

NO. 73872-1-I

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

**IN RE THE PERSONAL RESTRAINT PETITION OF
MATTHEW SCHLEY**

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

ALEX KOSTIN, WSBA #29115
Assistant Attorney General
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
AlexK@atg.wa.gov

FILED
July 5, 2016
Court of Appeals
Division I
State of Washington

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I. ISSUES PRESENTED

1. Whether the hearing officer in the Drug Offender Sentencing Alternative (DOSA) revocation hearing complied with due process when she determined by a preponderance of the evidence that Schley's termination from the substance abuse treatment program warranted the revocation of his DOSA sentence.

2. Where the hearing officer revoked the DOSA sentence because Schley had been terminated from the treatment program, and whether due process required in the DOSA revocation hearing that Schley be allowed to litigate his guilt or innocence of a prior serious infraction.

3. Whether the Court should consider issues that are not raised in the personal restraint petition and asserted for the first time in Schley's new brief.

4. Assuming the Court reaches the new issues, whether Schley was denied the right to counsel where Schley did not request counsel, the issues in the revocation hearing were not complex, and Schley was able to adequately represent himself.

5. Assuming the Court reaches the new issues, whether the Department has authority to revoke the DOSA sentence after the offender is terminated from the substance abuse treatment program.

II. STATEMENT OF THE CASE

In 2014, Schley was sentenced to two prison-based DOSA sentences under RCW 9.94A.660. Exhibits 1 and 2.¹ The sentences required Schley to undergo a comprehensive substance abuse assessment and to receive substance abuse treatment while incarcerated in prison. RCW 9.94A.662. Upon entering prison, Schley agreed in writing to participate in the substance abuse treatment program. Exhibit 4. In doing so, Schley agreed to abide by the terms and conditions of the treatment program. *Id.* Schley specifically agreed to refrain from any physical violence, or threats or acts of physical violence. Exhibit 5. Schley acknowledged that he could be administratively terminated from the treatment program if he failed to comply with the conditions of the program, or if he committed any major infraction that caused a change in his custody level. Exhibit 4. Schley was expressly warned in writing that failure to comply with the conditions would result in termination from the treatment program. Exhibits 5 and 6.

Just days after beginning treatment, Schley fought with Tang, another prisoner in the treatment program. Exhibit 8. This fight violated both prison rules and the conditions of the treatment program.

¹ Respondent previously submitted the referenced exhibits with the response to the personal restraint petition.

Schley and Tang began yelling at each other. Exhibit 8. Schley swung at Tang, but missed. Exhibit 8. Schley then grabbed Tang's throat and arm, and both men fell backward onto a bed. Exhibit 8. Tang then hit and kicked Schley off the bed and onto the floor. Exhibit 8. As a result of the fight, Schley had cuts, scrapes and red marks on his body. Exhibit 8. The injuries were consistent with being in a fight. Exhibit 8. Schley was placed in the Special Housing Unit (SHU) as a result of the fight. Exhibit 7, at 1 (entry dated 1/27/15). Schley's placement in the segregation unit made him non-compliant with the terms and conditions of the treatment program. Exhibit 7, at 1 (entry dated 1/29/2015).

The Department charged Schley with a serious infraction for fighting with another inmate, and held a prison disciplinary hearing. Exhibit 8. At the hearing, Schley contended that he never fought with Tang, and that his back injuries were caused when he got off his bunk. Exhibit 8. Schley submitted statements from five other offenders that they did not see any fight between Schley and Tang. Based on the physical evidence of Schley's injuries and the statements of confidential informants, the hearing officer found Schley guilty of the serious infraction of fighting. Exhibit 8. The hearing officer sanctioned Schley to 15 days in segregation and 15 days loss of good conduct time. Exhibit 8.

The treatment program staff subsequently terminated Schley from

the substance abuse treatment program. Exhibit 10.

Under RCW 9.94A.662, termination from the substance abuse treatment program required the Department to hold a hearing to determine whether Schley's DOSA sentence should be revoked. Exhibits 11 and 12. At the revocation hearing, the hearing officer considered the evidence that Schley had been terminated from the substance abuse treatment program because he violated conditions of the DOSA agreement. Exhibit 13, at 3. Although the evidence also included facts that Schley had been found guilty of a serious infraction of fighting, and had a change of custody level, the primary evidence before the hearing officer was that Schley had been terminated from the treatment program. Exhibit 13, at 2-3, and 5.

