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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY Chd
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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

In re the Personal Restraint of

JOHN PINO,

Petitioner.

No. 50876-1-II

REPLY TO DOC'S RESPONSE TO
PERSONAL RESTRAINT PETITION
(PRP)

COMES NOW John Pino, Petitioner Pro Se, and submits this Reply to the Department of Corrections' (DOC) Response to the underlying PRP.

II. DOC'S MOTION TO DISMISS

DOC contends that Mr. Pino's PRP should be dismissed because he could allegedly file a lawsuit under 42 U.S.C. §1983 and that, because of this hypothesized remedy, RAP 16.4(d) prohibits this Court from hearing this PRP. DOC's arguments are wholly without merit and the Court should not dismiss this PRP.

To begin, RAP 16.4(d) provides: "no more than one petition for similar relief on behalf of the same Petitioner will be entertained without good cause shown." The Washington Supreme Court has interpreted RAP 16.4(d) to mean that an issue that was heard and determined on appeal or in a prior petition cannot be heard on the merits in a PRP unless the

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Petitioner can show that the "ends of justice" would be served by rehearing the issue. In re Taylor, 105 Wn.2d 683, 686-89, 717 P.2d 755 (1986). This RAP 16.4(d) rule applies only to PRP's seeking similar relief. In re Perkins, 143 Wn.2d 261, 265, n.4, 19 P.3d 1027 (2001). As this PRP raises issues of DOC's arbitrary acts for the first time, RAP 16.4(d) is inapplicable.

Next, while RAP 16.4(d) allows the use of a PRP only "if other remedies which may be available to petitioner are inadequate under the circumstances," this provision is of no consequence. Such is the case because this provision simply reflects the PRP's status as an extraordinary remedy, and means that if a remedy at law—such as a timely appeal of a judgment—is available, a PRP cannot be employed. This provision does not preclude a PRP just because some other remedy might be available. See Toliver v. Olsen, 109 Wn.2d 607, 746 P.2d 809 (1987).

Last, RAP 16.4(a) specifically authorizes prisoner PRP's against DOC for agency action from which they have "no previous or alternative avenue for obtaining state judicial review," on the condition that the Petitioner shows unlawful restraint. A Petitioner is under "restraint" if he is "confined." Kozol v. DOC, 185 Wn.2d 405, 409, 373 P.3d 244 (2016). A restraint is "unlawful" if the challenged action is unconstitutional or violates the laws of the State of Washington. Id.; RAP 16.4(c)(2), (6). Administrative rules qualify as laws of the State of Washington under RAP 16.4(c)(2), (6). In re Personal Restraint of Cashaw, 123 Wn.2d 138, 149 n.6 866 P.2d 8 (1994). A prisoner may file a PRP to obtain judicial review of DOC's compliance with the due process requirements of the Federal and State Constitution and State-law regulations. Kozol, *supra* at 410-11.

Various actions of DOC have been properly reviewed via PRP. See, e.g., King v. DSHS, 146 Wn.2d 658, 49 P.3d 854 (2002)(PRP challenge to DOC's good-time calculation); In re Smith, 139 Wn.2d 199, 986 P.2d 131 (1999)(PRP challenge to DOC's calculation of earned early release time); In re Reismiller, 101 Wn.2d 291, 678 P.2d 323 (1984)(lack of evidence to support prison disciplinary charge); In re Young, 95 Wn.2d 216, 622 P.2d 373 (1980)(due process challenge to a prisoner's out-of-state transfer); see also RAP 16.4(c)(6)(authorizing attack on unconstitutional "conditions or manner of the restraint"). For DOC to argue that Mr. Pino cannot file a PRP challenging DOC's unlawful restraint is contrary to well-settled precedent on the issue—as recently clarified by Kozol, supra at 410-11. To give credence to DOC's argument on the issue would lead to absurd results—particularly when DOC admits that their reasons justifying their decision at issue are contrary to a Thurston County Superior Court Order. Response, pp.2-3; 19-20; see below. For these reasons, the Court should not dismiss this PRP.

IV. ARGUMENT

DOC advances an argument that their internal policy statement regarding visiting supersedes State administrative code; State Law; State Constitution; the Federal Constitution; and well-settled, binding judicial precedent. Response, p.13 ff. DOC's contentions should not be entertained by the Court.

A. DOC Is Bound To Follow The J&S By The Terms Ordered By The Sentencing Judge; DOC's Reason For Denying Visitation Contravenes The Sentencing Judge's Order And Is Arbitrary And Capricious.

DOC contends that the severity of Mr. Pino's underlying convictions warrant the denial of his visitor's applications for visit. Response, p.13. That is, DOC postures in such a way so as to claim that because the

victims of the underlying convictions are the visitors being denied, DOC's actions are not arbitrary and capricious. Id, P.13 ff. DOC's arguments are circular logic and should not be heeded.

To begin, Mr. Pino acknowledges the horrific offenses of conviction, and makes no attempt to downplay the significance of neither his actions nor DOC's duty to operate the prison facility's legitimate penological interests. Mr. Pino accepted responsibility for his actions, pled guilty in open Court, and prepared to serve his sentence as ordered by the Court. These factors should not be misconstrued by DOC in their attempts to justify subjecting Mr. Pino to arbitrary and capricious agency action.

