

No. 45716-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

---

IN RE THE PERSONAL RESTRAINT OF  
JON A. STEVENS,

Petitioner.

---

REPLY BRIEF IN SUPPORT OF TRANSFERRED Cr R 7.8  
MOTION/PERSONAL RESTRAINT PETITION

---

KATHRYN RUSSELL SELK  
WSBA No. 23879  
Counsel for Petitioner

RUSSELL SELK LAW OFFICE  
Post Office Box 31017  
Seattle, Washington 98103  
(206) 782-3353

TABLE OF CONTENTS

A. ARGUMENT IN REPLY. . . . . 1

DOC’S ARGUMENTS SHOULD BE REJECTED AS THEY  
MISSTATE THE ISSUES AND LAW. . . . . 1

B. CONCLUSION. . . . . 9

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

In re Fogle, 128 Wn.2d 56, 904 P.2d 722 (1995). . . . . 2, 3

McNabb v. Dept. of Corr., 163 Wn.2d 393,180 P.3d 1257 (2008). . . . . 4

WASHINGTON COURT OF APPEALS

In re Salinas, 130 Wn. App. 772, 124 P.3d 665 (2005). . . . . 1-3, 6-8

FEDERAL AND OTHER CASELAW

Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). . . . . 4

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

RCW 72.74.020(4)(d). . . . . 7

A. ARGUMENT IN REPLY

DOC'S ARGUMENTS SHOULD BE REJECTED AS THEY  
MISSTATE THE ISSUES AND LAW

In his PRP, Mr. Stevens asked this Court for relief from the unlawful restraint he is suffering as a result of the Department of Corrections (DOC) violating his equal protection rights by denying him the same earned early release time other inmates are given. In its second response, DOC repeats its earlier claims, misstates the issues and again fails to give proper weight to the precedent on the actual issue in the case. DOC Response 2 (Resp. 2 at 1-30).

This Court should reject each of DOC's arguments in turn.

First, this Court should see through DOC's transparent efforts to misstate the issues and the actual facts and arguments in this case. DOC declares that "Stevens seeks to overturn a long history of case law" with his request for relief. Resp. 2 at 1.

But it is DOC, not Stevens, which is arguing that this Court should not follow controlling law. Resp. 2 at 1-30. It is DOC which presents page after page of argument as if the issues in this case had never before been addressed by a Washington court. Resp. 2 at 1-28. It is DOC which only addresses the relevant, precedential decision of In re Salinas, 130 Wn. App. 772, 124 P.3d 665 (2005), in the scant two pages at the very end of

its brief and then only after urging this Court to adopt reasoning specifically rejected in Salinas. Resp. 2 at 1-30. It is DOC which ultimately asks this Court to overrule Salinas. Resp. 2 at 2-28. And it is DOC which is arguing that this Court should hold that the Salinas Court “did not have the information it needed to make an informed decision” and should follow DOC’s reasoning instead of the decision in Salinas because DOC disagrees with the Salinas decision. Resp. 2 at 28.

DOC’s claim to the contrary aside, the actual arguments of the parties make it clear that it is DOC, not Stevens, which is asking this Court to overrule caselaw.

DOC similarly misstates the case when it declares that “[t]his Court is bound by *In re Fogle*” in deciding the equal protection issue. Resp. 2 at 9-10. In In re Fogle, 128 Wn.2d 56, 66, 904 P.2d 722 (1995), a five-justice majority of our Supreme Court found no violation of equal protection when two different county jails had different provisions than DOC for granting earned early release based on the various programs they offered .

In its haste to declare Fogle “controlling,” however, DOC glosses over several crucial facts. Most telling, it somehow fails to note that the Salinas Court already examined this same issue in light of Fogle. Salinas, 130 Wn. App. at 780; see Resp. 2 at 9. DOC’s failure to mention this is

telling, because the Salinas Court found that Fogle did not, in fact, control. See Resp. 2 at 9; Salinas, 130 Wn. App. at 780. In Fogle, the issue was different treatment by different counties about what policies to adopt in their jails and whether they had authority to do so. Fogle, 128 Wn.2d at 63. In Salinas and here the issue is different treatment by the *same* authority - DOC. Salinas, 130 Wn. App. at 780. That alone is sufficient to distinguish Fogle. And the Salinas Court properly found. Salinas, 130 Wn. App. at 780.

Further, while DOC is correct that equal protection does not prohibit the legislature from drawing some “distinctions” among inmates those distinctions must nevertheless pass constitutional muster. See Resp. 2 at 9-10; see also, Salinas, 130 Wn. App. at 780.

