that offender back for a violation hearing, and may revoke the suspended portion of the offender's standard range sentence:

(7)(a) *The court may bring any offender sentenced under this section back into court at any time* on its own initiative to evaluate the offender's progress in treatment or ***to determine if any violations of the conditions of the sentence have occurred.***

(b) *If the offender is brought back to court, the court may* modify the conditions of the community custody or ***impose sanctions under subsection (c)*** of this subsection.

(c) *The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense at any time during the period of community custody if the offender violates the conditions or requirements of the sentence* or if the offender is failing to make satisfactory progress in treatment.

RCW 9.94A.660(7) (emphasis added).

²³ In subsections (3) and (4) to decide whether a DOSA sentence is appropriate by ordering a chemical dependency screening report which must address these questions:
“(i) whether the offender suffers from drug addiction;
(ii) whether the addiction is such that there is a probability that criminal behavior will occur in the future;
(iii) whether effective treatment for the offender's addiction is available . . . ; and
(iv) whether the offender and the community will benefit from the use of the alternative”

While RCW 9.94A.660(7) thus authorizes the sentencing court to revoke some or all of the defendant's community custody time and recommit the defendant to prison, the next statute, RCW 9.94A.662 can be interpreted – as the DOC has interpreted it – to authorize “the department” [of corrections] to revoke the DOSA sentence and recommit the offender to prison. As noted previously, RCW 9.94A.662(3) provides:

If the department finds that conditions of community custody have been willfully violated, the offender may be reclassified to serve the remaining balance of the original sentence. An offender who fails to complete the program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court.

Thus, it appears that the legislature purported to vest *both* the sentencing court *and* the DOC with the authority to revoke a DOSA sentence and recommit a defendant to prison. By enacting these two statutes, the Legislature has seemingly given the DOC the authority to veto any judicial determination that revocation of a DOSA sentence is *not* appropriate.

Suppose, for example, that a sentencing judge who has previously imposed a DOSA sentence learns that the defendant has had one positive urinalysis test, but reasons that this information does *not* warrant invoking his authority under RCW 9.94A.660(7) to bring the defendant back into court to determine whether a violation of the conditions of his sentence have been violated. Such a sentencing judge decides against even considering revocation because revocation does *not* seem appropriate. But

if the DOC, pursuant to RCW 9.94A.662(3), decides (1) that it wants to have an infraction hearing; (2) holds such a hearing and finds an infraction; and (3) decides to terminate the offender from his treatment program; then the DOC succeeds in vetoing the sentencing judge's decision not to revoke the DOSA because at that point DOSA revocation is mandatory.

Thus, RCW 9.94A.662(3) vests the DOC with the same type of veto power which the Washington Supreme Court struck down as unconstitutional in *Schillberg*. The statute at issue in *Schillberg* was found unconstitutional because it provided the prosecutor with no standards for deciding when to exercise its discretion to veto a judicial sentencing alternative. In the present case, the pertinent statute is even more flagrantly unconstitutional because it not only provides no standards to guide the action of the DOC, if interpreted as the DOC has recently decided it should be, the statute doesn't give the DOC any discretion at all. According to the DOC, the statute *mandates* DOSA revocation in every single case of drug treatment program termination. If the DOC responds that it has discretion to decide whether to administratively terminate an offender from a treatment program, then the statute is still unconstitutional because it provides absolutely no standards to guide the DOC as to when to opt for administrative termination. Thus the statute does *nothing* to "minimize[s] the possibility that the State will act arbitrarily" (*Schillberg*, at 781) in precisely the same way that the deferred prosecution statute operated in *Schillberg*.

In *Schillberg*, the “statute permit[ted] the prosecutor to arbitrarily veto a discretionary decision of the courts,” by allowing the prosecutor to nix a judicial decision to employ a treatment oriented sentencing alternative, and was therefore found unconstitutional. *Id.* at 781. In this case, RCW 9.94A.662(3) permits the DOC “to arbitrarily veto a discretionary decision of the [sentencing] court[.]” to not revoke a DOSA sentence, and thus to continue employing a treatment oriented sentencing alternative. Here, as in *Schillberg*, by allowing executive branch officials to veto a sentencing alternative pursuant to a standardless scheme that makes it impossible to engage in meaningful judicial review of that veto, the statute violates separation of powers and must be struck down.

IX.

CONCLUSION AND ADDITIONAL REQUEST FOR IMMEDIATE RELEASE PURSUANT TO RAP 16.15(b).

The claims raised by Petitioner do not all lead to the same form of relief. Therefore, for the sake of clarity, Petitioner maintains that he is entitled to the following types of relief on each of his claims:

If the Court agrees with petitioner that his second claim is meritorious, the Petitioner is entitled to vacation of his DOSA revocation because the DOC failed to find any willful violation of the conditions of his DOSA sentence. Since Petitioner has now served much more time in confinement in prison than he would ever have served if his DOSA had not been revoked, and since he is entitled to credit for time served, he is no

longer properly subject to any restraint whatsoever. Thus, he should be immediately released from all restraint.

If the Court agrees with Petitioner that his fifth claim is meritorious, then Petitioner is entitled to have his DOSA sentence reinstated, but there should not be any “retrial” of the alleged community custody violation before the DOC because the statute authorizing the DOC to conduct DOSA violation and DOSA revocation hearings violates separation of powers. Thus, it should be left to the discretion of the sentencing judge in Pierce County whether he wishes to bring Petitioner back before the Pierce County Superior Court for any type of hearing.

If the Court agrees with Petitioner that his third claim is meritorious, then his DOSA revocation should be set aside and no further work release violation or DOSA revocation hearings should be permitted because there is no constitutionally admissible evidence upon which a finding of a violation could ever be based. If the over-the-counter urinalysis test result is so inherently unreliable that its admission in evidence would violate due process, then the DOC has no evidence at all to support the allegation of a violation and thus no reason to hold any further hearings.

If the Court agrees with Petitioner that his fourth claim is meritorious, then his DOSA revocation should be set aside and no further DOSA violation or DOSA revocation hearing should be permitted at all, because materially exculpatory evidence was not preserved in violation of the Petitioner’s due process rights and it is no longer possible for him to

have a fair hearing on the allegation that his urine tested positive for an illegal drug.

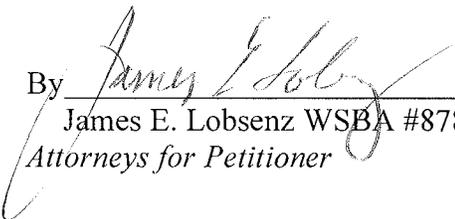
If the Court agrees with Petitioner that his first claim is meritorious – that his due process right to counsel was violated – then his infraction finding and his DOSA revocation should be set aside and his case remanded for a new DOC infraction hearing. (This *assumes* that this Court does *not* agree with Petitioner that RCW 9.94A.662(3) violates separation of powers.)

Finally, Petitioner simply wishes to draw the Court's attention to the fact that simultaneously with the filing of this PRP, he has also filed an emergency motion for release pursuant to RAP 16.15(b). For the reasons set forth in that separate motion, it would be extremely unjust to continue to incarcerate Petitioner while the parties await a decision of this Court on the merits of his PRP.

Respectfully submitted this 23rd day of August, 2017.

CARNEY BADLEY SPELLMAN, P.S.

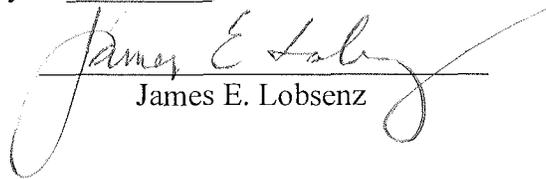
By


James E. Lobsenz WSBA #8787
Attorneys for Petitioner

AFFIRMATION

I, JAMES E. LOBSENZ, hereby affirm that I am counsel for petitioner, that I have read the foregoing petition, know its contents and I believe the petition to be true.

DATED this 23rd day of AUGUST, 2017.


James E. Lobsenz

VERIFICATION

I declare that I received a copy of the petition prepared by my attorney and that I consent to the petition being filed on my behalf.

DATED this ____ day of August, 2017.

Paul Bufalini

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

First-class United States mail, postage prepaid, to the following:

Petitioner

Mr. Paul Bufalini
DOC No. 306464
Washington Corrections Center
PO Box 900
Shelton WA 98584

DATED this 23rd day of August, 2017.


Deborah A. Groth, Legal Assistant

No. _____

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Personal Restraint of

PAUL BUFALINI,

Petitioner.

PETITIONER UNDER RESTRAINT OF A JUDGMENT OF THE
PIERCE COUNTY SUPERIOR COURT,
The Honorable Frank E. Cuthbertson

**DECLARATION OF JAMES E. LOBSENZ IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

James E. Lobsenz WSBA #8787
CARNEY BADLEY SPELLMAN, P.S.
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Attorneys for Petitioner

APPENDICES TO DECLARATION OF JAMES E. LOBSENZ

Appendix A: *Amended Information in Pierce County Cause No. 13-1-01924-0*..... A-1 to A-5

Appendix B: *Statement of Defendant on Plea of Guilty*B-1 to B-15

Appendix C: *Judgment & Sentence, entered on January 14, 2015*C-1 to C-5

Appendix D: *Work Release Notice of Allegations, Hearing, Rights, and Waiver, dated December 13, 2016*.....D-1

Appendix E: *DOC Hearing and Decision Summary Report, dated December 20, 2016* E-1 to E-2

Appendix F: *DOC Appeals Panel Decision, dated January 9, 2017*..... F-1

Appendix G: *Letter of David Bufalini in support of administrative appeal of infraction finding, dated February 3, 2017* G-1 to G-3

Appendix H: *Hearings Administrator’s Remand Letter dated February 8, 2017* H-1

Appendix I: *Letter of David Bufalini to Hearings Administrator Soliz, dated February 16, 2017* I-1

Appendix J: *Appeal of a Department Violation Process, dated March 1, 2017*J-1

Appendix K: *Appeals Panel Decision dated April 4, 2017* K-1 to K-2

Appendix L: *Attachment 1, the Disciplinary Sanction Table for Prison and Work Release, to Department of Corrections Policy No. 460.135* L-1 to L-8

I, JAMES E. LOBSENZ, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

1. I am counsel for Petitioner. I have personal knowledge of the facts set forth here.

2. On August 18, 2017, I spoke to records personnel at the Washington Corrections Center in Shelton, Washington; I asked what Petitioner Bufalini's release date was; and I was told that his estimated release date is February 20, 2019.

3. Attached as Appendix A is a true and correct copy of the Amended Information on file in Pierce County Superior Court Cause No. 13-1-01924-0.

4. Attached as Appendix B is a true and correct copy of the Statement of Defendant on Plea of Guilty in that same case.

5. Attached as Appendix C is a true and correct copy of the Judgment and Sentence entered on January 14, 2015 in that same case.

6. Attached as Appendix D is a true and correct copy of the *Work Release Notice of Allegations, Hearing Rights, and Waiver*, dated December 13, 2016, which was given to Petitioner Bufalini.

7. Attached as Appendix E is a true and correct copy of the *DOC Hearing and Decision Summary Report*, dated December 20, 2016.

8. Attached as Appendix F is a true and correct copy of the DOC Appeals Panel Decision, dated January 9, 2017.

9. Attached as Appendix G is a true and correct copy of the *Letter of David Bufalini in support of administrative appeal of infraction finding*, dated February 3, 2017.

10. Attached as Appendix H is a true and correct copy of the *Hearing Administrator's Remand Letter*, dated February 8, 2017.

11. Attached as Appendix I is a true and correct copy of the *Letter of David Bufalini to Hearings Administrator Soliz*, dated February 16, 2017.

12. Attached as Appendix J is a true and correct copy of the *Appeal of a Department Violation process*, dated March 1, 2017.

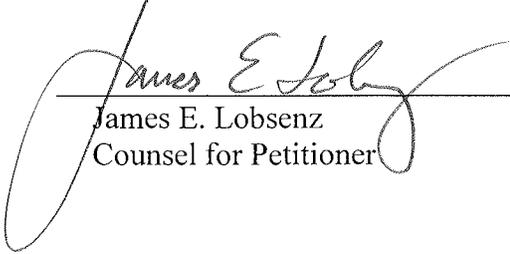
13. Attached as Appendix K is a true and correct copy of the *appeals Panel Decision*, dated April 4, 2017.

14. Attached as Appendix L is a true and correct copy of *Attachment 1 to the Disciplinary Sanction Table for prison and Work Release*, which is a part of Department of Corrections Policy No. 460.135.

15. The declaration of Paul Bufalini, submitted in support of his PRP, originally did not have paragraph numbers on it and did not have paragraph numbers when Paul Bufalini signed it. I hand wrote in paragraph

numbers so that the pertinent passages in his declaration could be cited to and easily found.

Dated thus 23rd day of August, 2017.



James E. Lobsenz
Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

First-class United States mail, postage prepaid, to the following:

Petitioner

Mr. Paul Bufalini
DOC No. 306464
Washington Corrections Center
PO Box 900
Shelton WA 98584

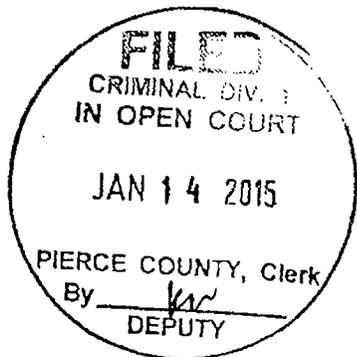
DATED this 23rd day of August, 2017.


