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No. 94280-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MATTHEW SCHLEY,

Respondent.

***AMICI CURIAE* BRIEF OF THE DEFENDER INITIATIVE,
COLUMBIA LEGAL SERVICES, AND DISABILITY RIGHTS
WASHINGTON**

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I. IDENTITY AND INTERESTS OF *AMICI CURIAE*

The Defender Initiative is a law school-based project that began in 2008 and is aimed at providing better representation for people accused of crimes and facing loss of their liberty and in the process increase fairness in and respect for the courts. The Initiative is part of Seattle University's Fred T. Korematsu Center for Law and Equality, whose mission is to advance justice and equality through a unified vision that combines research, advocacy, and education.

The Defender Initiative is deeply involved in issues relating to effective representation of people accused of crimes. Supported by a grant from the United States Department of Justice, the Initiative works with its partner The Sixth Amendment Center to provide technical assistance to improve public defense, including work with the Michigan Indigent Defense Commission and the Mississippi Task Force on Public Defense.

The Initiative has filed numerous amicus briefs, including in this case in Division I of the Washington Court of Appeals.

The Director of the Defender Initiative, Professor Robert C. Boruchowitz, has been a law professor for more than ten years, and has taught among other things a seminar on Right to Counsel and classes on Criminal Procedure Adjudicative. He was Director of The Defender Association in Seattle, Washington, for 28 years. He has been an expert

witness on issues related to the provision of public defense services, and his expertise was accepted by the State of New York Supreme Court, Appellate Division, in Hurrell-Harring v. New York, No. 518072 (2014).

Professor Boruchowitz was counsel in Grisby v. Herzog, 190 Wn. App. 786, 362 P.3d 763 (2015), which held that there is a case-by-case right to counsel in hearings considering revocation of community custody status. He and his students successfully represented Mr. Grisby in his Department of Corrections (DOC) revocation hearing after the Snohomish County Superior Court granted his writ.

Professor Boruchowitz, when he was a felony division staff attorney at The Defender Association in 1976, represented individuals at parole revocation hearings as appointed counsel.

He was amicus counsel in Mt. Vernon v. Weston, 68 Wn. App. 411, 844 P.2d 438 (1992), review denied by State v. Norris, 121 Wn.2d 1024 (1993), the first published Washington appellate opinion to refer to defender standards. He chairs the Committee on Standards of the Washington State Bar Association (WSBA) Council on Public Defense. He helped to draft the original Washington Defender Association Standards in 1984 and the amended standards in 1990 and he led the drafting of the revisions to the Indigent Defense Standards approved by

the WSBA Committee on Public Defense in August 2007.¹ He is a member of the American Bar Association Indigent Defense Advisory Group and serves on committees of the National Association for Public Defense and the National Legal Aid and Defender Association.

Columbia Legal Services is a private, non-profit law firm that advocates on behalf of people who face injustice and poverty in Washington State. For decades, its Institutions Project (IP) has assisted and represented incarcerated and formerly incarcerated youth and adults on a variety of legal issues, including those related to sentencing reform, poverty reduction and community reentry. IP is deeply involved in issues relating to the right to counsel through legislative advocacy, individual representation, and community outreach and education. IP frequently hears from people in the DOC through its intake system. Often times, prisoners contact IP requesting assistance with their DOSA revocation procedures and hearings. Individuals are often times ill-informed regarding their right to request and receive appointed counsel on a case-by-case basis. As a result, most do not request counsel and, thus, challenge the initial DOSA revocation hearing and appeal of their revocation *pro se*. IP is concerned about the fairness of the DOSA revocation hearing process

¹ See Public Defense Standards at <http://www.defensenet.org/about-wda/standards/Final%202007%20WDA%20Standards%20with%20Commentary.pdf>.

administered by DOC, and recently represented a prisoner in his revocation hearing to challenge this process. DOSA revocations result in longer sentences, removal from necessary drug and alcohol treatment, delayed reunification with families, and stop gap toward a fair second chance. This amicus fits squarely within the Institutions Project's reentry and ending the overreliance on incarceration priorities.

Columbia Legal Services and the Institutions Project have a long history of amicus advocacy including, for example, in the cases of State v. Bigsby, 189 Wn.2d 210, 399 P.3d 540 (2017), State v. Stump, 185 Wn.2d 454, 374 P.3d 89 (2016), and in this case in the Court of Appeals.

Disability Rights Washington is the organization designated by federal law and the Governor of Washington to provide protection and advocacy services to people in Washington with mental, developmental, physical, and sensory disabilities. DRW has a Congressional mandate to advocate on behalf of people with disabilities through the provision of a full range of legal assistance, including legal representation, regulatory and legislative advocacy, and education and training.