Notably, four of the justices in that case *would have* found an equal protection violation had occurred in Fogle. See Fogle, 128 Wn.2d at 66 (Alexander, J., dissenting). Interestingly, on habeas relief, a panel of the 9<sup>th</sup> Circuit Court of Appeals granted Fogle relief even applying the extreme limitations of habeas actions under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), finding that the decision of the majority of our state Supreme Court had acted contrary to, or engaged in an unreasonable application, of clearly settled federal law. The reason this is only “interesting” is because the U.S. Supreme Court then granted the

government's writ of certiorari and that Court vacated the 9<sup>th</sup> Circuit decision and remanded with instructions "to dismiss this case as moot." MacFarlane v. Walter, 179 F.3d at 1131 (9<sup>th</sup> Cir. 1999), cert. granted, judgment vacated and cause remanded sub nom. Lehman v. MacFarlane, 526 U.S. 1106, 146 L. Ed. 2d 790 120 S. Ct. 1959, 146 L. Ed.2d 790 (2000), dismissed on remand, 216 F.3d 881 (9<sup>th</sup> Cir. 2000).

DOC also mistakes the law when it tries to extend Turner v. Safley, 482 U.S. 78, 89-91, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), to apply here. Resp. 2 at 27. According to DOC, McNabb v. Dept. of Corr., 163 Wn.2d 393, 405, 180 P.3d 1257 (2008), somehow so holds. Resp. at 27. Applying that case, DOC argues, this Court has to give "judicial deference" to the DOC's decisions as mandated under Turner. Resp. 2 at 27.

But that is not, in fact, what McNabb holds. In that case, as here, DOC tried to extend Turner beyond its scope. McNabb, 163 Wn.2d at 405. The McNabb Court first noted that, in Turner, the Court recognized that there are "difficulties inherent in prison administration" which can justify diminishing prisoner rights where a prison regulation involving daily prison functioning is involved. McNabb, 163 Wn.2d at 405. But the McNabb Court then declared that Turner did not apply to the question of whether the state could impose forced feeding and hydration on a prisoner,

because Turner “merely provided the framework for determining whether a prison regulation was reasonable on its face.” McNabb, 163 Wn.2d at 405-406.

In McNabb, of course, the Court then appropriately considered the prison administration concerns and issues relating to having to allow a prisoner to starve themselves or have administrators force feed him and how having such ongoing behavior can affect other prisoners and raise safety concerns. 163 Wn.2d at 405-406.

But such concerns do not exist in this case. This is not a prison policy involving the question of what rights a prisoner has to decide whether to refuse nutrition and hydration and what steps DOC may take in response. This is a policy denying early release credit against a Washington sentence served concurrently to an out-of-state sentence in an out-of-state facility to *some* while giving such credit to others also serving a Washington sentence concurrently to an out-of-state sentence in an out-of-state facility.

Further, despite DOC’s protestations to the contrary, DOC has yet to articulate why it strains the safety of the prison system so much to give equal credit to all defendants serving Washington sentences outside the state. Instead, DOC faults Stevens for suggesting that DOC can ask the sending state for information about the offender’s conduct, explaining why

DOC does not like this idea. Resp. 2 at 25.

But again, DOC mistakes the facts. It was not Stevens who first suggested that the alleged administrative burden DOC faced was not so significant as to outweigh the defendant's equal protections rights. It was the appellate court, in Salinas. Of course, because DOC ignores Salinas until the end of DOC's briefing, it does not note this holding of that case. Resp. 2 at 15.

In reaching its conclusion, the Salinas Court first noted that other inmates are given credit for earned early release time against a Washington sentence, if they 1) serve concurrent sentences entirely in Washington, or 2) serve a Washington sentence concurrent to an out-of state sentence in an out-of-court facility which has a policy for awarding earned early release, or 3) serve a sentence in an out-of-state facility under the Interstate Corrections Compact (ICC), "regardless of whether such facilities have earned early release policies." 130 Wn. App. at 776.

The Salinas Court then rejected the same arguments DOC recycles here: that it is proper to treat people such as Salinas and Stevens differently from others because the state in which they are serving their Washington sentence has "no procedure for calculating any earned early release time," and that the Washington statute providing for "earned early release time" grants it only if the correctional agency having physical

custody and “jurisdiction” has adopted rules for it. 130 Wn. App. at 776-77.