Schley asserted that the hearing officer could not find by a preponderance of the evidence that he fought with Tang. Petitioner Attachment 1, Transcript of April 2, 2015, Hearing, at 14-18. The hearing officer, however, noted that the underlying serious infraction (whether Schley actually fought with Tang) was not the issue before her. Exhibit 13, at 4. The hearing officer said she would not reevaluate and reconsider whether Schley actually fought with Tang because her role was not to determine whether Schley was actually guilty of the prior prison infraction. Exhibit 13, at 4; Transcript at 20. Instead, the hearing officer pointed out that the issue before her was whether Schley's termination

from the treatment program warranted revocation. Transcript at 20 (“That’s what we’re looking at here.”).

After considering the evidence, the hearing officer concluded that Schley’s DOSA sentence should be revoked. Exhibit 13, at 5. In reaching this finding, the hearing officer expressly stated she was applying the preponderance of the evidence standard. Exhibit 13, at 5; Transcript at 24, 32. The hearing officer noted that while she heard evidence that Schley had been previously found guilty of a serious infraction and had heard evidence that the guilty finding changed his custody level, the most significant evidence supporting her decision to revoke the DOSA sentence was the testimony of the treatment program manager who testified why Schley was terminated from the treatment program. Exhibit 13, at 5.

Schley appealed his revocation to the Department’s Regional Appeals Panel. Exhibit 16. The panel denied the appeal. Exhibit 17. Schley submitted a second-level appeal to the Department’s Risk Management Director. Exhibit 18. The director denied the appeal, concurring with the appeals panel’s decision. Exhibit 19.

III. STANDARD OF REVIEW

To obtain relief in a personal restraint proceeding, the petitioner must prove that he is being restrained and that the restraint is unlawful. RAP 16.4(a) and (c)(2), (6). To show unlawful restraint, the petitioner must

present evidence that is more than speculation, conjecture, or inadmissible hearsay. *In re Gronquist*, 138 Wn.2d 388, 396, 978 P.2d 1083 (1999).

IV. ARGUMENT

A. **The Hearing Officer Complied With Due Process By Applying The Preponderance Of Evidence Standard In The DOSA Revocation Hearing**

Due process requires that the Department apply the preponderance of evidence standard when determining whether to revoke a DOSA sentence. *In re McKay*, 127 Wn. App. 165, 169-70, 110 P.3d 856 (2005). The preponderance standard requires that the revocation be “founded upon verified facts and accurate knowledge.” *Id.* at 170. Under the preponderance standard, the Department may revoke the DOSA sentence if a preponderance of the evidence shows the offender failed to comply with the conditions of the treatment program. *Id.* at 169-70. The offender’s failure to successfully complete the treatment program is a sufficient ground for revocation of the DOSA sentence. *Id.* at 169 n.12 (citing the DOSA agreement that expressly requires the offender to successfully complete the treatment program); *see also* RCW 9.94A.662(3) (an offender who fails to successfully complete the program shall be reclassified to serve the remaining balance of the original sentence).

The hearing officer applied the preponderance of evidence standard to determine that Schley had been terminated from the treatment

program. The hearing officer applied the preponderance of the evidence that Schley's DOSA sentence should be revoked.

Schley argues that the hearing officer was required to determine by a preponderance of evidence whether he was guilty of a serious infraction for fighting with Tang. But Schley had previously been found guilty of that serious infraction. The issue of Schley's guilt or innocence of the underlying infraction was not an issue in the DOSA revocation hearing. The hearing officer correctly determined that she need not reconsider the evidence and need not determine whether Schley fought with Tang.

The issue in the DOSA revocation hearing was not whether Schley fought with Tang, but whether Schley's termination from the treatment program warranted revocation of the DOSA sentence. Although the hearing officer considered evidence that Schley had previously been found guilty of a serious infraction (not whether he was actually guilty, but whether he had been found guilty), and evidence that the infraction resulted in a change of Schley's custody level, the hearing officer noted the important evidence before her was the evidence that Schley had been terminated from the substance abuse treatment program.

The evidence of his termination from the treatment program proved by a preponderance that the Department should revoke Schley's DOSA sentence. The hearing officer applied the correct preponderance of

the evidence standard in compliance with *McKay*. Schley fails to prove a due process violation.

B. Due Process Did Not Allow Schley To Re-Litigate In The Revocation Hearing Whether He Was Guilty Or Innocent Of The Prior Serious Infraction

Schley complains that the hearing officer did not find by a preponderance of the evidence that Schley actually fought with Tang. But this contention rests upon the false premise that the hearing officer was required to make such a determination. Due process did not require such a determination. Since the relevant fact was whether Schley had been terminated from the treatment program, and not whether Schley actually fought with Tang, the hearing officer was not required to find by a preponderance of the evidence that Schley actually fought with Tang.