Deborah A. Groth, Legal Assistant

APPENDIX A



13-1-01924-0 43950842 AMINF 01-15-15



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 13-1-01924-0

vs.

PAUL SAMUEL BUFALINI,

Defendant.

AMENDED INFORMATION

DOB: 1/5/1979 SEX : MALE RACE: WHITE
PCN#: 540977712 SID#: 22417548 DOL#: WA BUFALPS213BE

COUNT I

I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse PAUL SAMUEL BUFALINI of the crime of IDENTITY THEFT IN THE SECOND DEGREE, committed as follows:

That PAUL SAMUEL BUFALINI, in the State of Washington, during the period between the 28th day of April, 2013 and the 10th day of May, 2013, did unlawfully, feloniously, and knowingly obtain, possess, use or transfer a means of identification or financial information of another person, living or dead, to-wit: Cynthia Minette, with the intent to commit, or to aid or abet, any crime and did use such identification or financial information to obtain an aggregate total of credit, money, goods, services or anything else of value in an amount of one thousand five hundred dollars or less in value or did not obtain anything of value, contrary to RCW 9.35.020(3), and against the peace and dignity of the State of Washington.

COUNT II

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse PAUL SAMUEL BUFALINI of the crime of POSSESSING STOLEN PROPERTY IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and

AMENDED INFORMATION- 1

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

CRIMINAL

1 occasion that it would be difficult to separate proof of one charge from proof of the others, committed as
2 follows:

3 That PAUL SAMUEL BUFALINI, in the State of Washington, during the period between the
4 28th day of April, 2013 and the 10th day of May, 2013, did unlawfully, feloniously, and knowingly
5 possess a stolen access device, to-wit: a debit card, issued to Cynthia Minette, and withheld or
6 appropriated said access device to the use of any person other than the true owner or person entitled
7 thereto, contrary to RCW 9A.56.140(1) and 9A.56.160(1)(c), and against the peace and dignity of the
8 State of Washington.

9 COUNT III

10 And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the
11 authority of the State of Washington, do accuse PAUL SAMUEL BUFALINI of the crime of VEHICLE
12 PROWLING IN THE SECOND DEGREE, a crime of the same or similar character, and/or a crime based
13 on the same conduct or on a series of acts connected together or constituting parts of a single scheme or
14 plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to
15 separate proof of one charge from proof of the others, committed as follows:

16 That PAUL SAMUEL BUFALINI, in the State of Washington, on or about the 28th day of April,
17 2013, did unlawfully, with intent to commit a crime against a person or property therein, enter or remain
18 unlawfully in a vehicle other than a motor home, as defined in RCW 46.04.305, or a vessel equipped for
19 propulsion by mechanical means or by sail which has a cabin equipped with permanently installed
20 sleeping quarters or cooking facilities, contrary to RCW 9A.52.100(1)(2), and against the peace and
21 dignity of the State of Washington.

22 COUNT IV

23 And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the
24 authority of the State of Washington, do accuse PAUL SAMUEL BUFALINI of the crime of IDENTITY
THEFT IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the
same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
proof of one charge from proof of the others, committed as follows:

That PAUL SAMUEL BUFALINI, in the State of Washington, during the period between the
10th day of May, 2012 and the 31st day of May, 2012, did unlawfully, feloniously, knowingly obtain,
possess, use or transfer a means of identification or financial information of another person, living or
dead, to-wit: David Bufalini and/or Kristine Bufalini, with the intent to commit, or to aid or abet, any
crime and thereby obtains an aggregate total of credit, money, goods, service, or anything else of value in
excess of one thousand five hundred dollars, contrary to RCW 9.35.020(1)(2)(a), and against the peace
and dignity of the State of Washington.

AMENDED INFORMATION- 2

COUNT V

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse PAUL SAMUEL BUFALINI of the crime of FORGERY, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That PAUL SAMUEL BUFALINI, in the State of Washington, during the period between the 10th day of May, 2012 and the 31st day of May, 2012, did unlawfully and feloniously, with intent to injure or defraud, falsely make, complete or alter a written instrument described as follows, to-wit: Check #5026 and/or Check #5027 and/or Check #5030 and/or Check #5031 and/or Check #5036 and/or Check #5039 and/or Check #5040 and/or Check #5042 and/or Check #5043 and/or Check #5047 and/or Check #5048 and/or Check #5049, and/or knowing the same to be forged, possess, utter, offer, dispose of or put off as true such written instrument, contrary to RCW 9A.60.020(1)(a)(b), and against the peace and dignity of the State of Washington.

COUNT VI

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse PAUL SAMUEL BUFALINI of the crime of UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

That PAUL SAMUEL BUFALINI, in the State of Washington, during the period between the 28th day of April, 2013 and the 10th day of May, 2013, did unlawfully and feloniously possess a controlled substance, to-wit: heroin, classified under Schedule I of the Uniform Controlled Substance Act, contrary to RCW 69.50.4013(1), and against the peace and dignity of the State of Washington.

COUNT VII

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse PAUL SAMUEL BUFALINI of the crime of UNLAWFUL POSSESSION OF PAYMENT INSTRUMENTS, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

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1 That PAUL SAMUEL BUFALINI, in the State of Washington, during the period between the
 2 28th day of April, 2013 and the 10th day of May, 2013, did unlawfully and feloniously possess two or
 3 more checks or other payment instruments in the name of a person or entity, or with the routing number
 4 or account number of a person or entity, without the permission of the person or entity to possess such
 5 payment instrument, and with intent either to deprive the person of possession of such payment
 6 instrument or to commit theft, forgery, or identity theft, contrary to RCW 9A.56.320(2)(a)(i), and against
 7 the peace and dignity of the State of Washington.

COUNT VIII

8 And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the
 9 authority of the State of Washington, do accuse PAUL SAMUEL BUFALINI of the crime of BAIL
 10 JUMPING, a crime of the same or similar character, and/or a crime based on the same conduct or on a
 11 series of acts connected together or constituting parts of a single scheme or plan, and/or so closely
 12 connected in respect to time, place and occasion that it would be difficult to separate proof of one charge
 13 from proof of the others, committed as follows:

14 That PAUL SAMUEL BUFALINI, in the State of Washington, on or about the 1st day of August,
 15 2013, did unlawfully and feloniously, having been held for, charged with, or convicted of, Identity Theft
 16 in the Second Degree and/or Possessing Stolen Property in the Second Degree, a class "B" or "C" felony,
 17 and been released by court order or admitted to bail with knowledge of the requirement of a subsequent
 18 personal appearance before any court in this state, fail to appear as required, contrary to RCW
 19 9A.76.170(1),(3)(c), and against the peace and dignity of the State of Washington.

COUNT IX

20 And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the
 21 authority of the State of Washington, do accuse PAUL SAMUEL BUFALINI of the crime of BAIL
 22 JUMPING, a crime of the same or similar character, and/or a crime based on the same conduct or on a
 23 series of acts connected together or constituting parts of a single scheme or plan, and/or so closely
 24 connected in respect to time, place and occasion that it would be difficult to separate proof of one charge
 from proof of the others, committed as follows:

That PAUL SAMUEL BUFALINI, in the State of Washington, on or about the 10th day of
 October, 2013, did unlawfully and feloniously, having been held for, charged with, or convicted of,
 Identity Theft in the Second Degree and/or Possessing Stolen Property in the Second Degree, a class "B"
 or "C" felony, and been released by court order or admitted to bail with knowledge of the requirement of
 a subsequent personal appearance before any court in this state, fail to appear as required, contrary to
 RCW 9A.76.170(1),(3)(c), and against the peace and dignity of the State of Washington.

COUNT X

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse PAUL SAMUEL BUFALINI of the crime of BAIL JUMPING, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows:

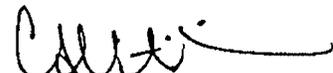
That PAUL SAMUEL BUFALINI, in the State of Washington, on or about the 7th day of November, 2013, did unlawfully and feloniously, having been held for, charged with, or convicted of, Identity Theft in the Second Degree and/or Possessing Stolen Property in the Second Degree, a class "B" or "C" felony, and been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court in this state, fail to appear as required, contrary to RCW 9A.76.170(1),(3)(c), and against the peace and dignity of the State of Washington.

DATED this 9th day of January, 2015.

UNIVERSITY PLACE POLICE DEPT
WA02724

MARK LINDQUIST
Pierce County Prosecuting Attorney

cav

By: 
CLAIRE A VITIKAINEN
Deputy Prosecuting Attorney
WSB#: 39987

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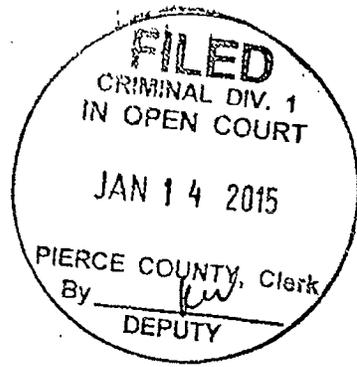
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APPENDIX B

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13-1-01924-0 43950849 STTDFG 01-15-15



**Superior Court of Washington
For Pierce County**

State of Washington
Plaintiff

vs.

Paul Samuel Bufalin
Defendant

No. 13-1-01924-0

**Statement of Defendant on Plea of
Guilty to Non-Sex Offense
(STTDFG)**

1. My true name is: Paul Samuel Bufalin
2. My age is: 36
3. The last level of education I completed was 14th grade - Soph - college

4. **I Have Been Informed and Fully Understand That:**

- (a) I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is: Brett A. Kurtzer
- (b) I am charged with the crime(s) of: Identity Theft - Second Degree as set out in the Amended Information, dated, 1/9/15, a copy of which I hereby acknowledge previously receiving and reviewing with my lawyer. PS
(Defendant's initials)

The elements of this crime [] these crimes are as set out in the Amended Information, dated 1/9/15 a copy of which I hereby acknowledge previously receiving and reviewing with my lawyer. PS
(Defendant's initials)

Additional counts are addressed in Attachment "B"

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5. **I Understand I Have the Following Important Rights, and I Give Them Up by Pleading Guilty:**

- (a) The right to a speedy and public trial by an impartial jury in the county where the crime was allegedly committed;
- (b) The right to remain silent before and during trial, and the right to refuse to testify against myself;
- (c) The right at trial to hear and question the witnesses who testify against me;
- (d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;
- (e) The right to be presumed innocent unless the State proves the charge beyond a reasonable doubt or I enter a plea of guilty;
- (f) The right to appeal a finding of guilt after a trial as well as other pretrial motions such as time for trial challenges and suppression issues.

6. **In Considering the Consequences of My Guilty Plea, I Understand That:**

- (a) Each crime with which I am charged carries a maximum sentence, a fine, and a **Standard Sentence Range** as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	COMMUNITY CUSTODY RANGE (Only applicable for crimes committed on or after July 1, 2000. For crimes committed prior to July 1, 2000, see paragraph 6(f).)	MAXIMUM TERM AND FINE
1	9	43-57 mos	∅	12 mos	
2	9	22-89 mos	∅	∅	5 yrs / \$0.000
3	∅	0-364 days	∅	∅	364 days / \$5000

*The sentencing enhancement codes are: (RPh) Robbery of a pharmacy, (CSG) Criminal street gang involving minor, (AE) Endangerment while attempting to elude. The following enhancements will run consecutively to all other parts of my entire sentence, including other enhancements and other counts: (F) Firearm, (D) Other deadly weapon, (V) VUCSA in protected zone, (JP) Juvenile present, (VH) Vehicular Homicide, see RCW 46.61.520, (SM) Sexual Motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9), (P16) Passenger(s) under age 16.

- (b) The standard sentence range is based on the crime charged and my criminal history. Criminal history includes prior convictions and juvenile adjudications or convictions, whether in this state, in federal court, or elsewhere.
- (c) The prosecuting attorney's statement of my criminal history is attached to this statement. Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If the prosecutor and I disagree about the computation of the offender score, I understand that this dispute will be resolved by the court at sentencing. I

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waive any right to challenge the acceptance of my guilty plea on the grounds that my offender score or standard range is lower than what is listed in paragraph 6(a). If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.

- (d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding on me. I cannot change my mind if additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase or a mandatory sentence of life imprisonment without the possibility of parole is required by law.
- (e) In addition to sentencing me to confinement, the judge will order me to pay \$500.00 as a victim's compensation fund assessment and any mandatory fines or penalties that apply to my case. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The amount of restitution may be up to double my gain or double the victim's loss. The judge may also order that I pay a fine, court costs, attorney fees and the costs of incarceration.
- (f) **For crimes committed prior to July 1, 2000:** In addition to sentencing me to confinement, the judge may order me to serve up to one year of community custody if the total period of confinement ordered is not more than 12 months. If the total period of confinement is more than 12 months, and if this crime is a drug offense, assault in the second degree, assault of a child in the second degree, or any crime against a person in which a specific finding was made that I or an accomplice was armed with a deadly weapon, the judge will order me to serve at least one year of community custody. If this crime is a vehicular homicide, vehicular assault, or a serious violent offense, the judge will order me to serve at least two years of community custody. The actual period of community custody may be longer than my earned early release period. During the period of community custody, I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me.