The Salinas Court was also unconvinced by the same protestations that DOC makes here - that it could not be responsible for figuring out such credit if the state in which the time was served did not do so. Id. Put simply, the Court held, while it was “no doubt easier to compare and transfer earned early release time in systems that explicitly provide inmates credit for such time,” such “administrative inconvenience” was not a rational basis for “discriminating against this inmate[.]” 130 Wn. App. at 778. And a crucial part of reaching that conclusion was the fact that DOC **engages in just such “inconvenience” with some inmates already**, even if the state in which they served a concurrent Washington sentence *did not have an earned early release system in place*. 130 Wn. App. at 778. The Salinas Court pointed out that, when an inmate was serving time out-of-state pursuant to the Interstate Corrections Compact (“ICC”), inmates who serve a concurrent Washington sentence in an out-of-state prison are *still* given earned early release time and DOC makes the required calculation. 130 Wn. App. at 778, citing, RCW 72.74.020(4)(d). Further, the Salinas Court noted, the ICC requires the receiving state to “report an inmate’s conduct to the sending state so that the sending state has a record for adjusting the inmate’s sentence based on that conduct.”

130 Wn. App. at 778. DOC could simply have the other state engage in the same practice in order to provide the same information in cases such as that of Mr. Salinas, the Court pointed out. Id.

Thus, it was not Mr. Stevens who crafted this suggestion. The Salinas Court looked at these same issues, examined the caselaw, balanced the interests, applied the rational relationship test and *still* found there was a violation of equal protection principles for DOC to grant credit in some cases and not in others based solely upon a concern for “administrative inconvenience.” 130 Wn. App. at 778-79. The Court concluded that it was a violation of equal protection for DOC to recognize “good time for confinement in prisons in other jurisdictions in some cases, but . . . not recognize it in others,” because there was no rational basis to deny the same treatment to offenders “who serve a concurrent sentence in another state’s prison.” Salinas, 130 Wn. App. at 780-81.

Thus, under Salinas, DOC’s refusal to give Mr. Stevens earned early release credit against the Washington sentence he served concurrently with the sentence in Idaho is a violation of Stevens’ state and federal equal protection clause rights.

DOC attempts to minimize Salinas by relegating discussion of it until *after* DOC has made all of the arguments already recognized - and rejected - by the Salinas Court. This Court should not be swayed by this

tactic, or by DOC's efforts to make it appear that it is Stevens who is asking this Court to overturn existing law, when in fact it is DOC. DOC is asking this Court to overrule Salinas, in order to deprive Mr. Stevens of the same earned early release credit other inmates serving concurrent Washington sentences in other states receive, based on administrative inconvenience. This Court should reject DOC's arguments and should grant Mr. Stevens relief from the unlawful restraint he is suffering by ordering that Stevens is entitled to the same earned early release time credit as other Washington offenders.

B. CONCLUSION

This Court should grant Mr. Stevens relief from the unlawful restraint he is suffering as a result of the violation of his rights to equal protection, for the reasons stated herein and in his previously-filed pleadings.

DATED this 26th day of January, 2015.

Respectfully submitted,

/s/ Kathryn A. Russell Selk  
Kathryn Russell Selk, No. 23879  
Counsel for Petitioner  
RUSSELL SELK LAW OFFICE  
Post Office Box 31017  
Seattle, Washington 98103  
(206) 782-3353

DECLARATION OF SERVICE BY MAILING/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby certify that I served opposing counsel and appellant as follows: the Pierce County Prosecutor's Office with this motion via this Court's portal upload at pcpatcecf@co.pierce.wa.us, Department of Corrections (DOC) Ronda Larson, at rondal.1@atg.wa.gov, and via first-class mail, postage pre-paid, as follows: Mr. Jon Stevens, Cedar Creek Corrections Center, P.O. Box 37, Littlerock, WA 98556-0037.

DATED this 26<sup>th</sup> day of January, 2015.

Respectfully submitted,

/s/ Kathryn Russell Selk  
KATHRYN RUSSELL SELK No. 23879  
RUSSELL SELK LAW OFFICE  
Post Office Box 31017  
Seattle, Washington 98103  
(206) 782-3353

**RUSSELL SELK LAW OFFICES**

**January 26, 2015 - 2:15 PM**

**Transmittal Letter**

Document Uploaded: 7-prp2-457164-Reply Brief.pdf

Case Name: In re the Personal Restraint of Stevens

Court of Appeals Case Number: 45716-4

**Is this a Personal Restraint Petition?**  Yes  No

**The document being Filed is:**

Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion:  \_\_\_\_\_

Answer/Reply to Motion:  \_\_\_\_\_

Brief:  Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes:  \_\_\_\_\_

Hearing Date(s):  \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other:  \_\_\_\_\_

**Comments:**

No Comments were entered.

Sender Name: K A Russell Selk - Email: [karsdroit@aol.com](mailto:karsdroit@aol.com)

A copy of this document has been emailed to the following addresses:

[pcpatcecf@co.pierce.wa.us](mailto:pcpatcecf@co.pierce.wa.us)

[rondal.l@atg.wa.gov](mailto:rondal.l@atg.wa.gov)