McKay did not hold that the Department must apply a preponderance of evidence standard in prison disciplinary hearings. Rather, *McKay* recognized the lower “some evidence” standard properly applied to such disciplinary hearings. *McKay*, 127 Wn. App. at 170 n.17.²

² Schley’s argument ignores the factual difference between his case and *McKay*. In *McKay*, the Department held one combined hearing that considered for the first time both whether McKay actually committed the underlying infraction and whether his behavior warranted revocation. *McKay*, 127 Wn. App. at 167-68; Exhibit 22, McKay’s 2003 Hearing and Decision Summary. Since the one hearing involved the ultimate issue of revocation, the preponderance standard applied. But *McKay* did not hold

Because “some evidence” showed Schley had fought with Tang, Schley was properly found guilty of the prison infraction in the prior hearing.

Schley’s contention rests upon the incorrect assertion that due process required the hearing officer to reevaluate the evidence of the underlying infraction, and determine anew whether Schley actually fought with Tang. Due process did not impose such a requirement. In fact, the Washington Supreme Court rejected such an assertion in the analogous case of *In re Gronquist*, 138 Wn.2d 388, 978 P.3d 1083 (1999).

In *Gronquist*, the Department’s rules provided that an offender found guilty of four minor infractions within a six month period of time was guilty of a serious infraction. The Supreme Court considered whether the offender in the serious infraction hearing had a right to re-litigate his innocence of the prior minor infractions. *Gronquist*, 138 Wn.2d at 390-91. Similar to Schley’s argument here, Gronquist argued that because he received less due process (or no process) in the minor infraction hearings, he was entitled to re-litigate his innocence of the prior minor infractions when the Department held the hearing on the serious infraction. *Id.* at 398. Similar to Schley’s argument here, Gronquist contended that the Department must prove the prior minor infractions using the higher due

that the preponderance standard applies to separately held hearings involving only the prison infraction.

process standards applicable in serious infraction hearings. *Id.* Like Schley, Gronquist argued that the higher due process standard must apply to prove the underlying infraction behavior when the prior infraction is used in a subsequent, more serious hearing. *Id.* at 398 and 401.

The Washington Supreme Court rejected this contention, holding that the offender has no right to re-litigate the prior infractions when the prior infractions are used as evidence in the subsequent serious infraction. *Gronquist*, 138 Wn.2d at 399-406. Due process did not allow Gronquist to collaterally challenge the prior minor infractions in the subsequent serious infraction hearing. *Id.* at 403. Similarly, Schley cannot collaterally challenge the prior serious infraction when it was used in the subsequent DOSA revocation hearing.

The same reasoning applies even in criminal cases. The United States Supreme Court has concluded that there is no general constitutional right to challenge a prior conviction used to enhance the sentence on a subsequent conviction. *Custis v. United States*, 511 U.S. 485, 493-97 (1994). Absent exceptions not applicable here, the prosecution need not re-prove the defendant's guilt of the prior crimes, or the validity of the prior convictions, in order to use the prior convictions in sentencing. *Id.* The fact of the prior convictions, not whether the defendant was guilty of the prior crimes, is important. *Id.*

Similarly, Schley did not have a right to challenge his guilt on the prior serious infraction in his DOSA revocation hearing. Due process did not require the hearing officer to apply the preponderance of the evidence standard to determine whether Schley actually fought with Tang.

Schley's contention would essentially require this Court, contrary to *Gronquist* and *McKay*, to establish a new standard of proof for prison disciplinary hearings. Under Schley's argument, the Department would have to apply either the some evidence, or the preponderance of evidence standard in a prison disciplinary hearing, depending upon whether the infraction finding could later be used in a subsequent revocation hearing. Essentially, if the results of the prison disciplinary hearing might be evidence used in a revocation proceeding, then the Department must apply the higher preponderance standard in the prison disciplinary hearing. No case law requires such a rule.

Moreover, Schley's contention about the underlying infraction ignores the reality that the hearing officer's decision in the revocation hearing did not rest upon whether Schley actually fought with Tang. The hearing officer did not revoke the DOSA sentence because Schley got into a fight. Rather, the hearing officer determined revocation was proper based upon the preponderance of the evidence that Schley had been terminated from the substance abuse treatment program. The hearing

officer determined by a preponderance of the evidence that this termination warranted revocation of the DOSA sentence. Since the hearing officer applied the preponderance of the evidence standard, there was no due process violation.