For crimes committed on or after July 1, 2000: In addition to sentencing me to confinement, under certain circumstances the judge may order me to serve up to one year of community custody if the total period of confinement ordered is not more than 12 months, but only if the crime I have been convicted of falls into one of the offense types listed in the following chart. For the offense of failure to register as a sex offender, regardless of the length of confinement, the judge will sentence me for up to 12 months of community custody. If the total period of confinement ordered is more than 12 months, and if the crime I have been convicted of falls into one of the offense types listed in the following chart, the court will sentence me to community custody for the term established for that offense type unless the judge finds substantial and compelling reasons not to do so. If the period of earned release awarded per RCW 9.94A.728 is longer, that will be the term of my community custody. If the crime I have been convicted of falls into more than one category of offense types listed in the following chart, then the community custody term will be based on the offense type that dictates the longest term of community custody.

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OFFENSE TYPE	COMMUNITY CUSTODY TERM
Serious Violent Offenses as defined by RCW 9.94A.030(45)	36 months
Violent Offenses as defined by RCW 9.94A.030(54)	18 months
Crimes Against Persons as defined by RCW 9.94A.411(2)	12 months
Offenses under Chapter 69.50 or 69.52 RCW (not sentenced under RCW 9.94A.660)	12 months
Offenses involving the unlawful possession of a firearm where the offender is a criminal street gang member or associate	12 months

Certain sentencing alternatives may also include community custody.

During the period of community custody I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me, including additional conditions of community custody that may be imposed by the Department of Corrections. My failure to comply with these conditions will render me ineligible for general assistance, RCW 74.04.005(6)(h), and may result in the Department of Corrections transferring me to a more restrictive confinement status or other sanctions.

If I violate the conditions of my community custody, the Department of Corrections may sanction me up to 60 days confinement per violation and/or revoke my earned early release, or the Department of Corrections may impose additional conditions or other stipulated penalties. The court also has the authority to impose sanctions for any violation.

- (g) The prosecuting attorney will make the following recommendation to the judge: Agreed DUSA sentence of 36.75 mos DOC and 36.75 mos community custody; \$500 COPA \$200 costs, \$100 DNA, restitution by LOC; no contact with victims except for parents, no use or possession of controlled substances, no association with known
 The prosecutor will recommend as stated in the plea agreement, which is incorporated by reference. Drug users or sellers, LAB, comply with DASA requirements

(h) Warrant suspended
The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless the judge finds substantial and compelling reasons not to do so. I understand the following regarding exceptional sentences:

- (i) The judge may impose an exceptional sentence below the standard range if the judge finds mitigating circumstances supporting an exceptional sentence.
- (ii) The judge may impose an exceptional sentence above the standard range if I am being sentenced for more than one crime and I have an offender score of more than nine.
- (iii) The judge may also impose an exceptional sentence above the standard range if the State and I stipulate that justice is best served by imposition of an

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exceptional sentence and the judge agrees that an exceptional sentence is consistent with and in furtherance of the interests of justice and the purposes of the Sentencing Reform Act.

- (iv) The judge may also impose an exceptional sentence above the standard range if the State has given notice that it will seek an exceptional sentence, the notice states aggravating circumstances upon which the requested sentence will be based, and facts supporting an exceptional sentence are proven beyond a reasonable doubt to a unanimous jury, to a judge if I waive a jury, or by stipulated facts.

If the court imposes a standard range sentence, then no one may appeal the sentence. If the court imposes an exceptional sentence after a hearing, either the State or I can appeal the sentence.

- (i) **If I am not a citizen of the United States**, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.
- (j) **I may not possess, own, or have under my control any firearm, and under federal law any firearm or ammunition**, unless my right to do so is restored by the court in which I am convicted or the superior court in Washington State where I live, and by a federal court if required. I must immediately surrender any concealed pistol license.
- (k) I will be ineligible to vote until that right is restored in a manner provided by law. If I am registered to vote, my voter registration will be cancelled. Wash. Const, art. VI, § 3, RCW 29A.04.079, 29A.08.520.
- (l) **Government assistance may be suspended** during any period of confinement.
- (m) **I will be required to have a biological sample collected** for purposes of DNA identification analysis. I will be required to pay a \$100.00 DNA collection fee.

Notification Relating to Specific Crimes: If any of the following paragraphs DO NOT APPLY, counsel and the defendant shall strike them out. The defendant and the judge shall initial all paragraphs that DO APPLY.

PB (n) ~~This offense is a most serious offense or "strike" as defined by RCW 9.94A.030, and if I have at least two prior convictions for most serious offenses, whether in this state, in federal court, or elsewhere, the crime for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole.~~

PB (o) ~~The judge may sentence me as a first-time offender instead of giving a sentence within the standard range if I qualify under RCW 9.94A.030. This sentence could include as much as 90 days' confinement and up to one year of community custody plus all of the conditions described in paragraph (e). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training.~~

PB (p) ~~The judge may sentence me under the Parenting Sentencing Alternative if I qualify under~~

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RCW 9.94A.655. If I am eligible, the judge may order DOC to complete either a risk assessment report or a chemical dependency screening report, or both. If the judge decides to impose the Parenting Sentencing Alternative, the sentence will consist of 12 months of community custody and I will be required to comply with the conditions imposed by the court and by DOC. At any time during community custody, the court may schedule a hearing to evaluate my progress in treatment or to determine if I have violated the conditions of the sentence. The court may modify the conditions of community custody or impose sanctions. If the court finds I violated the conditions or requirements of the sentence or I failed to make satisfactory progress in treatment, the court may order me to serve a term of total confinement within the standard range for my offense.

RB (q) **If this crime involves kidnapping involving a minor**, including unlawful imprisonment involving a minor who is not my child, I will be required to register where I reside, study or work. The specific registration requirements are set forth in the "Offender Registration" Attachment. These requirements may change at a later date. I am responsible for learning about any changes in registration requirements and for complying with the new requirements.

RB (r) **If this is a crime of domestic violence**, I may be ordered to pay a domestic violence assessment of up to \$100.00. If I, or the victim of the offense, have a minor child, the court may order me to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

RB (s) **If this crime involves prostitution, or a drug offense associated with hypodermic needles**, I will be required to undergo testing for the human immunodeficiency (HIV/AIDS) virus.

_____ (t) **The judge may sentence me under the drug offender sentencing alternative (DOSA) if I qualify under RCW 9.94A.660.** If I qualify and the judge is considering a residential chemical dependency treatment-based alternative, the judge may order that I be examined by DOC before deciding to impose a DOSA sentence. If the judge decides to impose a DOSA sentence, it could be either a prison-based alternative or a residential chemical dependency treatment-based alternative.

If the judge imposes the **prison-based alternative**, the sentence will consist of a period of total confinement in a state facility for one-half of the midpoint of the standard range, or 12 months, whichever is greater. During confinement, I will be required to undergo a comprehensive substance abuse assessment and to participate in treatment. The judge will also impose a term of community custody of one-half of the midpoint of the standard range.

If the judge imposes the **residential chemical dependency treatment-based alternative**, the sentence will consist of a term of community custody equal to one-half of the midpoint of the standard sentence range or two years, whichever is greater, and I will have to enter and remain in a certified residential chemical dependency treatment program for a period of *three to six months*, as set by the court.

As part of this sentencing alternative, the court is required to schedule a progress hearing during the period of residential chemical dependency treatment and a treatment termination hearing scheduled three months before the expiration of the term of community custody. At either hearing, based upon reports by my treatment provider and the department of corrections on my compliance with treatment and monitoring requirements and recommendations regarding termination from treatment, the judge may modify the

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conditions of my community custody or order me to serve a term of total confinement equal to one-half of the midpoint of the standard sentence range, followed by a term of community custody under RCW 9.94A.701.

During the term of community custody for either sentencing alternative, the judge could prohibit me from using alcohol or controlled substances, require me to submit to urinalysis or other testing to monitor that status, require me to devote time to a specific employment or training, stay out of certain areas, pay \$30.00 per month to offset the cost of monitoring and require other conditions, such as affirmative conditions, and the conditions described in paragraph 6(e). The judge, on his or her own initiative, may order me to appear in court at any time during the period of community custody to evaluate my progress in treatment or to determine if I have violated the conditions of the sentence. If the court finds that I have violated the conditions of the sentence or that I have failed to make satisfactory progress in treatment, the court may modify the terms of my community custody or order me to serve a term of total confinement within the standard range.

- _____ (u) If I am subject to community custody and the judge finds that I have a **chemical dependency** that has contributed to the offense, the judge may order me to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which I am pleading guilty.
- _____ (v) If this crime involves the **manufacture, delivery, or possession with the intent to deliver methamphetamine**, including its salts, isomers, and salts of isomers, or amphetamine, including its salts, isomers, and salts of isomers, and if a fine is imposed, \$3,000 of the fine may not be suspended. RCW 69.50.401(2)(b).
- _____ (w) If this crime involves a **violation of the state drug laws**, my eligibility for state and federal food stamps, welfare, and education benefits may be affected. 20 U.S.C. § 1091(r) and 21 U.S.C. § 862a.
- _____ (x) I understand that RCW 46.20.285(4) requires that my driver's license be revoked if the judge finds I used a **motor vehicle in the commission of this felony**.
- _____ (y) If this crime involves the offense of **vehicular homicide** while under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, committed on or after January 1, 1999, an additional two years shall be added to the presumptive sentence for vehicular homicide for each prior offense as defined in RCW 46.61.5055(14).
- _____ (z) If I am pleading guilty to **felony driving under the influence of intoxicating liquor or any drugs, or felony actual physical control** of a motor vehicle while under the influence of intoxicating liquor or any drug, in addition to the provisions of chapter 9.94A RCW, I will be required to undergo alcohol or chemical dependency treatment services during incarceration. I will be required to pay the costs of treatment unless the court finds that I am indigent. My driving privileges will be suspended, revoked or denied. Following the period of suspension, revocation or denial, I must comply with ignition interlock device requirements. In addition to any other costs of the ignition interlock device, I will be required to pay an additional; fee of \$20 per month.
- _____ (aa) ~~For the crimes of vehicular homicide committed while under the influence of intoxicating~~

liquor, or any drug defined by RCW 46.61.520 or for vehicular assault committed while under the influence of intoxicating liquor, or any drug as defined by RCW 46.61.522, or for any felony driving under the influence (RCW 46.61.502(6)), or felony physical control under the influence (RCW 46.61.504(6)), the court shall add 12 months to the standard sentence range for each child passenger under the age of 16 who is an occupant in the defendant's vehicle. These enhancements shall be mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions.

PB (bb) For the crimes of felony driving under the influence of intoxicating liquor, or any drug, for vehicular homicide while under the influence of intoxicating liquor, or any drug, the court may order me to reimburse reasonable emergency response costs up to \$2,500 per incident.

PB (cc) The crime of _____ has a mandatory minimum sentence of at least _____ years of total confinement. This law does not apply to crimes committed on or after July 24, 2005, by a juvenile who was tried as an adult after decline of juvenile court jurisdiction. The law does not allow any reduction of this sentence. This mandatory minimum sentence is not the same as the mandatory sentence of life imprisonment without the possibility of parole described in paragraph 6[1].

PB (dd) I am being sentenced for two or more serious violent offenses arising from separate and distinct criminal conduct and the sentences imposed on counts _____ and _____ will run consecutively unless the judge finds substantial and compelling reasons to do otherwise.

PB (ee) The offense(s) I am pleading guilty to include(s) a **Violation of the Uniform Controlled Substances Act in a protected zone enhancement or manufacture of methamphetamine when a juvenile was present** in or upon the premises of manufacture enhancement. I understand these enhancements are mandatory and that they must run consecutively to all other sentencing provisions.

PB (ff) The offense(s) I am pleading guilty to include(s) a **deadly weapon, firearm, or sexual motivation enhancement**. Deadly weapon, firearm, or sexual motivation enhancements are mandatory, they must be served in total confinement, and they must run consecutively to any other sentence and to any other deadly weapon, firearm, or sexual motivation enhancements.

PB (gg) I am pleading guilty to (1) **unlawful possession of a firearm(s) in the first or second degree and (2) felony theft of a firearm or possession of a stolen firearm**, I am required to serve the sentences for these crimes consecutively to one another. If I am pleading guilty to **unlawful possession of more than one firearm**, I must serve each of the sentences for unlawful possession consecutively to each other.

PB (hh) I may be required to register as a felony firearm offender under RCW 9.41.330 and RCW 9.41.333. The specific registration requirements are in the "Felony Firearm Offender Registration" Attachment.

PB (ii) If I am pleading guilty to the crime of **unlawful practices in obtaining assistance** as defined in RCW 74.08.331, no assistance payment shall be made for at least six months if this is my first conviction and for at least 12 months if this is my second or subsequent conviction. This suspension of benefits will apply even if I am not incarcerated. RCW

1/15/2015 5101 0015

74.08.290.