DRW's Amplifying Voices of Inmates with Disabilities (AVID) project is specifically focused on advocating for people with disabilities in jails and prisons. AVID has been recognized across the state and nationally, and has been asked to present at events for the White House,

U.S. Senate, National Center on Disability, and at multiple conferences for corrections advocates and administrators across the country.

AVID has conducted monitoring in all twelve state prisons and has undertaken investigations into potential abuse or neglect of people with disabilities in the prisons. AVID has received and responded to thousands of inmate calls during that time and has engaged in advocacy on behalf of individual inmates with disabilities, addressing issues such as inappropriate or long term segregation, access to accommodations, reentry planning, and access to substance abuse programming, including DOSA programming.

AVID has received calls from inmates with DOSA sentences regarding their termination from the program for potentially disability-related reasons. While the Department of Corrections has assured this Court that treatment termination for improper reasons could be addressed in the context of a DOSA revocation hearing, DRW has reason to believe that such improper termination is not in fact addressed at a revocation hearing. DRW has investigated two reports of DOSA treatment termination and revocation for disability-related reasons and in neither instance did DOC effectively address this issue in the context of the DOSA revocation hearing.

DRW is interested in Mr. Schley's case because the current process precludes inmates from challenging the underlying infraction and treatment termination by a preponderance of the evidence standard and in essence becomes a sham procedure in which no issue of fact is actually determined. DRW's constituents have been subject to this process and, even when violations of federal law regarding disability-related accommodations are identified, inmates are unable to raise these issues due to the process DOC has created. The remedy ordered in Schley, that the underlying facts relied upon for termination and revocation be assessed under the higher standard of proof and that an inmate be advised of their right to request counsel at that stage, would prevent these abuses of process and preserve the due process rights of our clients.

II. ISSUES TO BE ADDRESSED BY *AMICI CURIAE*

- A. When the Department of Corrections conducts a hearing to determine facts that, if proved, will lead to a revocation of a DOSA, it must apply a preponderance of the evidence standard to the determination of the alleged facts. If these facts, if proved, support a disciplinary infraction, DOC can choose whether to bifurcate the proceedings, but it cannot choose to apply a lower standard to the facts supporting a DOSA revocation.
- B. When the Department of Corrections conducts a hearing to determine facts that, if proved, will lead to a revocation of a DOSA, it must provide the opportunity to request counsel at that hearing.

III. STATEMENT OF THE CASE AND INTRODUCTION

The Court of Appeals granted Mr. Schley's personal restraint petition challenging the revocation of his DOSA sentence. The Court recognized that

An offender facing revocation of a sentence imposed pursuant to the drug offender sentencing alternative (DOSA) has a due process right to have an alleged violation of a condition of the sentence proved by a preponderance of the evidence.

In re Schley, 197 Wn. App. 862, 864, 392 P.3d 1099 (2017), review granted, 189 Wn.2d 1001, 403 P.3d 38 (2017).

Mr. Schley had been terminated from his substance abuse treatment program based on a "some evidence" finding that he had been involved in a fight. Those facts were used as a basis to revoke his DOSA, which the Court found denied him due process. Id. at 865.

Mr. Schley was found guilty of fighting at a prison infraction hearing that relied on anonymous reports from witnesses he could not cross-examine, and was placed in segregation for 15 days. He denied the fight. Based on the infraction, he was administratively terminated from the chemical dependency treatment program and based solely on that termination, which had been made on a "some evidence" burden of proof without counsel, DOC revoked his DOSA sentence and he had to serve the remainder of his sentence in custody. Id. at 866. The Court of Appeals

called this “the inevitable result of a finding of guilt at Schley’s infraction hearing...” Id. at 868. It added, “[t]he DOSA revocation hearing did not resolve any genuine issue of fact by a preponderance of the evidence.” Id.

The Court noted that Mr. Schley’s liberty interest at the DOSA revocation hearing was the loss of over two and one half years in the community. Id. at 869. The Court held that Mr. Schley was entitled to “a hearing structured to assure that the fighting finding is based on verified facts and accurate knowledge.” Id. The Court found that it would be a minimal “additional burden on the Department to apply the appropriate burden of proof at the initial infraction hearing.” Id. at 870. It held that “proof of a fact that necessarily results in revocation of a DOSA sentence must be by a preponderance of the evidence.” Id.