C. Schley Was Properly Found Guilty In The Prison Disciplinary Hearing Of The Serious Infraction For Fighting

As discussed above, Schley had no right to re-litigate in the DOSA revocation hearing whether he actually fought with Tang, or whether the prior guilty finding was valid. But even if Schley could collaterally challenge the prior infraction, such a challenge would fail because the Department properly found Schley guilty of the serious infraction.

The evidence at the prior infraction hearing showed Schley fought with Tang, and received injuries as a result of the fight. Exhibit 8. Schley received all process due in the prison disciplinary hearing. Exhibit 8. The guilty finding was affirmed on appeal. Schley admitted there was “some evidence” to support the serious infraction guilty finding. Transcript at 21. This is the proper standard for prison disciplinary hearings. *See Superintendent v. Hill*, 472 U.S. 445, 455, 108 S. Ct. 2460, 101 L.Ed.2d 370 (1985); *In re Reismiller*, 101 Wn.2d 291, 297, 627 P.2d 323 (1984); *In re Grantham*, 168 Wn.2d 204, 216, 227 P.3d 285 (2010); *In re Gronquist*, 138 Wn.2d at 396. Since the prior hearing complied with due process, and

there was some evidence to support the finding, Schley cannot show his guilty finding in the prior prison disciplinary hearing was invalid. Even if he could collaterally challenge the prior finding of guilt, such a challenge would fail.

D. This Court Should Refuse To Consider, Or In The Alternative, Deny Relief On The Issues Not Raised In The Personal Restraint Petition

This Court appointed counsel to address the claim raised in the personal restraint petition of whether the Department applied the wrong standard of proof in the DOSA revocation hearing. *See* Court's March 16, 2016 order. Without seeking to amend the personal restraint petition, counsel now raises new arguments regarding claims not raised in the petition. The Court should decline to consider claims not raised in the personal restraint petition because the claims are not properly before the Court. *In re Yates*, 183 Wn.2d 572, 576, 353 P.3d 1283 (2015) (noting the new claims were not properly before the court because RAP 16.7(a)(2) requires the petitioner to include all grounds for relief in the petition); *State v. Ice*, 138 Wn. App. 745, 748, 158 P.3d 1228 (2007) (declining to reach issue not raised in the personal restraint petition and raised for the first time in the petitioner's reply brief). This Court should decline to review the new claims.

Alternatively, the Court should deny the arguments as meritless.

Schley contends that he was denied the right to counsel at the DOSA revocation hearing, but this claim fails for two reasons. First, because Schley never requested counsel for the hearing, the Department was not required to determine whether counsel should be appointed for Schley in the hearing. *Gagnon v. Scarpelli*, 411 U.S. 778, 789-91, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) (limited due process right to counsel applies only where the offender requests counsel in the hearing); *Grisby v. Herzog*, 190 Wn. App. 786, 362 P.3d 763 (2015) (Department must determine whether to appoint counsel because Grisby requested counsel for the violation hearing). Since Schley did not request counsel for the hearing, the Department was not required to make a case-by-case determination whether to appoint counsel.

Second, even if Schley had requested counsel, he was not entitled to counsel here because this was not a complex case. The appointment “of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings. . . .” *Gagnon*, 411 U.S. at 790. Counsel is not necessary where the case is not complex and the offender appears capable to speaking effectively for himself. *Id.* at 790-91. In *Gagnon*, the Court noted that counsel likely is not needed where the factual issue is easily resolved, such as by reference to a court judgment. *Id.* at 791 (“respondent’s admission to having committed another serious

crime creates the very sort of situation in which counsel need not ordinarily be provided.”). Here, the material factual issue was whether Schley had been terminated from the substance abuse treatment program. This factual issue was not complex and was easily resolved.

In *In re Price*, 157 Wn. App. 889, 240 P.3d 188 (2010), the Court determined the offender was not entitled to counsel because the case was not complex and the offender showed an ability to represent his own position. *Price*, 157 Wn. App. at 906 (“This was not a complex case that involved evidentiary or legal subtleties. Rather, the case turned on straightforward factual determinations about the alleged violations and the credibility of various witnesses.”), *id.* at 907 (transcript showed the offender asked pertinent questions, and objected to the timeliness of the hearing). This case was even less complex than *Price*, since Schley’s hearing focused primarily on whether he was terminated from the substance abuse treatment program. Schley also showed an ability to represent himself. In fact, Schley cited to case law, including the *McKay* decision, and argued why the hearing officer should reevaluate the evidence of the underlying infraction to determine whether Schley actually fought with Tang. Although Schley ultimately did not prevail in the revocation hearing, this was not a case where Schley was unable to

represent himself. Consequently, Schley was not denied the limited due process right to counsel.