PS

(ij) The judge may authorize **work ethic camp**. To qualify for work ethic authorization my term of total confinement must be more than twelve months and less than thirty-six months. I cannot currently be either pending prosecution or serving a sentence for violation of the uniform controlled substance act and I cannot have a current or prior conviction for a sex or violent offense. RCW 9.94A.690

- 7. I plead guilty to count(s) 1-10 as charged in the Amended Information, dated 11/9/15. I have received a copy of that Information and reviewed it with my lawyer.
- 8. I make this plea freely and voluntarily.
- 9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.
- 10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement:

Between 5/1/12 + 5/31/12 in Pierce Co Washington, I forged + cashed multiple checks from an account belonging to my parents, D. Bufalini + K. Bufalini. I obtained Mosekhan \$1500 - On 4/25/13 I broke into a vehicle belonging to Cynthia Minette + stole her property, including credit cards. I knew she was a real person + intended to commit a crime with those cards. I also had those cards + multiple checks belonging to my father in my vehicle between 4/25/13 + 5/10/13 I also had heroin in my possession in my vehicle between 4/25/13 + 5/10/13. On 8/1/13, 10/10/13 + 11/7/13 I

Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.

12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" and/or "Felony Firearm Offender Registration" Attachment, if applicable. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

PS

Release of person

failed to appear for court hearings. I had signed for these dates. All of these events took place in Pierce Co, Washington

Paul B...
Defendant

I have read and discussed this statement with the defendant. I believe that the defendant is competent and fully understands the statement.

[Signature]
Prosecuting Attorney

Callahan
Print Name

30087
WSBA No.

[Signature]
Defendant's Lawyer

Broth A. Kentz
Print Name

17283
WSBA No.

0017

5101

1/16/2015

The defendant signed the foregoing statement in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check appropriate box]:

- (a) The defendant had previously read the entire statement above and that the defendant understood it in full;
- (b) The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full; or
- (c) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full. The Interpreter's Declaration is included below.

Interpreter's Declaration: I am a certified or registered interpreter, or have been found otherwise qualified by the court to interpret in the _____ language, which the defendant understands. I have translated and interpreted this document for the defendant from English into that language. I have no reason to believe that the defendant does not fully understand both the interpretation and the subject matter of this document. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) _____, (state) _____, on (date) _____.

Interpreter

Print Name

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

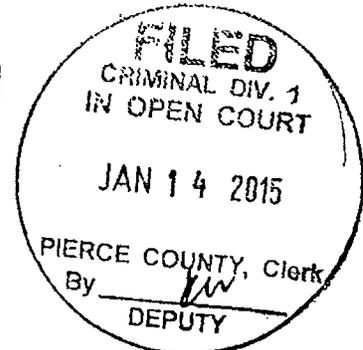
Dated: _____

1/14/15

Frank E. Cuthbertson

Judge

FRANK E. CUTHBERTSON



5019

5101

1/16/2015

Case Name: State v Bufolin Cause No: 13-1-01924-0

ATTACHMENT "B"

4. (b) (continued) Defendant is pleading guilty to these additional counts:

Count VIII: Bail Jump

Elements: 1) On or about 8/1/13, within Pierce County
2) having been charged with a class "B" or "C" felony
3) and having been released by court order with knowledge of requirement of a subsequent appearance 4) did fail to appear as required

This crime carries a maximum sentence of 5 years imprisonment and a \$ 10,000 fine. The standard range is from 51 months to 60 months based upon the attached stipulation as to my criminal history.

Offense Designations: Most Serious Offense[] Serious Violent[] Violent Non-Violent[] Sex[] Drug[] Traffic[] (check all that apply)

Count IX: Bail Jump

Elements: on or about 10/10/13 within Pierce County
2) having been charged with a class "B" or "C" felony
3) and having been released by court order with knowledge of requirement of a subsequent appearance 4) did fail to appear as required

This crime carries a maximum sentence of 5 years imprisonment and a \$ 10,000 fine. The standard range is from 51 months to 60 months based upon the attached stipulation as to my criminal history.

Offense Designations: Most Serious Offense[] Serious Violent[] Violent Non-Violent[] Sex[] Drug[] Traffic[] (check all that apply)

6. (b) (continued) Defendant is pleading guilty to these additional counts:

COUNT NO.	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancement for (F) Firearm, (D) Other Deadly Weapon, (V) VUCSA in protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, or (JP) Juvenile Present	TOTAL ACTUAL CONFINEMENT (standard range including enhancements)	STANDARD RANGE COMMUNITY CUSTODY (Only applicable for crimes committed on or after July 1, 2000. For crimes committed prior to July 1, 2000, see paragraph 6(f))	MAXIMUM PENALTY
<u>VIII</u>	<u>51-60 mos</u>	<u>Ø</u>	<u>51-60 mos</u>	<u>Ø</u>	<u>5 yrs / \$10,000</u>
<u>IX</u>	<u>51-60 mos</u>	<u>Ø</u>	<u>51-60 mos</u>	<u>Ø</u>	<u>5 yrs / \$10,000</u>

ATTACHMENT "B"

0020

5101

1/16/2015

Case Name: State v. Bufalini Cause No: 13-1-01924-0

ATTACHMENT "B"

4. (b) (continued) Defendant is pleading guilty to these additional counts:

Count ~~VI~~ VII: Unlawful Possession of Controlled Substance

Elements: 1) On or ~~about~~ ^{between} 4/28/13 and 5/16/13 within Pierce County
2) did unlawfully possess
3) a controlled substance; to wit: heroin

This crime carries a maximum sentence of 5 years imprisonment and a \$ 10,000 fine. The standard range is from 12+ months to 24 months based upon the attached stipulation as to my criminal history.

Offense Designations: Most Serious Offense[] Serious Violent[] Violent[] Non-Violent[] Sex[] Drug[] Traffic[] (check all that apply)

Count ~~VI~~ VII: Unlawful Possession of Payment Instruments

Elements: 1) On or between 4/28/13 and 5/16/13 within Pierce County
2) did unlawfully possess two or more checks in the name of another person,
3) without the permission of the person to possess such check,
4) with intent to deprive said person of the check

This crime carries a maximum sentence of 5 years imprisonment and a \$ 10,000 fine. The standard range is from 22 months to 29 months based upon the attached stipulation as to my criminal history.

Offense Designations: Most Serious Offense[] Serious Violent[] Violent[] Non-Violent[] Sex[] Drug[] Traffic[] (check all that apply)

6. (b) (continued) Defendant is pleading guilty to these additional counts:

COUNT NO.	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancement for (F) Firearm, (D) Other Deadly Weapon, (V) VUCSA in protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, or (JP) Juvenile Present	TOTAL ACTUAL CONFINEMENT (standard range including enhancements)	STANDARD RANGE COMMUNITY CUSTODY (Only applicable for crimes committed on or after July 1, 2000. For crimes committed prior to July 1, 2000, see paragraph 6(f))	MAXIMUM PENALTY
<u>VI</u>	<u>12+ - 24 mos</u>	<input checked="" type="checkbox"/>	<u>12-24</u>	<u>12</u>	<u>5 yrs / \$10,000</u>
<u>VII</u>	<u>22 - 29 mos</u>	<input checked="" type="checkbox"/>	<u>22 - 29 mos</u>	<u>Ø</u>	<u>5 yrs / \$10,000</u>

ATTACHMENT "B"

0021

5101

1/15/2015

Case Name: State v. Bufalini Cause No: 13-1-01924-0

ATTACHMENT "B"

4. (b) (continued) Defendant is pleading guilty to these additional counts:

Count IV: Identity Theft - First Degree

Elements: 1) On or between 5/10/12 and 5/11/12 within Pierce County
2) did unlawfully and knowingly obtain financial information of another person 3) with intent to commit any crime and obtain anything of value in excess of \$1500

This crime carries a maximum sentence of 10 years imprisonment and a \$ 20,000 fine. The standard range is from 63 months to 84 months based upon the attached stipulation as to my criminal history.

Offense Designations: Most Serious Offense[] Serious Violent[] Violent[] Non-Violent[] Sex[] Drug[] Traffic[] (check all that apply)

Count V: Forgery

Elements: 1) On or between 5/10/12 and 5/11/12 within Pierce County
2) did unlawfully with intent to injure or defraud
3) falsely make or complete a check, knowing the same to be offered as a true written instrument

This crime carries a maximum sentence of 22.5 years imprisonment and a \$ 50,000 22 fine. The standard range is from 22 months to 29 months based upon the attached stipulation as to my criminal history.

Offense Designations: Most Serious Offense[] Serious Violent[] Violent[] Non-Violent[] Sex[] Drug[] Traffic[] (check all that apply)

6. (b) (continued) Defendant is pleading guilty to these additional counts:

COUNT NO.	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancement for (F) Firearm, (D) Other Deadly Weapon, (V) VUCSA in protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, or (JP) Juvenile Present	TOTAL ACTUAL CONFINEMENT (standard range including enhancements)	STANDARD RANGE COMMUNITY CUSTODY (Only applicable for crimes committed on or after July 1, 2000. For crimes committed prior to July 1, 2000, see paragraph 6(f))	MAXIMUM PENALTY
<u>IV</u>	<u>63-84 mos</u>	<u>Ø</u>	<u>63-84 mos</u>	<u>Ø 12 mos</u>	<u>10 yrs / \$20,000</u>
<u>V</u>	<u>22-29 mos</u>	<u>Ø</u>	<u>22-29 mos</u>	<u>Ø</u>	<u>5 yrs / \$10,000</u>

ATTACHMENT "B"

0022

5101

1/16/2015

Case Name: State v. Bufalini Cause No: 13-1-01924-0

ATTACHMENT "B"

4. (b) (continued) Defendant is pleading guilty to these additional counts:

Count II: Possessing Stolen Property - Second Degree

Elements: 1) On or between 4/28/13 and 5/10/13 within Pierce County 2) did unlawfully and knowingly possess 3) stolen property 4) and withhold the property from the true owner

This crime carries a maximum sentence of 5 years imprisonment and a \$ 10,000 fine. The standard range is from 22 months to 29 months based upon the attached stipulation as to my criminal history.

Offense Designations: Most Serious Offense[] Serious Violent[] Violent[] Non-Violent[] Sex[] Drug[] Traffic[] (check all that apply)

Count III: Vehicle Prowling - Second Degree

Elements: 1) On or about 4/28/13 within Pierce County 2) did unlawfully with the intent to commit a crime therein 3) enter or remain unlawfully in a motor vehicle

This crime carries a maximum sentence of 364 ^{day jail} ~~years~~ imprisonment and a \$ 5000 fine. The standard range is from 0 ^{days} ~~months~~ to 314 ^{months} ~~days~~ based upon the attached stipulation as to my criminal history.

Offense Designations: Most Serious Offense[] Serious Violent[] Violent[] Non-Violent[] Sex[] Drug[] Traffic[] (check all that apply)

6. (b) (continued) Defendant is pleading guilty to these additional counts:

COUNT NO.	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancement for (F) Firearm, (D) Other Deadly Weapon, (V) VUCSA in protected zone, (VH) Vehicular Homicide, See RCW 46.61.520, or (JP) Juvenile Present	TOTAL ACTUAL CONFINEMENT (standard range including enhancements)	STANDARD RANGE COMMUNITY CUSTODY (Only applicable for crimes committed on or after July 1, 2000. For crimes committed prior to July 1, 2000, see paragraph 6(f))	MAXIMUM PENALTY
<u>II</u>	<u>22-29mos</u>	<u>Ø</u>	<u>22-29mos</u>	<u>Ø</u>	<u>5yrs/10,000</u>
<u>III</u>	<u>0-364 days</u>	<u>Ø</u>	<u>0-364 days</u>	<u>Ø</u>	<u>364 days/5,000</u>

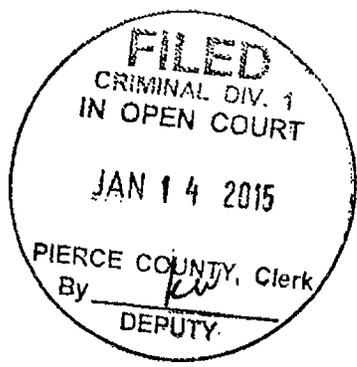
ATTACHMENT "B"

APPENDIX C

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13-1-01924-0 43950854 JDOSSG 01-15-15



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 13-1-01924-0

vs.

AS TO COUNT III ONLY

PAUL SAMUEL BUFALINI,

Defendant.

JUDGMENT AND SENTENCE

(Misd. and/or Gross Misd.)

Plea of Guilty

Found Guilty by Jury

Found Guilty by Court

SUSPENDED

DOB: 01/05/79
RACE: WHITE
SEX: MALE
AGENCY: WA02724
INCIDENT #: 131180857

This matter coming on regularly for hearing in open court on the 14th day of JANUARY, 2015, the defendant PAUL SAMUEL BUFALINI and HIS attorney BRETT A. PURTZER appearing, and the State of Washington appearing by Claire A Vitikainen Prosecuting Attorney for Pierce County, following a plea of guilty accepted by the court on the 9TH day of JANUARY, 2015.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That said Defendant is guilty of the crime(s) of VEHICLE PROWLING IN THE SECOND DEGREE, Charge Code: (G11), as charged in the AMENDED Information herein, and that HE shall be punished by confinement in the Pierce County Jail for a term of not more than ~~ONE YEAR~~ 300 days

() The State has pleaded and proved that the crime charged in Count(s) _____ involve(s) domestic violence.

