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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Personal Restraint Petition of:

MATTHEW DOUGLAS SCHLEY,

Petitioner.

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**RESPONSE OF THE DEPARTMENT OF  
CORRECTIONS TO AMICI CURIAE BRIEF**

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## I. INTRODUCTION

The brief of Amici Curiae brings nothing new to this case. Like Schley, Amici Curiae argue that the Department must prove by a preponderance of the evidence the facts underlying Schley's termination from the in-prison drug treatment program in order to reclassify his DOSA sentence. Like Schley, Amici Curiae argue that the facts the Department must prove include whether Schley actually fought with another inmate. Further, like Schley, Amici Curiae argue that because the Department must prove the underlying facts, the case is complex and the Department must appoint counsel. But like Schley, Amici Curiae misunderstand what facts must be proven at the reclassification hearing and, consequently, misapprehend the complexity of the hearing and the need for counsel.

The Department reclassified the DOSA sentence because clinical staff had terminated Schley from the treatment program. The fact of termination, and not the underlying behavior resulting in the clinical decision to terminate treatment, was the material fact at issue in the reclassification hearing. Given that the Department only had to prove that clinical staff had terminated Schley from treatment, the issue to be decided at the reclassification hearing was not complex. Since the hearing did not involve complex issues, and Schley was capable of adequately representing himself in that hearing, Schley was not entitled to counsel.

## II. ARGUMENT

### A. **Due Process did not Require the Department to Prove by a Preponderance of the Evidence the Underlying Behavior that Led to Schley's Termination From Treatment**

Amici Curiae argue that due process required the Department to prove the facts of Schley's underlying behavior that led to clinical staff's decision to terminate Schley from the treatment program. But the Due Process Clause itself does not establish what elements the Department must prove in order to reclassify the sentence. Rather, as in criminal cases, the Court must look to the applicable statute to determine what elements must be proven to satisfy due process. *See State v. Johnson*, 188 Wn.2d 742, 750-52, 399 P.3d 507, 511 (2017) (the Court first reviewed statute to determine the elements for proving second degree theft of an access device).

Here, the statute did not require proof of Schley's underlying behavior. Rather, the statute provides, "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). The statute thus required only proof of administrative termination from treatment, not proof of the facts of Schley's underlying behavior. *See State v. McCormick*, 166 Wn.2d 689, 705, 213 P.3d 32 (2009) (noting the sex offender sentencing alternative statute requires only proof that the offender failed to complete treatment).

Amici Curiae argues that *In Re McKay*, 127 Wn. App. 165, 110 P.3d 856 (2005) imposes the obligation to prove by a preponderance of evidence the facts underlying the reason for termination from the treatment program. But like Schley, Amici Curiae misread the holding in *McKay*.

*McKay* involved the issue of whether the some evidence standard or the preponderance standard applied to DOSA reclassification hearings. *McKay*, 127 Wn. App. at 167-68. The Department charged McKay with a serious prison infraction and with failing to participate in treatment, and the Department held a single hearing for both the serious prison infraction and the DOSA reclassification. *Id.* Applying the some evidence standard, the hearing officer found McKay had failed to participate in treatment and determined that McKay's failure to participate in treatment warranted reclassification of the DOSA sentence. *Id.* at 168. Granting relief, the Court of Appeals held that the Department must apply the preponderance standard in order to reclassify the DOSA sentence. *Id.* at 168-170.

The *McKay* court never held that the Department must prove the facts underlying the serious prison infraction by a preponderance of the evidence. *McKay*, 127 Wn. App. at 168-70. On the contrary, the *McKay* court recognized that serious prison infractions are properly resolved under the lower "some evidence" standard. *Id.* at 170 n. 17 (citing *Wolff v. McDonnell*, 418 U.S. 539, 561-62, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)).

Amici Curiae mistakenly argue that the reclassification of Schley's DOSA sentence resulted from the guilty finding for his serious prison infraction. But the Department did not reclassify Schley's sentence because he had been found guilty of the fighting infraction. Rather, the Department reclassified the DOSA sentence because clinical staff had terminated Schley from the treatment program. The termination from treatment, not the infraction for fighting, was the fact that triggered reclassification of the DOSA sentence. The Department complied with due process by proving this fact under the preponderance of evidence standard.

Amici Curiae also fail to recognize that clinical staff may decide to terminate treatment based upon a variable of factors, including factors unrelated to a single prison infraction. For example, clinical staff may terminate the offender from the treatment program because the offender displayed "[a] pattern of behavioral issues that have been continual and responses to interventions have been unsuccessful." Appendix D, Motion for Discretionary Review, at 1. Under the Amici's argument, if the clinical staff terminated treatment due to such a pattern of behavior, the Department would not only have to prove that the clinical staff terminated the offender for this reason, but also prove that the offender engaged in the particular behavior over the course of the year. Such proof is not required by the statute or due process.