Schley next argues that the Department exceeded its authority to revoke his DOSA sentence. But RCW 9.94A.662 expressly authorizes the Department to revoke the DOSA sentence and to reclassify Schley to serve the remainder of his original sentence. “[U]nder the current version of the statute, the legislature has granted DOC the power to revoke a DOSA sentence and determine penalties for noncompliance.” *State v. Roy*, 126 Wn. App. 124, 128, 107 P.3d 750 (2005); *see also In re Price*, 157 Wn. App. at 907-09; *McKay*, 127 Wn. App. at 170; *In re Blackburn*, 168 Wn.2d 881, 232 P.3d 1091, 1093 (2010).

Schley’s argument that the Department exceeded its authority is based upon the flawed premise that the Department revoked the DOSA sentence because Schley fought with another inmate. Schley argues that having sanctioned him in the prison disciplinary hearing for this behavior, the Department could not revoke his DOSA sentence for this behavior. But the hearing officer did not revoke the DOSA sentence because Schley fought with Tang. The hearing officer revoked the DOSA sentence because Schley had been terminated from the substance abuse treatment program, and his termination from the program warranted revocation. The Department had clear statutory authority to revoke the DOSA sentence.

V. CONCLUSION

For the reasons discussed above, the Court should deny the personal restraint petition.

RESPECTFULLY SUBMITTED this 5th day of July, 2016.

ROBERT W. FERGUSON
Attorney General

s/ Alex Kostin
ALEX KOSTIN, WSBA #29115
Assistant Attorney General
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
AlexK@atg.wa.gov

VI. CERTIFICATE OF SERVICE

I hereby certify that on the date below, I caused to be electronically filed ***BRIEF OF RESPONDENT*** with the Clerk of the Court which will send notification of such filing to the following:

WASHINGTON APPELLATE PROJECT
ATTN: MARLA L. ZINK
1511 3RD AVENUE SUITE 701
SEATTLE WA 98101-3647
marla@washapp.org

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

EXECUTED this 5th day of July, 2016, at Olympia, WA.

s/ Janine Latone
JANINE LATONE
Legal Assistant 3
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
JanineL@atg.wa.gov

EXHIBIT 22



RELEASE FROM DOC CUSTODY/CONFINEMENT: YES NO (See Confinement Order DOC 09-238)

OFFENDER NAME (LAST, FIRST) Malkin, Leah	DOC # 782220	FOS # -	DATE OF BIRTH
CAUSE NUMBER(S) 02-1877-3 / 02-14600-9 / 02-15644-6 / 02-16818-5 / 02-18377-0 / 00-14115-4			
OFFENDER STATUS <input type="checkbox"/> CCI <input checked="" type="checkbox"/> CCP <input type="checkbox"/> CCJ <input type="checkbox"/> CCM <input type="checkbox"/> FOS <input type="checkbox"/> PRE - OAA <input checked="" type="checkbox"/> OAA			

DATE OF HEARING 8/22/03 LOCATION OF HEARING PLP-2

CCO NAME Mans WAIVED APPEARANCE YES NO

OTHER PARTICIPANTS Daria Carver - CDP COMPETENCY CONCERN YES NO

Laura Codd - CDP WAIVED 24 HOUR NOTICE YES NO

CFr Poyoncha INTERPRET/COMM. ASSISTANT YES NO

ALLEGATIONS	PLEA	FINDING Guilty / Not Guilty Probable Cause Found
(552) Causing an innocent person to be penalized or prosecuted against by lying ^{on} 8/11/03. (645)	G	GUILTY
(762) Failure to participate in CD treatment ^{on} 8/11/03.	NG	GUILTY

SUMMARY OF TESTIMONY / WITNESSES; RECOMMENDATION, REASONS FOR CONTINUANCE, HEARING OFFICER RECOMMENDATION (If Interstate Compact Case); MISCELLANEOUS INFORMATION

CCO, witness + def. testimony + discovery material

SANCTIONS AND DECISIONS

OSA revocation - time start/end TBD by DOC records.

- Aknel -
OFFENDER SIGNATURE

Kimberly Allen
HEARING OFFICER SIGNATURE

Distribution: WHITE - Hearing File
PINK - Receiving/Detaining Facility
COPY - Interstate Compact fax with 09-228 to sending state within 72 hours
DOC 09-233 (02/22/2002) OAA / POL

8/22/03
DATE

Kimberly Allen
HEARING OFFICER NAME (PRINTED)

GREEN - Offender
CANARY - Field File
GOLDENROD - Rules, Contracts, and Public Disclosure - HQ
DOC 320.140 DOC 320.155 DOC 460.130