Said sentence shall be (suspended) on the attached conditions of (suspended) sentence and that the Defendant pay the prescribed crime victim compensation penalty assessment as per RCW 7.68.035 in the amount of \$ 500 -.

The said Defendant is now hereby committed to the custody of the sheriff of aforesaid county to be detained.

Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.

Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

Bail is hereby exonerated.

Signed this 04 day of January, 2015 in the presence of said Defendant.

FRANK E. CUTHBERTSON

JUDGE

CERTIFICATE

Entered Jour. No. _____ Page No. _____ Department No. _____, this _____ day of _____,

I, _____, County Clerk and Clerk of the Superior Court of the State of Washington, in and for the County of Pierce, do hereby certify that the foregoing is a fully, true and correct copy of the judgment, sentence, and commitment in this cause as the name appears of record in my office.

WITNESS my hand and seal of said Superior Court this _____ day of _____,

County Clerk and Clerk of Superior Court.

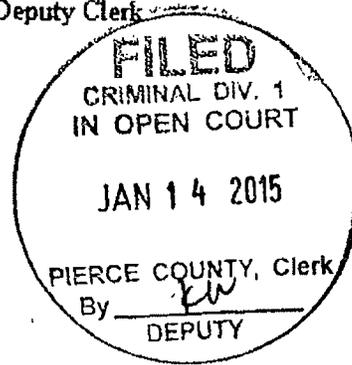
By _____
Deputy Clerk

Presented by:

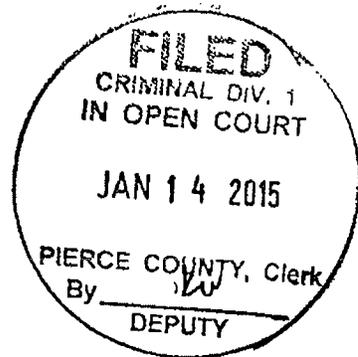
Claire A Vitikainen
Claire A Vitikainen
Deputy Prosecuting Attorney
WSB # 39987

Approved as to Form:

BRETT A. PURTZER
BRETT A. PURTZER
Attorney for Defendant
WSB# 17283



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 13-1-01924-0

vs.

PAUL SAMUEL BUFALINI,

CONDITIONS ON SUSPENDED SENTENCE

Defendant.

This matter coming on regularly for sentencing before the Honorable F. Culbertson, Judge, on the 14th day of JANUARY, 2015, and the Court having sentenced the defendant PAUL SAMUEL BUFALINI to the term of ONE YEAR for the crime(s) of VEHICLE PROWLING IN THE SECOND DEGREE and the Court having suspended that term, the Court herewith orders the following conditions and provisions:

1. () Termination date is to be _____ year(s) after date of sentence.
2. () The Defendant shall be under the charge of a probation officer employed by the Department of Corrections and follow implicitly the instructions of said Department, and the rules and regulations promulgated by the Department of Corrections for the conduct of the Defendant during the time of his/her probation herein.
- () That the Defendant be under the supervision of the Court (bench probation).
3. () Defendant will pay the following amounts to the Clerk of the Superior Court, Pierce County, Washington.
 - \$ _____ Attorney fees as reimbursement for a portion of the expense of his/her court appointed counsel provided by the Pierce County Department of Assigned Counsel. The court finds that the defendant is able to pay said fee without undue financial hardship.
 - \$ _____ Crime Victim Compensation penalty assessment per RCW 7.68.035;
 - \$ _____ Court Costs;
 - \$ _____ Fine;

File to Close on completion of jail time

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1/16/2015

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Imposed on felony JIS

\$ _____ Other: _____

\$ _____ Restitution to be forwarded to: _____

Restitution hearing set for _____

\$ _____ TOTAL payable at the rate of \$ _____ per month commencing _____

Revocation of this probation for nonpayment shall occur only if defendant wilfully fails to make the payments having the financial ability to do so or wilfully fails to make a good faith effort to acquire means to make the payment.

A notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the offender, if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed.

THE FINANCIAL OBLIGATIONS IMPOSED IN THIS JUDGMENT SHALL BEAR INTEREST FROM THE DATE OF THE JUDGMENT UNTIL PAYMENT IN FULL, AT THE RATE APPLICABLE TO CIVIL JUDGMENTS. RCW 10.82.090. AN AWARD OF COSTS ON APPEAL AGAINST THE DEFENDANT MAY BE ADDED TO THE TOTAL LEGAL FINANCIAL OBLIGATIONS. RCW 10.73.

Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.

Further Conditions as follows:

*Count III: 364 / 0 suspended, CRTS to be determined by DOC
file to close on completion of jail time*

IT IS FURTHER ORDERED that, upon completion of any incarceration imposed the defendant shall be released from the custody of the Sheriff of Pierce County and report to the authorized Probation Officer of this district, to receive his instructions: Bail is hereby exonerated.

[] PURSUANT TO 1993 LAWS OF WASHINGTON, CHAPTER 419, IF THIS OFFENDER IS FOUND TO BE A CRIMINAL ALIEN ELIGIBLE FOR RELEASE AND DEPORTATION BY THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, SUBJECT TO ARREST AND RE-INCARCERATION IN ACCORDANCE WITH THIS LAW, THEN THE UNDERSIGNED JUDGE AND PROSECUTOR CONSENT TO SUCH RELEASE AND DEPORTATION PRIOR TO THE EXPIRATION OF THE SENTENCE.

DONE IN OPEN COURT this 14 day of June 2015

[Handwritten Signature]

JUDGE

Presented by:

[Handwritten Signature]

Claire A Vitikainen
Deputy Prosecuting Attorney
WSB # 39987

FRANK E. CUTHBERTSON

FILED
CRIMINAL DIV. 1
IN OPEN COURT
JAN 14 2015
PIERCE COUNTY, Clerk
By *KW*
DEPUTY

Approved as to Form:

[Handwritten Signature]

BRETT A. PURTZER
Attorney for Defendant
WSB # 17283

[Handwritten Signature]

PAUL SAMUEL BUFALINI
Defendant

nmrk

APPENDIX D



**WORK RELEASE NOTICE OF ALLEGATIONS,
HEARING, RIGHTS, AND WAIVER**

Offender Name BUFALINI, Paul	DOC # 306464	Date 12/13/16	Present Location WCC
CCO Name Kelly Dean Facility PHWR	Present Custody Status MI1 Present Custody Score 72		
Infraction(s) alleged: (Include Infraction # Behavior/Date) 752 - Receiving a positive test for use of unauthorized drugs, alcohol, or other intoxicants on/before 12/11/16.			
Hearing Date 12/20/16	Time 2:30 TSD	<input type="checkbox"/> a.m. <input checked="" type="checkbox"/> p.m.	Location WCC

You have been charged with violating work release rules/conditions. You have the following rights:

- ◆ To receive written notice of the alleged violations not less than twenty-four hours (24) prior to the hearing unless notice is waived in writing by you.
- ◆ To, in preparation for the hearing, ask the hearing officer that certain department or contract staff members, other work release offender, and other persons be present as witnesses at the hearing. The hearing officer shall grant such request if it is determined by the hearing officer that to do so would not be unduly hazardous to the work/training release facility's safety or correctional goal: Provided, however, limitations may be made by the hearing officer if the information to be presented by the witnesses is deemed to be irrelevant, duplicative, or unnecessary to the adequate presentation of your case.
- ◆ To be present at all stages of the hearing, except during deliberation in appropriate circumstances.
- ◆ To have an electronically recorded hearing conducted within eight (8) working days of suspension of your work/training release plan unless a longer time is approved by the Hearings Administrator or their designee.
- ◆ To present documentary evidence and to call witnesses approved by the hearing officer.
- ◆ To have a neutral and detached hearing officer conduct your hearing.
- ◆ To present your own case to the hearing officer. If there is a language or communications barrier, the hearing officer shall appoint an advisor.
- ◆ To confront and cross-examine only those witnesses appearing and testifying at the hearing at the discretion of the hearing officer.
- ◆ To testify during the hearing or remain silent. Your silence will not be held against you.
- ◆ To admit to any or all of the allegations. This may limit the scope of the hearing.
- ◆ To waive your right to a hearing by signing an admission of the allegation and request that the hearing be dispensed with entirely or limited only to questions of disposition.
- ◆ To receive a written Hearing and Decision Summary including the evidence presented, a finding of guilty or not guilty, the sanctions imposed, and the reasons to support the findings of guilt and the sanction imposed immediately following the hearing or, in the event of a deferred decision, within two (2) working days.
- ◆ To receive a copy of the full Department of Corrections Hearing Report.
- ◆ To appeal to the Regional Appeals Panel, in writing, within seven (7) calendar days of your receipt of the Hearing and Decision Summary.
- ◆ To obtain a copy of the audio recording of the hearing by requesting it in writing at the address below. To waive any or all of the above rights.

DOC REGIONAL APPEALS PANEL
1016 So. 28th ST. 3rd Floor
Tacoma WA 98409

Admission to Allegations

I admit to the following allegations:

APPENDIX E



HEARING AND DECISION SUMMARY REPORT

Release from DOC Custody/Confinement: Yes No (See Confinement Order DOC 09-238)

Offender Name (Last, First) <i>Latelini Paul</i>	DOC # <i>308464</i>	RLC <i>HV</i>	Date of Birth <i>1/5/79</i>
Cause Number(s) <i>131019240</i>			

Offender Status CCI CCP CCJ CCM CPA DOSA W/R FOS
 Misdemeanor/Gross Misdemeanor

Date of Hearing *12/15/16* Location of Hearing *WCC*

CCO Name *CCO Kelly Dean*

Other Participants _____

Waived Appearance Yes No
 Competency Concern Yes No
 Waived 24 Hour Notice Yes No
 Interpreter/Staff Assistant Yes No
 Jurisdiction Confirmed Yes No
 Appeal Form Provided Yes No

Preliminary Matters: *None reported*

ALLEGATIONS	PLEA	FINDING Guilty/Not Guilty Probable Cause Found
<i>D# 252 2/12 12/11/16</i>	<i>NG</i>	<i>Guilty</i>

EVIDENCE RELIED UPON (LIST):

J&S Notice of Allegation, Hearing, Rights and Waiver form Report of Alleged Violations
 Conditions, Requirements, and Instructions form Chronological Reports CCO Testimony
 Offender Testimony Negotiated Sanction Other (listed below):

Distribution: Original – Hearing File, Copy – Offender, Field File, Receiving/Retaining Facility



HEARING AND DECISION SUMMARY REPORT

SUMMARY OF FACTS PRESENTED/ REASONS FOR FINDINGS:

P stated not guilty to the listed allegation. P claimed using any substance, P stated he has been clean and sober for years and would not be willing to mess up his recovery. P puts himself guilty based on the testimony provided at the time of the hearing.

SANCTIONS AND REASONS FOR SANCTION:

Termination of the WRI status and 2 weeks loss of good conduct time.

- **Obey all Facility Rules
- **Comply with CCO, CCS, and Hearing Officer directives
- **Report in Person to CCO Within one Business Day of Release

Offender Name (Last, First):	DOC #
D. L. [unclear]	306469

Offender Signature	Date
[Signature]	12/20/16

Hearing Officer Signature	Hearing Officer Name (Print)
[Signature]	S. Jackson

The contents of this document may be eligible for public disclosure. Social Security Numbers are considered confidential information and will be redacted in the event of such a request. This form is governed by Executive Order 00-03, RCW 42.56, and RCW 40.14.

APPENDIX F



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
 P.O. BOX 41100 • Olympia, Washington 98504-1100
APPEALS PANEL DECISION

FROM: DOC Appeals Panel

TO: Bufalini, Paul

DOC #: 306464

Date: January 9, 2017

On December 20, 2016, you were either sanctioned to 1-3 days of confinement or a hearing was conducted for violations of your conditions of supervision/custody.

On or about 12-23-16, your appeal was received in which you requested a review of a sanction or decision of the Hearing Officer. Your appeal is based on:

- A procedural issue.
- A jurisdictional issue.
- The finding of guilt.
- The sanction imposed.

The Hearings Panel has reviewed your appeal request. The Panel has reviewed the Discovery material and listened to the recording of the hearing, **AND THEREFORE** the decision is to:

- Affirm the process and decision.
- Modify the sanction as stated below.
- Remand for a hearing. You will be notified of the hearing date.
- Reverse the hearing decision.
- Vacate the violation process.

Comments: Mr. Bufalini, you appealed your hearing based on the adverse finding. You argue you are not guilty, the cup is not 100% accurate and imply it should be sent to the lab. Further you have not been in trouble for 2 years so why would someone jeopardize their sentence with 2 weeks left. Your remedy is to maintain your sentence.

In reviewing the evidence and recording the panel found that the Hearing Officer acted in a fair and impartial manner when entering your finding. The Hearing Officer appropriately weighed the evidence provided and contrary to your plea, the most persuasive evidence was the urinalysis test collected which resulted in a positive test for a controlled substance. The evidence supports the proper protocol and policy along with a witness observation validated the result. There was no requirement for further testing as existing policy regarding the accuracy of the urinalysis test supports this finding. The appeal panel affirms the finding and subsequent sanction as it was within the disciplinary sanction guidelines.