DOC's actions here serve no legitimate penological objective. Mr. Pino concedes that he has no absolute right to visitation in prison. Dunn v. Castro, 621 F.3d 1196, 1202 (9th Cir. 2010). But while imprisoned Mr. Pino retains his fundamental right to be free from arbitrary and capricious actions, Pierce County Sheriff v. Civil Service Commission, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983), and also his fundamental right for DOC to abide by the rules which governs its exercise of discretion. Id at 694.

"Arbitrary and capricious action has been defined as willful unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached."

Id at 695.

DOC's action here falls squarely within the above definition of "arbitrary and capricious." DOC repeatedly denied Mr. Pino's visitors from visits because they (visitors) are the victims of his current offenses of conviction. See generally Attachment E to DOC's Response. Citing SCCC Policy 450.300, §VI, A (1-3), DOC attempts to justify their

denial by claiming that victims cannot visit their perpetrators. But DOC's justification is "willful unreasoning action, without consideration and in disregard of facts and circumstances." This is so because by the very policy they cite, there is an exception which applies here:

"...unless they [victims] have written approval from the ... sentencing Court,..." Attachment E to DOC's Response; SCCC Policy 450.300(VI)(A)(1)(in pertinent part). As DOC admits here, there are three separate Orders from the sentencing Court which Amend the very restraining orders relied on by DOC to deny the visiting at issue. Response, pp.2-3; 19-20. The said Orders Amending the No Contact Orders each specifically provide written authorization for Mr. Pino to have contact, viz: "the only exception is for the defendant to have in person contact while he is incarcerated with DOC." See Attachment D to DOC's Response.

As such, DOC's action is "without consideration and in disregard of facts and circumstances" that the Policy they cite allows visiting if the sentencing Court approves in writing, and that here the sentencing Court so approved—in writing. There is no room for two opinions here: Mr. Pino meets every requisite of SCCC Policy to have the visits being denied here. Whereas the Courts are cautioned to avoid becoming involved in the minutiae of prison operations, Bell v. Wolfish, 441 U.S. 520, 560 (1979), in turn DOC should not become involved in the wisdom and judicial authority of the Courts. Mr. Pino's sentencing Court has specifically authorized his contact with his victims while incarcerated with DOC; DOC is bound by law to apply those terms. Dress v. DOC, 168 Wa.App. 319, 328, 279 P.3d 875 (2012) ("The relevant case law is clear that DOC has no authority to correct or ignore a final judgment and sentence, even if it

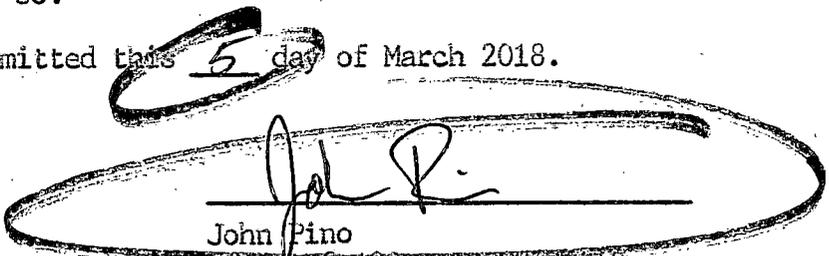
is erroneous.").

The remainder of DOC's arguments pertaining to procedural due process is impertinent. Mr. Pino claims violation of the substantive aspect of due process guarantees, not the procedural aspect as needlessly argued at length by DOC in their Response. Any such argument is inapposite to this matter and should not be considered. To the extent that the Court believes that this issue is dispositive or that further procedural due process argument is necessary for review, Mr. Pino will provide supplemental briefing on this Court's instruction.

V. CONCLUSION

DOC's denial of Mr. Pino's visitors deprives him of substantive due process. DOC's actions are arbitrary and capricious because they are without consideration of the true fact that the sentencing Court specifically authorized in writing that Mr. Pino is permitted an exception to the no contact order used by DOC to deny visiting, and DOC's own policy allows the same exception when authorized in writing by the Court. By their own admission, DOC's reasons to deny Mr. Pino's visits are inapplicable. DOC gives no valid reason to deny Mr. Pino visits. For these reasons; this Court should grant this PRP and reverse DOC's administrative action of denying Mr. Pino's visits at issue. Mr. Pino respectfully requests so.

Respectfully submitted this 5 day of March 2018.



John Pino

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DECLARATION OF SERVICE BY MAIL

GR 3.1

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I, John Pino, declare and say WASHINGTON

That on the 5 day of March, 2018, I deposited the

following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 50876-1-II

* Reply to Doc's Response to PRP

* Declaration of Service by Mail GR 3.1

addressed to the following:

* WA Court of APPEALS
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950 Broadway, Ste 300
Tacoma WA
98402

* Attorney General of WA
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98504-0116

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

DATED THIS 5 day of March, 2018, in the City of Aberdeen, County of Grays Harbor, State of Washington.

John Pino
Signature

JOHN PINO
Print Name

DOC 723342 UNIT H3A20L
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