The Court of Appeals noted that the DOC conceded that if the case were remanded for a new hearing, it would advise Mr. Schley that he had a right to request counsel, as required by Grisby v. Herzog, 190 Wn. App. 786, 813 (2015). Id. at 871-72. If counsel is requested, the Department must decide whether to appoint counsel. The Court noted that the issues at a new revocation hearing at which the alleged fighting would be determined under the proper standard of proof are more complex than the limited issue of whether Mr. Schley was terminated from treatment. Id. at

872.

This Court should affirm the Court of Appeals opinion.

V. ARGUMENT

A. DOC Must Use a Preponderance of the Evidence Standard and Provide the Opportunity to Request Counsel at the Hearing It Conducts to Determine the Facts of An Allegation That Leads to Revocation of a DOSA.

If the Department plans to conduct only one hearing to determine whether an alleged infraction will lead to a revocation of a DOSA, it must provide the opportunity to request counsel at that hearing. If it has a bifurcated process, with a prison disciplinary hearing using a “some evidence” standard, without counsel, followed by a DOSA revocation hearing, then, as the Court of Appeals held, it must test the evidence against the accused at the second hearing by the preponderance of the evidence standard.

In either instance, such protections are required to ensure that prisoners are not erroneously subject to months, if not years, of additional incarceration and deprived of the therapeutic substance abuse treatment offered by the DOSA program.

- 1. The Department should be required to find by a preponderance of the evidence that Mr. Schley was guilty of the conduct that resulted in a fighting infraction.**

The Court of Appeals was correct to find that the Department of

Corrections (DOC) was required to find by a preponderance of the evidence the facts that led to Mr. Schley being administratively terminated from chemical dependency treatment. DOSA revocation hearings can result in the significant loss of liberty and of access to needed substance abuse treatment. Heightened due process protections are required. In re Pers. Restraint of McKay, 127 Wn. App. 165, 168-70, 110 P.3d 856 (2005). Revocation can – and did for Mr. Schley -- amount to several additional years in prison.

The sanction in Mr. Schley's case, because he was found guilty of a "762" violation ["Failing to complete or administrative termination from a DOSA substance abuse treatment program." WAC 137-25-030], was to serve the remainder of his sentence in DOC custody.

That a 762 violation requires a heightened standard is recognized by DOC itself, which has created a distinct adjudicatory process for DOSA revocation hearings that is unlike that required for other serious violations. WAC 137-25-030 ("*This violation must be initiated by authorized staff and heard by a community corrections hearing officer in accordance with chapter 137-24 WAC*"). Other DOC disciplinary proceedings for serious violations require only an internal adjudication by facility staff. WAC 137-28-270.

DOC has recognized that in light of the heightened liberty interest at stake in a revocation proceeding, a correspondingly heightened burden of proof is also required. WAC 137-24-030 states that the “department has the obligation of proving each of the allegations of violation by a preponderance of the evidence.” WAC 137-24-030(10). This different standard is appropriate because, unlike a finding of guilt of a fighting infraction, a finding of guilt on a 762 violation results in revocation of treatment and of time in the community. On its own, the fighting infraction in Mr. Schley’s case resulted in 15 days’ segregation and loss of 15 days’ good conduct time. See Motion for Discretionary Review, at 5. But because Mr. Schley was on a DOSA sentence, that same infraction subjected him to a much more severe sanction: termination from the chemical dependency program, which inevitably resulted in a revocation of his DOSA sentence, which – according to DOC -- necessarily results in Mr. Schley being ordered to serve 29 more months of incarceration.²

DOC’s argument here, that a guilty finding based on “some evidence” from an infraction hearing may serve as the unquestioned predicate for treatment termination and DOSA revocation, without any

² Amici would argue that under both RCW 9.94A.662(3) and DOC Policy 580.655, a person whose in-prison DOSA is revoked is not in fact required to serve the remainder of his term in confinement, and the hearing officer has discretion to impose a lesser sanction. However, DOC argues otherwise.

assessment of the behavior that gave rise to the infraction under the “preponderance of the evidence” standard, undermines its own procedural protections. Indeed, it would be illogical to require this heightened burden of proof for these hearings – given the liberty interest at stake – if the revocation hearing officer’s only task is to prove that the prisoner was terminated from treatment, a fact that was “utterly indisputable” at that stage of the process. Schley, 197 Wn. App. at 870. Whether a prisoner has received a major infraction, and whether he was administratively terminated from chemical dependency treatment are simple “yes” or “no” questions. Despite the State’s arguments,³ the hearing officer at the DOSA revocation hearing is not really applying a preponderance of the evidence standard. As the court noted, Mr. Schley’s “DOSA was functionally revoked once he was found guilty of fighting by “some evidence” at the infraction hearing.” Id. at 868. Therefore, this stage of the proceeding is useless unless there is an assessment of the underlying behavior under the heightened, appropriate, standard of proof.