Jeff Mayeda

Jeff Mayeda, DOC Appeals Panel Member

1-9-17

Date

Carol S. Nickerson

Carol S. Nickerson, DOC Appeals Panel Member

1-9-17

Date

APPENDIX G

LAW OFFICES OF
DAVID A. BUFALINI
A PROFESSIONAL SERVICE CORPORATION

DAVID A. BUFALINI

DEBBIE J. CROWL
Paralegal / Claims Negotiator

KIMBERLY VORHEIS
Legal Assistant / Claims Negotiator

ANJULI PRADHAN
Litigation Paralegal

2107 N. 30th Street
Tacoma, Washington 98403-3318

Telephone (253) 272-2100
Facsimile (253) 272-9988
www.bufalinilaw.com

February 3, 2017

Department of Corrections
Deputy Secretary
PO BOX 41100
Mail Stop 41100
Olympia, WA 98504-1100

Re: Paul Bufalini
DOC #306464

Dear Sir:

I am writing on behalf of my son Paul Bufalini, Washington DOC#306464. I have enclosed Mr. Bufalini's Notice of Appeal of the sanctions hearing that took place on January 31, 2017. There are a number of irregularities and inconsistencies that should be considered.

By way of history, Paul was granted a DOSA sentence in Pierce County Superior Court in January, 2015. He was incarcerated at Olympic Corrections Center until released in early August, 2016. At that time he was placed in Progress House in Tacoma, where he was nearing completion of all of his required counseling and class work. I believe he was only two classes away from successfully completing that part of his sentencing requirement. He secured full-time employment shortly after arriving at Progress House and worked without missing any days until the events of December 17, 2016.

On that Sunday I picked Paul up for our regular weekend social visits. I had picked Paul up every Saturday and Sunday after he was placed at Progress House and became eligible for social visits. Our routine was the same each time and December 17th was no different. After picking Paul up we drove straight to the family home in University Place. Once there we never left until it was time to return Paul to Progress House. We never had visitors during the times Paul was there. We never left the home. Paul did not have access to any street or prescription drugs while at our home.

Paul submitted to a random over-the-counter urine test when he returned the evening of December 17th. He was told that he had tested positive for a benzodiazepam. Later he was told he had tested positive for an opiate. Paul was shocked, as was I, knowing that he had been in my presence while at our home both Saturday and Sunday. He asked to be re-tested immediately. He was

denied the re-test. I found out after speaking to his counselor the following day that his urine specimen had been discarded, and that Paul's request and my request for a lab analysis of his sample be conducted.

The test kits indicate that the results are preliminary and should be submitted to a lab for verification. Despite this disclaimer Progress House does not preserve the samples. Considering the consequences if a test is positive, i.e., loss of personal freedom and in Paul's case revocation of his DOSA status and incarceration for another two years, it is in my view a violation of Paul's due process rights to confront witnesses who offer evidence against him. A lab test would at a minimum allowed Paul to challenge the opinion of the lab technician who tested the sample. Paul lost that basic right of an accused.

Paul was advised of the revocation of his DOSA status verbally by his counselor at Shelton on approximately January 17th. His hearing had occurred weeks prior but he had never received notice of the decision until after his appeal period had expired. I had brought this to the attention of DOC in Olympia and received the enclosed undated letter on February 1st advising that, in fact, no revocation decision had been made and that a hearing was going to take place yesterday, January 31st. Since Paul had been verbally advised by his counselor two weeks earlier that his DOSA had been revoked and given his new release date in February, 2019, the enclosed letter's author, Mr. Mayeda, was either uninformed, or being less-than-honest in his representation that no DOSA revocation decision had been made. Either way, this reflects poorly on DOC and its' handling of Paul's case.

Paul had no idea that there was going to be a hearing on January 31st until that day. The "hearing" lasted mere minutes and was simply to advise him that his DOSA had been revoked. At no time prior to or at the time of any of the hearings Paul has attended has he been advised of his right to request the presence of counsel, or that DOC in the face of such a request would consider the particular circumstances of his case and make a determination of his right to counsel. I believe DOC's failure in that regard violated Paul's due process rights under both the Federal and State constitutions. That right was established in *Grisby v. Herzog*, 190 Wash.App. 786 (Wash.App. Div. 1,2015). I believe the decision entitled Paul to the representation of counsel at his DOSA revocation hearing. He was in community custody at the time of the alleged violation of his DOSA conditions. Relevant language from that decision is as follows:

The rationale of *Scarpelli* is not that an attorney becomes valuable only in a hearing that focuses on the offender's potential for rehabilitation. Under *Scarpelli*, **if a convicted offender faces an allegation that might result in a return to prison after he has been released to the community, the hearing authority *must* evaluate a request for counsel on a case-by-case basis.** The case-by-case evaluation requirement is imposed because there are occasions when, by virtue of the offender's individual circumstances, he would be deprived of procedural due process if counsel were not appointed to present his case. See *Scarpelli*, 411 U.S. at 783–85, 93 S.Ct. 1756 (discussing rehabilitation), 786–90, 93 S.Ct. 1756 (discussing case-by-case evaluation).

Grisby v. Herzog, 362 P.3d 763, 771, 190 Wash.App. 786, 805 (Wash.App. Div. 1,2015).;

In light of the fact that the sanction range included incarceration for an additional two years, the right to counsel applied to Mr. Bufalini's hearing. Since he was unaware of his right to counsel, his failure to make that specific request should not constitute a waiver of his right to counsel. He cannot waive a right he was unaware of.

Paul had successfully completed 99% of the DOSA sentencing terms. His entire time at Olympic Corrections Center and at Progress House until the positive preliminary urinalysis result was without incident or any violations. Revocation of his DOSA status, particularly in light of the fact that it was based solely on an over-the-counter urinalysis that the manufacturer disclaims as accurate without lab analysis verification is patently unfair and unreasonable, and would seem to defeat the underlying purpose of and policy reasons for the DOSA sentencing alternative.

I am asking you to intervene on behalf of Paul, and to investigate the circumstances that have led to his current incarceration at Shelton, the revocation of his DOSA status, and his new release date in February, 2019. I know from my practice experience that routine urinalysis and blood tests results based on tests performed in a hospital setting are not admissible in criminal prosecutions, and that only specific lab analysis results are deemed admissible against the accused. The consequences are the same here – loss of personal liberty for two additional years. There is something terribly wrong if the results in Paul's case, and in the cases of others similarly situated, are allowed to stand. I am hoping that one or both of you will investigate on Paul's behalf, and if possible, secure his return to the DOSA program he was so close to successfully completing. Thank you.

Very truly yours,

David A. Bufalini

David A. Bufalini
dbufalini@bufalinilaw.com

DB/ksv

APPENDIX H



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
Hearings Unit

P.O. Box 41103, Olympia, WA 98501-1103

February 8, 2017

8812
360-725-8586

David Bufalini
Attorney at Law
210, 1st Street
Tacoma, WA 98403-3318

I'm writing in response to your letter dated February 3, 2017. You request the Department of Corrections investigate the circumstances leading to your son, Paul Bufalini, DOC 306464, incarceration and revocation of his Drug Offender Sentence Alternative status, and his new release date in February 2019.

I've reviewed Paul's hearing and sanction imposed on January 31, 2017. His hearing is remanded. A new hearing will be scheduled immediately and he will be notified.

Sincerely,

Dominga Soliz,
Hearing Administrator

cc: Electronic File
Paul Bufalini

Email:

DOMINGA.SOLIZ@
DOC.WA.GOV.

APPENDIX I

LAW OFFICES OF
DAVID A. BUFALINI

A PROFESSIONAL SERVICE CORPORATION

DAVID A. BUFALINI

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KIMBERLY VORHEIS
Legal Assistant / Claims Negotiator

ANJULI PRADHAN
Litigation Paralegal

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February 16, 2017

Dominga Soliz
Hearing Administrator
Department of Corrections
Hearing Unit
PO Box 41103
Olympia WA 98501-1103

Re: Paul Bufalini
DOC #306464

Dear Ms. Domingo:

I received your letter dated February 8, 2017 regarding Paul Bufalini. Thank you for agreeing to remand the matter for review of the circumstances relating to Paul's incarceration and his revocation hearing and resulting sanction. Part of the issue was Paul's request for the assistance of counsel. I want to participate in the remand hearing and am requesting permission to do so. My wife's father and Paul's grandfather, Pat Olsen, passed away yesterday. This follows the death of his wife, Joan Olsen, last month. I have a conflict next Tuesday, February 21st, on a legal matter that I simply cannot reschedule. It involves three parties traveling from out-of-state, two of whom are already here. The third will fly in tomorrow. Thousands of dollars in travel expenses have been incurred and cannot be recaptured.

In addition, the family is making arrangements for Mr. Olsen's memorial service, which will likely be next week sometime. The exact date is uncertain. Please consider my request that Paul's remand hearing be schedule the week of February 27th. I apologize for any inconvenience this may cause to the involved parties, but am asking for this accommodation so that the issues surrounding Paul's case can get a full and fair hearing on the merits, and the issues resolved on that basis. Thank you.

Very truly yours,

David A. Bufalini

David A. Bufalini
dbufalini@bufalinilaw.com

APPENDIX J



APPEAL OF A DEPARTMENT VIOLATION PROCESS

Offender Name: Paul Botalini DOC #: 306464 Arrest/Hearing Date: 3-1-17

Mailing Address for Response:

City: State: Zip:

CCO/Hearing Officer: Ackerman Location/Jail: WCC

PLEASE CHECK THOSE THAT APPLY TO YOUR APPEAL (Please note you must specifically identify a problem with one or more of the below listed reasons to appeal).

I am appealing based on:

- A procedural issue
A jurisdictional issue
The finding of guilt
[X] The sanction imposed

Describe the reason(s) and/or provide any additional evidence to support your appeal.

SEE ATTACHED

If my appeal is granted, the desired outcome is:

(Please note the outcome must be something that the Department can provide. For example, the Department cannot change jail policies or procedures.)

1 RE-ADMIT TO DOSA to complete
2 RELEASE FROM CUSTODY SINCE PASC ORIGINAL RELEASE DATE

This appeal must be in writing and postmarked or hand-delivered to the address listed below within 7 days of your sanction being imposed. The Department will respond to your appeal within 15 business days of its receipt of your appeal. Sanctions are NOT STAYED pending the outcome of an appeal.

APPEALS PANEL
P.O. Box 41103
Olympia, WA 98504-1103

NOTE: You have a right to file a personal restraint petition under court rules after the final decision of the Department.

The contents of this document may be eligible for public disclosure. Social Security Numbers are considered confidential information and will be redacted in the event of such a request. This form is governed by Executive Order 00-03, RCW 42.56, and RCW 40.14.

APPENDIX K



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
P.O. BOX 41100 • Olympia, Washington 98504-1100
APPEALS PANEL DECISION

FROM: DOC Appeals Panel

TO: Mr. Paul Bufalini

DOC #: 306464

Date: 4/4/17

On 3/1/17, you were either sanctioned to 1-3 days of confinement or a hearing was conducted for violations of your conditions of supervision/custody.

On 3/7/17, your appeal was received in which you requested a review of a sanction or decision of the Hearing Officer. Your appeal is based on:

- A procedural issue.
- A jurisdictional issue.
- The finding of guilt.
- The sanction imposed.

The Hearings Panel has reviewed your appeal request. The Panel has reviewed the Discovery material and listened to the recording of the hearing, **AND THEREFORE** the decision is to:

- Affirm the process and decision.
- Modify the sanction as stated below.
- Remand for a hearing. You will be notified of the hearing date.
- Reverse the hearing decision.
- Vacate the violation process.

Comments: Mr., Bufalini, this Appeals Panel reviewed the correspondence received and the audio recording of your 2/22/17 and 3/1/17 hearings that were conducted at the Washington Corrections Center (WCC) in Shelton, Wa. To begin, originally you had a work release hearing on 12/20/16 where you were found guilty of controlled substance use. As a result of this hearing, you were terminated from work release and subsequently terminated from chemical dependency treatment. At your 1/4/17 hearing, your DOSA was revoked after you were found to be guilty of a #762 infraction. You had also appealed your 12/20/16 work release hearing and the decision of that hearing had been upheld by an appeals panel.

On 2/8/17, the Hearings Administrator sent correspondence to your father, David Bufalini, indicating that your 1/31/17 hearing had been reviewed and you would be remanded for a new hearing process as a result. On 2/22/17, your remanded hearing took place with another Hearing Officer and a determination was made at that process that you would not be granted representation by counsel for this hearing based on your understanding of the hearing process and ability to defend yourself against the #762 allegation. There was also mention by your father, via telephonic testimony, that the Hearings Administrator indicated in her 2/8/17 correspondence that there was to be a DOC investigation of the circumstances leading to your incarceration. The letter actually states that an investigation leading to your incarceration was requested by your father, not that she was ordering an investigation. Your 2/22/17 hearing was continued on 3/1/17 to give the Hearing Officer an opportunity to speak with the Hearings Administrator regarding the scope of your hearing. The scope of your hearing was determined to look at the DOSA revocation that took place on 1/4/17. At the conclusion of your 3/1/17 remanded hearing, the Hearing Officer made the decision to revoke the DOSA based on RCW 9.94A.662(3). According to RCW 9.94A.662(3), "an offender who fails to complete the program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court". If someone is terminated from DOSA chemical dependency treatment, revocation of the DOSA is mandatory per the previously stated RCW.