Without discussing *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 978 P.2d 1083 (1999), Amici also cite to numerous cases for the general proposition that the preponderance of evidence standard applies whenever the liberty interest at issue becomes more significant. But none of the cited cases require the Department to reprove the facts of Schley's underlying behavior when he is terminated from treatment.<sup>1</sup>

Amici Curiae also argue the importance of DOSA sentences. But the study cited by Amici involve DOSA sentences where the offender has remained in treatment. The study does not show that it benefits society, and reduces recidivism, to keep an offender on a DOSA sentence after termination from treatment. Allowing an offender terminated from treatment to continue reaping the benefit of a reduced sentence does not serve the public's interest. Prohibiting reclassification of the sentence despite the proof by a preponderance of the evidence that clinical staff have terminated the offender from the treatment program would simply mean that the untreated offender releases to the community in half the time.

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<sup>1</sup> Amici Curiae allege that clinical staff have improperly terminated offenders from treatment based upon a disability. But Schley has not raised this issue, and he has never alleged his termination resulted from improper motives. The Court should therefore decline to consider the issue. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 819, 225 P.3d 213, 234 (2009) (the Court will not consider issue raised solely by an amicus).

**B. Schley was not Entitled to Counsel in Light of the Limited Issue to be Decided at the DOSA Reclassification Hearing**

Amici Curiae argue that because Schley denies having fought with the other inmate, he should receive counsel in his DOSA reclassification hearing. Amici Curiae then essentially contend that most DOSA reclassification hearings will require the appointment of counsel. But since the DOSA reclassification hearing properly focused on the limited issue of whether or not the clinical staff terminated Schley from treatment, and Schley was able to adequately represent himself in the hearing, he was not denied the limited due process right to request counsel.

Amici Curiae first cites to *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). But *Gagnon* itself recognizes that due process does not always provide a right to counsel. *Id.* at 790-91. *Gagnon* recognized there is no need for counsel if the case is not complex and the offender appears capable of speaking effectively for himself. *Id.* *Gagnon* further recognizes that the appointment of counsel will likely be undesirable and constitutionally unnecessary in most hearings. *Id.* at 790.<sup>2</sup>

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<sup>2</sup> Amici Curiae also cite to *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) and *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932), but Amici Curiae admit both cases involved criminal proceedings, not revocation hearings. Neither case requires the appointment of counsel in Schley's reclassification hearing.

Amici Curiae next argue that the Nebraska Supreme Court recognized the importance of counsel in hearings similar to DOSA reclassification hearings. *State v. Shambley*, 281 Neb. 317, 327, 795 N.W.2d 884 (2011). But the *Shambley* court simply recited the general due process rights available to a defendant in a revocation hearing under *Gagnon* and *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). *See Shambley*, 381 Neb. at 327. The Nebraska Supreme Court found a due process violation based upon the particular facts of Shambley’s hearing, but the court did not hold that counsel should be appointed in most drug program revocation hearings.

Amici Curiae next cite to two federal habeas corpus cases, which Amici argue recognized the importance of counsel in hearings such as the DOSA reclassification hearings. However, the Seventh Circuit in *Shead v. Quatsoe*, 486 F.2d 694, 696 (7th Cir. 1973) actually recognized that *Gagnon* “concluded that the appointment of counsel is ‘constitutionally unnecessary in most revocation hearings.’” *Id.* (quoting *Gagnon*, 411 U.S. at 790). And, although the district court in *Cresci v. Schmidt*, 419 F. Supp. 1279, 1283 (E. D. Wis. 1976) found the petitioner should have been allowed the assistance of retained counsel under the particular facts of that case, the court stressed, “This is not to say that the petitioner had an absolute, constitutional right to the assistance of retained counsel.” *Id.*

Here, the hearing concerned whether clinical staff had terminated Schley from treatment. Even if the hearing involved the issue of why clinical staff had terminated Schley from treatment, the issues still were not complex. The hearing involved a straightforward factual issue. *In re Price*, 157 Wn. App. 889, 906, 240 P.3d 188 (2010). Given that Schley demonstrated an adequate ability to represent himself, the lack of counsel did not violate the limited right to request counsel.

### III. CONCLUSION

The Department properly reclassified Schley's DOSA sentence after finding by a preponderance of the evidence that clinical staff had terminated Schley from the treatment program. The Department's actions complied with due process. For that reason, the Court should reverse the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 29th day of December, 2017.

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**CERTIFICATE OF SERVICE**

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I certify under penalty of perjury under the laws of the state of  
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EXECUTED this 29th day of December, 2017, at Olympia, WA.

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