DOC also asserts that treatment for an “improper motive” may be assessed at a DOSA revocation proceeding. DOC’s Supplemental Brief, at 4. However, it is unclear how that is possible given DOC’s reading of the

³ See Motion for Discretionary Review at 12 (“The hearing officer then applied the preponderance of the evidence standard to determine that Schley’s termination from treatment warranted revocation of the DOSA sentence”).

statutory scheme, which would preclude anything of substance from occurring at the hearing. Schley, 197 Wn. App. at 868-70. Indeed, as amicus DRW points out in its statement of interest, inmates who have reported termination of treatment for improper reasons related to their disability and need for accommodations have been unable to raise these important issues at the DOSA revocation hearing. The underlying behavior and treatment termination must be assessed under the heightened standard of proof to preserve the procedural due process afforded by DOC's own regulations.

Unless the hearing examiner is reviewing the underlying facts that resulted in termination, and making a finding on those facts by a preponderance of the evidence, then revocation is a foregone conclusion, rendering the hearing and the benefit of counsel meaningless.

Accordingly, this Court should find that any hearing in which facts are determined that will inexorably lead to a DOSA revocation should apply the "preponderance of the evidence" standard to those facts and provide for the opportunity to request counsel. That may be done either at the initial infraction hearing, when it is clear that the prisoner will be terminated from treatment and subject to a "762" violation and DOSA revocation as a result, or in the final DOSA revocation.

While it is true that prisoners are not entitled to full due process protections, a convicted defendant has a limited liberty interest, which entitles him to minimal due process rights. State v. Nelson, 103 Wn.2d 760, 762-63, 697 P.2d 579 (1985). When facing only a loss of good time credits, due process is satisfied by the “some evidence” standard. In re Anderson, 112 Wn.2d 546, 548-49, 772 P.2d 510 (1989); In re Johnston, 109 Wn.2d 493, 497, 745 P.2d 864 (1987); In re Pers. Restraint of Krier, 108 Wn. App. 31, 38, 29 P.3d 720 (2001). However, when a more significant liberty interest is at stake, minimal due process rights require a preponderance standard. See State v. Ammons, 105 Wn.2d 175, 185-86, 713 P.2d 719, modified, 718 P.2d 796 (1986), superceded by statute, RCW 10.73.090 (Use of evidentiary standard of preponderance of the evidence to establish alleged criminal history satisfies minimal due process where defendants faced enhanced sentence); RCW 9.94B.040(3)(c) (state has burden of showing by preponderance of evidence that violation of condition of sentence occurred, which, if proved, could result in up to 60 days’ confinement per violation). Moreover, in these circumstances, genuine issues of fact are in dispute. See, e.g. State v. Bao Dinh Dang, 178 Wn.2d 868, 874, 312 P.3d 30 (2013) (before revoking insanity acquittee’s conditional release from

confinement, trial court must by preponderance of the evidence find acquittee dangerous).

This Court should find that the preponderance of the evidence standard applies to the determination of the facts underlying Mr. Schley's termination from chemical dependency treatment, whether at his 762 hearing or at an earlier stage in the process.

2. The Opportunity for Counsel Must be Provided at the Determinative Hearing.

As the Court of Appeals held, at the hearing that can result in revocation of a DOSA, the accused must be able to request counsel, as required by Grisby, supra. Even if the Department decides to have only one hearing, rather than the two-step process it used against Mr. Schley, the Grisby reasoning applies.

The U.S. Supreme Court nearly 80 years ago emphasized that “the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.” Johnson v. Zerbst, 304 U.S. 458, 462–63, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). As the Court said in Powell v. Alabama, 287 U.S. 45, 69, 53 S. Ct. 55, 77 L. Ed. 158 (1932): “He lacks both the skill and knowledge adequately to prepare his defence, even though he have a

perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.”

Amici realize that Johnson and Powell were criminal cases and that Mr. Schley’s case is a revocation of a DOSA, to which a due process, not Sixth Amendment, right to counsel applies. But the reasoning is applicable. Particularly in this case, in which the Department presented anonymous written statements to take away two and a half years of liberty, counsel was required to challenge the quality of the evidence and to advocate effectively for Mr. Schley, including the possibility of presenting live testimony on his behalf.

As the U.S. Supreme Court has written about probation revocation hearings:

Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty....In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.