This panel agrees with the decision made by the Hearing Officer and there will be no modifications made to the imposed sanction of DOSA revocation. There were also no noted procedural issues on the part of the Hearing Officer

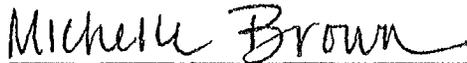
which indicates that the reviewed processes were conducted properly. This panel did not review the 12/20/16 hearing because that process had previously been appealed and the decision was upheld by an Appeals Panel.



Reco Rowe, DOC Appeals Panel Member

4/4/17

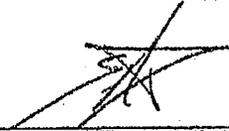
Date



Michelle Brown, DOC Appeals Panel Member

4/4/17

Date



Eric Petersen, DOC Appeals Panel Member

4/4/17

Date

Distribution: ORIGINAL - Hearing File COPY - Offender, Central or Field File via CCO, Hearing Officer, Hearing Supervisor, Work Release Supervisor, Imaging System

APPENDIX L

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category A - 20 classification points

VIOLATION	SANCTION
501 Committing homicide	Loss of up to 75 days good conduct time credits
502 Committing aggravated assault against another offender	
507 Committing an act that would constitute a felony and that is not otherwise included in these rules	Loss of 76 to 150 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
511 Committing aggravated assault against a visitor or community member	
521 Taking or holding any person hostage	
550 Escaping	Loss in excess of 150 days requires Assistant Secretary approval
601 Possessing, manufacturing, or introducing an explosive device or any ammunition, or any components thereof	
602 Possessing, manufacturing, or introducing any firearm, weapon, sharpened instrument, knife, or poison, or any component thereof	
603 Introducing or transferring any unauthorized drug or drug paraphernalia	
604 Committing aggravated assault against a staff member	
611 Committing sexual assault against a staff member	
613 Committing an act of sexual contact against a staff	
635 Committing sexual assault against another offender, as defined in Department policy (i.e., aggravated sexual assault or offender-on-offender sexual assault)	
637 Committing sexual abuse against another offender, as defined in Department policy	
650 Rioting, as defined in RCW 9.94.010	
651 Inciting others to riot, as defined in RCW 9.94.010	
830 Escaping from work/training release with voluntary return within 24 hours	
831 While in work/training release, failing to return from an authorized sign out	
882 While in Prison, introducing, possessing, or using a cell phone, electronic/wireless communication device, or related equipment without authorization	

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category B - 15 classification points

LEVEL 1

VIOLATION		SANCTION
633	Assaulting another offender	Loss of up to 60 days good conduct time credits
704	Assaulting a staff member	Loss of 61 to 120 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval Loss in excess of 120 days requires Assistant Secretary approval

Category B - 10 classification points

LEVEL 1

VIOLATION		SANCTION
504	Engaging in a sex act with another person(s) within the facility that is not otherwise included in these rules, except in an approved extended family visit	Loss of up to 60 days good conduct time credits
553	Setting a fire	Loss of 61 to 120 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
560	Possessing items or materials likely to be used in an escape without authorization	Loss in excess of 120 days requires Assistant Secretary approval
711	Assaulting a visitor or community member	
744	Making a bomb threat	
884	Urinating, defecating, or placing feces or urine in any location other than a toilet or authorized receptacle	
886	Adulterating any food or drink	
892	Giving, selling, or trading any prescribed medication, or possessing another offender's medication	

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category B - 10 classification points

LEVEL 2

VIOLATION	SANCTION
505 Fighting with another offender	Loss of up to 60 days good conduct time credits
556 Refusing to submit to or cooperate in a search when ordered to do so by a staff member	Loss of 61 to 120 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
607 Refusing to submit to a urinalysis and/or failing to provide a urine sample within the allotted time frame when ordered to do so by a staff member	
608 Refusing or failing to submit to a breath alcohol test or other standard sobriety test when ordered to do so by a staff member	Loss in excess of 120 days requires Assistant Secretary approval
609 Refusing or failing to submit to testing required by policy, statute, or court order, not otherwise included in these rules, when ordered to do so by a staff member	
652 Engaging in or inciting a group demonstration	
655 Making any drug, alcohol, or intoxicating substance, or possessing ingredients, equipment, items, formulas, or instructions that are used in making any drug, alcohol, or intoxicating substance	
682 Engaging in or inciting an organized work stoppage	
707 Introducing or transferring alcohol or any intoxicating substance not otherwise included in these rules	
716 Using an over the counter medication without authorization or failing to take prescribed medication as required when administered under supervision	
736 Possessing, manufacturing, or introducing an unauthorized keys or electronic security access device	
750 Committing indecent exposure	
752 Possessing or receiving a positive test for use of an unauthorized drug, alcohol, or intoxicating substance	
778 Providing a urine specimen that has been diluted, substituted, or altered in any way	

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category B - 10 classification points

LEVEL 3

VIOLATION	SANCTION
503 Extorting or blackmailing, or demanding or receiving anything of value in return for protection against others or under threat of informing	Loss of up to 60 days good conduct time credits
506 Threatening another with bodily harm or with any offense against any person or property	Loss of 61 to 120 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
509 Refusing a direct order by any staff member to proceed to or disperse from a particular area	
525 Violating conditions of a furlough	Loss in excess of 120 days requires Assistant Secretary approval
549 Providing false or misleading information during any stage of an investigation of sexual misconduct, as defined in Department policy	
558 Interfering with staff members, medical personnel, firefighters, or law enforcement personnel in the performance of their duties	
600 Tampering with, damaging, blocking, or interfering with any locking, monitoring, or security device	
605 Impersonating any staff member, other offender, or visitor	
653 Causing an inaccurate count or interfering with count by means of unauthorized absence, hiding, concealing oneself, or other form of deception or distraction	
654 Counterfeiting or forging, or altering, falsifying, or reproducing any document, article of identification, money, or security, or other official paper without authorization	
660 Possessing money, stamps, or other negotiable instruments without authorization, the total value of which is five dollars or more	
709 Out-of-bounds: Being in another offender's cell or being in an area in the facility with one or more offenders without authorization	
738 Possessing clothing or assigned equipment of a staff member	
739 Possessing, transferring, or soliciting any person's identification information, including current staff members or their immediate family members, when not voluntarily given. Identification information includes Social Security numbers, home addresses, telephone numbers, driver's license numbers, medical, personnel, financial, or real estate information, bank or credit card numbers, or other like information not authorized by the Superintendent	
745 Refusing a transfer to another facility	
746 Engaging in or inciting an organized hunger strike	
762 Failing to complete or administrative termination from a DOSA substance abuse treatment program. Note: This violation must be initiated by authorized staff and heard by a Community Corrections Hearing Officer in accordance with chapter 137-24 WAC	

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category B - 10 classification points

LEVEL 3

VIOLATION

777	Causing injury to another person by resisting orders, assisted movement, or physical efforts to restrain	Loss of up to 60 days good conduct time credits
813	Being in the community without authorization, or being in an unauthorized location in the community	Loss of 61 to 120 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
814	While in work/training release, violating an imposed special condition	
879	Operating or being in a motor vehicle without permission or in an unauthorized manner or location	Loss in excess of 120 days requires Assistant Secretary approval
889	Using facility phones, information technology resources/systems, or related equipment without authorization	

Category C - 5 classification points

LEVEL 1

VIOLATION

SANCTION

508	Spitting or throwing objects, materials, or substances in the direction of another person(s)	Loss of up to 30 days good conduct time credits
557	Refusing to participate in an available work, training, education, or other mandatory programming assignment	Loss of 31 to 60 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
563	Making a false fire alarm or tampering with, damaging, blocking, or interfering with fire alarms, fire extinguishers, fire hoses, fire exits, or other firefighting equipment or devices	
610	While in Prison, receiving or possessing prescribed medication without authorization	Loss in excess of 60 days requires Assistant Secretary approval
620	Receiving or possessing contraband during participation in off-grounds or outer perimeter activity or work detail	
659	Committing sexual harassment against another offender, as defined in Department policy	
661	Committing sexual harassment against a staff member, visitor, or community member	
663	Using physical force, intimidation, or coercion against any person	
702	Possessing, manufacturing, or introducing an unauthorized tool	
708	Organizing or participating in an unauthorized group activity or meeting	
717	Causing a threat of injury to another person by resisting orders, assisted movement, or physical efforts to restrain	
720	Flooding a cell or other area of the facility	
724	Refusing a cell or housing assignment	

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category C - 5 classification points

LEVEL 1

VIOLATION	SANCTION
734 Participating or engaging in the activities of any unauthorized club, organization, gang, or security threat group; or wearing or possessing the symbols of an unauthorized club, organization, gang, or security threat group	Loss of up to 30 days good conduct time credits
810 Failing to seek/maintain employment or training or maintain oneself financially, or being terminated from work, training, education, or other programming assignment for negative or substandard performance	Loss of 31 to 60 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
893 Damaging, altering, or destroying any item that results in the concealment of contraband or demonstrates the ability to conceal contraband	Loss in excess of 60 days requires Assistant Secretary approval
896 Harassing, using abusive language, or engaging in other offensive behavior directed to or in the presence of another person(s) or group(s) based upon race, creed, color, age, sex, national origin, religion, sexual orientation, marital status or status as a state registered domestic partner, disability, veteran's status, or genetic information	
899 Failing to obtain prior written authorization from the sentencing court, contrary to RCW 9.94A.645, prior to commencing or engaging in any civil action against any victim or family of the victim of any serious violent crime the offender committed	

Category C - 5 classification points

LEVEL 2

VIOLATION	SANCTION
552 Causing an innocent person to be penalized or proceeded against by providing false information	Loss of up to 20 days good conduct time credits
554 Damaging, altering, or destroying any item that is not the offender's personal property, the value of which is ten dollars or more	Loss of 21 to 40 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
710 Acquiring an unauthorized tattoo/piercing/scar, tattooing/piercing/scarring another, or possessing tattoo/piercing/scarring paraphernalia	
718 Using the mail, telephone, or electronic communications in violation of any law, court order, or previous written warning, direction, and/or documented disciplinary action	Loss in excess of 40 days requires Assistant Secretary approval
726 Telephoning, sending written or electronic communication, or otherwise initiating communication with a minor without the approval of that minor's parent or guardian	

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category C - 5 classification points

LEVEL 3

VIOLATION	SANCTION
606 Possessing, introducing, or transferring any tobacco, tobacco products, matches, or tobacco paraphernalia	Loss of up to 10 days good conduct time credits
657 Being found guilty of four or more general violations arising out of separate incidents within a 90-day period	Loss of 11 to 20 days good conduct time credits requires Superintendent/Community Corrections Supervisor approval
658 Failing to comply with any administrative or post-hearing sanction imposed for committing any violation	
812 Failing to report/turn in all earnings	Loss in excess of 20 days requires Assistant Secretary approval

Category D - 5 classification points

VIOLATION

VIOLATION	SANCTION
517 Committing an act that would constitute a misdemeanor and that is not otherwise included in these rules	No loss of good conduct time credits
551 Providing false information to the hearing officer or in a disciplinary appeal	No segregation
555 Stealing property, possessing stolen property, or possessing another offender's property	
559 Gambling or possessing gambling paraphernalia	
656 Giving, receiving, or offering any person a bribe or anything of value for an unauthorized favor or service	
662 Soliciting goods or services for which the provider would expect payment, when the offender knows or should know that he/she lacks sufficient funds to cover the cost	
706 Giving false information when proposing a release plan	
714 Giving, selling, purchasing, borrowing, lending, trading, or accepting money or anything of value except through approved channels, the value of which is ten dollars or more	
725 Telephoning or sending written or electronic communication to any offender in a correctional facility, directly or indirectly, without prior written approval of the superintendent/community corrections supervisor/designee	
728 Possessing any sexually explicit material(s), as defined in WAC 137-48-020	
740 Committing fraud or embezzlement, or obtaining goods, services, money, or anything of value under false pretense	
741 Stealing food, the value of which is five dollars or more	

DISCIPLINARY SANCTION TABLE FOR PRISON AND WORK RELEASE

Category D - 5 classification points

VIOLATION		SANCTION
742	Establishing a pattern of creating false emergencies by feigning illness or injury	No loss of good conduct time credits
755	Misusing or wasting issued supplies, goods, services, or property, the replacement value of which is ten dollars or more	No segregation
811	Entering into an unauthorized contract	
861	Performing or taking part in an unauthorized marriage	
890	Failing to follow a medical directive and/or documented medical recommendations, resulting in injury	

No. _____

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Personal Restraint of

PAUL BUFALINI,

Petitioner.

PETITIONER UNDER RESTRAINT OF A JUDGMENT OF THE
PIERCE COUNTY SUPERIOR COURT,
The Honorable Frank E. Cuthbertson

**DECLARATION OF PAUL BUFALINI IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

1. My name is Paul Samuel Bufalini. I am the Petitioner above-named. I am over the age of eighteen (18) years and would be competent to testify to the matters stated herein. I make this declaration based on my personal knowledge.

2. On the date that it is claimed that my random urine sample given at Progress House in Tacoma tested positive for opiates, I had spent the entire day at my parents' home in University Place, after being picked up by my father at Progress House. We went straight from Progress House to my parents' home, with no stops in-between.