Gagnon v. Scarpelli, 411 U.S. 778, 790-91, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

Here, Mr. Schley has denied committing the alleged violation that would lead to revocation of his DOSA. He should be provided counsel at

the infraction hearing, if the determination of that will inevitably lead to revocation of his DOSA, or at a second hearing at which the facts will be determined by a preponderance of the evidence.⁴

Other state and federal courts have recognized the holding of Gagnon on the importance of counsel in revocation hearings. The Nebraska Supreme Court, in requiring due process protections in a drug court proceeding, wrote, “In addition, the parolee or probationer has a right to the assistance of counsel in some circumstances where the parolee's or probationer's version of a disputed issue can fairly be represented only by a trained advocate.” State v. Shambley, 281 Neb. 317, 327, 795 N.W.2d 884, 893 (Neb. 2011) (footnote omitted).

In reviewing two habeas corpus petitions claiming deprivation of due process because of failure to appoint counsel at parole revocation hearings, the Seventh Circuit wrote, considering Gagnon: “Even if the violation is a matter of public record, or is uncontested, there may be

⁴ Amici recognize that “[p]rison discipline cases are significantly different from other administrative proceedings that can result in the loss of liberty.” In re Pers. Restraint of Grantham, 168 Wn.2d 204, 215, 227 P.3d 285, 292 (2010). But if the discipline hearing in effect leads to the kind of loss of liberty involved in revocation of a DOSA, the Department must provide the greater protections of the preponderance standard and the opportunity to request counsel, either in a combined infraction/revocation hearing or in a second hearing.

substantial ground for opposing revocation which only counsel can adequately present.” Shead v. Quatsoe, 486 F.2d 694, 696 (7th Cir. 1973).

In reversing a parole revocation because the petitioner had been denied representation by retained counsel, a federal district court wrote of the importance of the assistance of counsel.

The petitioner had a colorable claim that he either lacked the necessary intent to commit the violation or that his lack of intention was a mitigating circumstance making revocation inappropriate. It is apparent from the record, that the hearing examiner's evaluation of the credibility of petitioner's witnesses was crucial to the decision to revoke petitioner's parole. The presence of counsel would have better enabled the petitioner to establish the credibility of his witnesses and prevent the severe deprivation of liberty he has suffered.

This is not to say that the petitioner had an absolute, constitutional right to the assistance of retained counsel. The court holds that the concept of fundamental fairness advanced in Shead, supra, required this petitioner, on these facts, to have the assistance of retained counsel at the revocation hearing.

Cresci v. Schmidt, 419 F. Supp. 1279, 1281-82 (E.D. Wis. 1976).

During both the DOC disciplinary hearing and the DOSA revocation hearing, Mr. Schley denied participating in a fight. Mr. Schley provided his version of the facts and did not have an opportunity to confront confidential sources.

DOC's reading of the statute would undermine the court's determination in Grisby, supra, that the need for counsel should be assessed at a DOSA revocation hearing. 190 Wn. App. at 806 (2015). The

Court relied on the holding in Gagnon that counsel may be required when there are “substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.” Grisby, 190 Wn. App. at 804, quoting Gagnon 411 U.S. at 790-91. Clearly, the Grisby court did not anticipate that DOSA revocation hearings would be a rubber stamp of a prior determination that an inmate has been infracted and therefore terminated from treatment by a lower standard of proof. It anticipated that there were factual determinations to be made, assertions to be tested, and arguments to be raised in revocation hearings, necessitating appointment of counsel in some cases.

“The legislative intent of DOSA is to increase the use of effective treatment for substance abusing individuals, thereby reducing recidivism.”⁵ The Washington State Institute for Public Policy estimated that 40.5 percent of DOSA-eligible participants would be reconvicted of a new felony within three years of release from prison without DOSA.⁶ Individuals who gain control of their addictions can maintain housing and

⁵ Washington State Institute for Public Policy, *Washington’s Drug Offender Sentencing Alternative: Update on Recidivism Findings*, (December 2006) http://www.wsipp.wa.gov/ReportFile/961/Wsipp_Washingtons-Drug-Offender-Sentencing-Alternative-An-Update-on-Recidivism-Findings_Full-Report.pdf (last visited December 1, 2017).

⁶ Id.

employment – avenues toward overcoming poverty and reducing recidivism.

The absence of counsel in DOSA revocation hearings can lead to catastrophic results – longer sentences, loss of necessary drug treatment, and delayed reunification with family– for numerous inmates. The benefit of participating in the DOSA program is invaluable and the process by which people are removed requires due process.

VI. CONCLUSION

This Court should affirm the Court of Appeals and order a new hearing to be held under a preponderance of the evidence standard and preceded by a determination of Mr. Schley’s need for appointed counsel.

Respectfully submitted, December 1, 2017.



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The Defender Initiative does not, in this brief or otherwise, represent the official views of Seattle University or its School of Law.

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