After arriving at my parents' home I spent the day watching football with my dad, or visiting with my mother. WE had no visitors. We ate dinner. Afterwards, I developed a headache. I was hesitant to take even over-the-counter medications because I was concerned about how it might affect my urine in the event I was asked to give a urine sample when I got back to Progress House. My parents believed that it was safe for me to take something for my headache and gave me two (2) Aleve. Several hours later my dad took me back to Progress House. We made no stops during that trip.

3. When I checked back in at Progress House I was told to give a urine sample for testing. I peed into the little plastic cup that comes with the test kit. The person administering the test looked at the cup and shook it several times. To my disbelief he told me that I had tested positive. I do not recall if he identified the drug I allegedly tested positive for.

4. I immediately requested a re-test, using a different cup. My request was denied. The sample was marked and I thought that it was going to be sent off for formal laboratory testing. To my knowledge it never has been. I have asked a number of times if the sample still exists but have never gotten an answer. I believe the manufacturer of the test kit provides shipping materials and instructions with each kit. I saw the test giver put my sample in an envelope. I have no idea what happened to it after that.

5. I was transported to the prison in Shelton early the next morning. Within days I was scheduled for a hearing to determine if I have violated the terms of my DOSA sentence. The day before the hearing I was provided "discovery." I met with a DOC employee, I believe his name was Lauren or Loren, I'm not sure of the spelling. At that time I asked him if I was entitled to be represented by an attorney at the first hearing, since I was possibly facing two years of prison time if I was found guilty. I was told that I was not entitled to an attorney at that first hearing. I assumed that the person I spoke to the day before knew the rules and would know if I was entitled to counsel. I took his word for it and assumed that I did not have the right to have an attorney present at the violation hearing. For that reason I never raised the issue of counsel at the first hearing. It was only later that I found out I apparently did have the right to request a determination of my eligibility to be represented by counsel at the first hearing. I began to raise the issue with DOC, as did my father, who is an attorney, at every hearing.

6. Eventually, DOC remanded my third hearing for re-hearing, specifically to determine if my case was one that justified me having an attorney. On remand the hearings officer determined that my case did not justify the assignment of counsel. I have since learned that it would not have mattered anyway, since the outcome was pre-determined once I was

found guilty of a violation of a condition of my DOSA at the very first hearing.

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of August, 2017.


Paul S. Bufalini 306464
DOC#306464

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

First-class United States mail, postage prepaid, to the following:

Petitioner

Mr. Paul Bufalini
DOC No. 306464
Washington Corrections Center
PO Box 900
Shelton WA 98584

DATED this 23rd day of August, 2017.


Deborah A. Groth, Legal Assistant

No. _____

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Personal Restraint of

PAUL BUFALINI,

Petitioner.

PETITIONER UNDER RESTRAINT OF A JUDGMENT OF THE
PIERCE COUNTY SUPERIOR COURT,
The Honorable Frank E. Cuthbertson

**DECLARATION OF DAVID BUFALINI IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

My name is David Bufalini. I am the biological father of the Petitioner above-named. I am over the age of eighteen (18) years and would be competent to testify to the matters stated herein. I make this declaration based on my personal knowledge. The following facts are true and correct.

1. On the date that it is claimed that Paul tested positive for opiates, I had spent the entire day with him. I picked him up from Progress House in Tacoma and we drove straight to our family home in University Place. Once we were there we never left the home. There were no visitors. We ate lunch, and later dinner.

2. After dinner Paul said he had a headache. He was hesitant to take even over-the-counter medications, concerned about how it might affect his urine in the event he was asked to give a urine sample when he got back to Progress House. I believed that it was safe for Paul to take something for his headache and after some assurance I gave him two (2) over-the counter Aleve tablets. Several hours later I took Paul back to Progress House. We made no stops during that trip. I signed Paul in and returned home. Soon thereafter, Paul called, extremely upset. He told me that he had tested positive after giving a urine sample. I told him to immediately request a re-test using a new test kit. He told me he already had, and was denied.

3. The next day I spoke to Paul's Community Corrections Office Kelly Dean. I asked her to preserve Paul's urine sample. I asked that it be shipped to a lab for formal testing. I told her that I would cover the entire costs for shipping and testing. Ms. Dean told me that there was no requirement that the urine sample be saved. She told me at that time that Paul's sample had not been saved. I asked rhetorically how Paul might ever hope to prove his innocence now that the only evidence that gave him a chance to do that had been destroyed.

4. When I found out that Paul had been found guilty of a violation I again raised the issues of formal testing of the sample by a lab to verify to

claimed result, as well as the issue of right-to-counsel, since Paul was facing two years of imprisonment if he was kicked out of DOSA. I was advised that no right to counsel existed.

5. I corresponded with employees of DOC, including the Director and the Deputy Director. I raised the issue of the destruction of the urine sample. I suggested that if DOC failed to preserve the sample, it had in effect failed to preserve Paul's only way to disprove the alleged positive result. I also raised the right-to-counsel issue that had been brought to my attention by the attorney who represented Paul on the charges that initially led to his incarceration, Brett Purtzer. I am a civil attorney with no experience in criminal law matters. I reviewed the case Mr. Purtzer had directed me to, the recent *Schley* decision. I was struck by the similarities with Paul's case. I also read the *Grigby* decision, which seemed to support Paul's right to request a determination if he qualified for the assistance of counsel. I have raised the evidentiary and right-to-counsel issues at every stage of Paul's hearings process, including each time that I testified at his hearings, all to no avail.

6. Eventually, DOC remanded Paul's third hearing for a re-hearing, specifically to determine if his case was one that justified having the assistance of an attorney. On remand the hearings officer determined that Paul's case did not warrant the assignment of counsel. I have since

learned that it would not have mattered anyway, since the outcome was pre-determined once he was found guilty of a violation. Assistance of counsel at any stage following the finding of a violation is apparently of no benefit to Paul, the end result following inevitably from the finding of a violation.

7. Attached as Exhibit A is a copy of an article published in the Journal of Family Practice, entitled "What common substances can cause false positives on urine screens for drugs of abuse" and published in October, 2006. The table at the end of the article identifies Naproxen as a potential cause of false-positive urine screen results for Canniboids and Barbituates.

8. On the day of Paul Bufalini's urine screen that resulted in his incarceration and ultimately revocation of his DOSA, I gave Paul two Aleve for a headache he complained of. Aleve is a form of Naproxen.

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of August, 2017.


David A. Bufalini

APPENDIX A

Which interventions, drugs best target diabetic neuropathy? Find out in this month's audiocast.

CLINICAL INQUIRIES

What common substances can cause false positives on urine screens for drugs of abuse?

J Fam Pract. 2006 October;55(10):893-897

Author(s): Chris E. Vincent, MD, Arthur Zebelman, PhD, Cheryl Goodwin, MLS

Author and Disclosure Information



EVIDENCE-BASED THERAPY

False-positive reports on urine drug screens by immunoassay are rare (strength of recommendation [SOR]: **C**, small controlled-exposure studies, small case series). Nonsteroidal anti-inflammatory drugs, fluoroquinolones, and Vicks Inhaler are most frequently implicated (**TABLE**).

Ruling out a false-positive result requires confirmation with a more specific test, usually gas chromatography/mass spectrometry (GC-MS). A true-positive drug screen may occur in a urine specimen from a patient who legally or unknowingly ingests a product that is metabolized to a drug of abuse. Passive exposure to a substance is unlikely to cause a positive drug screen (SOR: **B**, small controlled-exposure studies).

CLINICAL COMMENTARY

Having a plan makes communication less emotional when the results come back

Mary M. Stephens, MD, MPH

East Tennessee State University, Kingsport

Before I order a urine drug screen I ask myself, "What will I do with the results?" If other substances are present, will I discontinue controlled substances or refer to psychiatry or pain management? I also ask patients what they think I will find. On several occasions, patients have admitted to taking recreational drugs that the drug screen misses. Having a plan makes communication less emotional for both the provider and patient when the results come back.

You should be able to follow-up results promptly and order a GC-MS if indicated. In addition, if working in a group, indicate a plan for follow-up in your progress notes so that the patient gets a consistent message.

MD-IQ QUIZ: E-cigarette use

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Drug & Dosing Information

Evidence summary

Two different assays are commonly available for urine drug testing. The immunoassay is quick, highly sensitive, and relatively inexpensive but may lack specificity. It tests for classes of drugs (such as opiates) without distinguishing among individual drugs within that class. Gas chromatography in combination with mass spectrometry (GC-MS) is a more expensive and time-consuming test, but is the gold standard for confirming a positive result on immunoassay. By definition, all positive results on GC-MS are true positives.

Reports of false-positive urine drug screening for substances of abuse are infrequent and limited to case reports and a few controlled-exposure studies. The **TABLE** lists some of the substances reported to cause false-positive results.

Positive confirmation tests may occur in urine specimens from patients who legally or unknowingly ingest products that contain drugs of abuse. In these instances, the finding is a true positive but may not reflect drug abuse by the client. Many products available without prescription outside of the US contain opiates (eg, Donnagel PG from Canada).¹ Several controlled-exposure studies have shown that as little as 1 poppy seed muffin (about 15 g of seed) can produce detectable amounts of morphine and codeine by immunoassay as well as GC-MS.^{1,2} In 1998, the federal government increased the **threshold defining a positive screen for urine morphine and codeine from 300 to 2000 ng/mL** to reduce spurious reports of opiate-positive tests from **poppy seed consumption**.^{1,2}

Substances that do not produce positive urine drug screens include **passively inhaled crack cocaine or marijuana** (unless “extreme”), and ingested products containing hemp or other common herbal preparations.^{1,2,10} In one study, 6 volunteers in an 8×8×7-ft enclosed room were exposed to 200 mg freebase cocaine vapor; **none of their urine samples exceeded the federal GC-MS threshold**. In a similar study of 3 non-smokers exposed to 8 marijuana smokers (smoking 32 joints) in a 10×10×8-ft enclosed room, no samples from the nonsmokers exceeded the federal GC-MS threshold.² In an exposure study of 90 volunteers who ingested 8 different herbal preparations, there were no positive urine drug screens.¹

TABLE
Substances reported to cause false-positive urine drug screen results

Expand table

SUBSTANCE FALSELY IDENTIFIED ON TEST	ACTUALSUBSTANCE	TYPE OF STUDY	NOTES
Amphetamine and methamphetamine	Selegiline	Single case report ^{1,2}	L-stereoisomer only detected (D-stereoisomer present in illicit drugs)
Amphetamine and methamphetamine	Vicks Inhaler	Several case reports, controlled- exposure studies ¹⁻³	L-stereoisomer only detected; most positives noted with twice recommended dosage
Barbiturate	NSAIDs (ibuprofen, naproxen)	Controlled- exposure study of 60 subjects (510 specimens) ⁴	0.4% false-positive rate
Benzodiazepine	Oxaprozin	Controlled- exposure study of 12 patients (36 specimens) ⁵	100% false-positive rate, some cases lack controls

*Ofloxacin and levofloxacin most likely to cause false positive.

SUBSTANCE FALSELY IDENTIFIED ON TEST	ACTUALSUBSTANCE	TYPE OF STUDY	NOTES
Cannabinoid	NSAIDs (ibuprofen, naproxen)	Controlled- exposure study of 60 subjects (510 specimens) ⁴	0.4% false-positive rate
Opiate	Fluoroquinolone*	Controlled- exposure studies (8 subjects) and case series (9 subjects) ⁶	Most levels detected were below new 1998 threshold (2000 ng/mL)
Opiate	Rifampin	3 case reports ⁷	
Phencyclidine	Venlafaxine	1case report ⁸	Confirmed by GC- MS (7200 mg intentionally ingested)
Phencyclidine	Dextromethorphan	1case report ⁹	(500 mg ingested)

*Ofloxacin and levofloxacin most likely to cause false positive.

Recommendations from others

The US Department of Health and Human Services requires confirmation of positive immunoassay results by GC-MS for drug testing in the workplace.¹ The College of American Pathologists, the principal organization of board-certified pathologists, states:

“Confirmation testing, a standard of practice in forensic toxicology, should be performed in clinical toxicology whenever possible.”¹¹

Evidence-based answers from the Family Physicians Inquiries Network

ADDICTION MEDICINE

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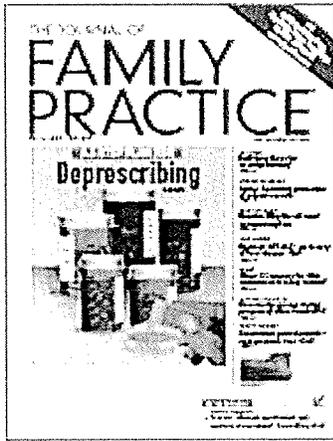
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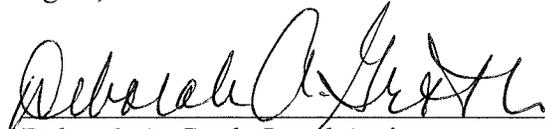
The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

First-class United States mail, postage prepaid, to the following:

Petitioner

Mr. Paul Bufalini
DOC No. 306464
Washington Corrections Center
PO Box 900
Shelton WA 98584

DATED this 23rd day of August, 2017.


Deborah A. Groth, Legal Assistant

CARNEY BADLEY SPELLMAN

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