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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: PERSONAL RESTRAINT OF MATTHEW SCHLEY

STATE OF WASHINGTON,

Movant,

v.

MATTHEW SCHLEY,

Respondent and Cross-Movant.

ON APPEAL FROM THE WASHINGTON STATE DEPARTMENT
OF CORRECTIONS, RISK MANAGEMENT DIRECTOR

ANSWER TO STATE'S MOTION FOR DISCRETIONARY
REVIEW AND CROSS-MOTION FOR DISCRETIONARY REVIEW

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 ORIGINAL

TABLE OF CONTENTS

I. IDENTITY OF RESPONDING PARTY AND DECISION BELOW..... 1

II. ISSUES FOR CROSS-MOTION FOR REVIEW 2

III. COUNTERSTATEMENT OF FACTS 2

IV. ARGUMENT IN OPPOSITION TO DISCRETIONARY REVIEW 5

 A. **DOC ignores that the Court of Appeals cogently applied settled precedent** 6

 1. Relying on a prior finding established by ‘some evidence’ does not rise to the preponderance standard required by due process as confirmed in *McKay*..... 6

 2. DOC unavailingly attempts to recast the issue presented 11

 3. DOC’s allegation of conflict with *Gronquist* and *McCormick* is manufactured 12

 B. **DOC conceded it would provide the required notice of the right to request counsel on remand, so there is no issue for this Court to review** 14

V. CROSS-MOTION FOR DISCRETIONARY REVIEW..... 16

 A. The Court should grant review of DOC’s authority to impose three sanctions—an infraction, termination from treatment and DOSA revocation—for a single incident of fighting 16

 B. The Court should grant review of the issue of first impression whether DOC’s statutory authority to administratively terminate DOSA participants extends to disciplinary infractions entirely unrelated to chemical dependency recovery 18

V. CONCLUSION..... 20

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<i>Beckett v. Dep't of Soc. & Health Serv.</i> , 87 Wn.2d 184, 550 P.2d 529 (1976).....	13
<i>In re Detentions of McLaughlin & Gilman</i> , 100 Wn.2d 832, 676 P.2d 444 (1984).....	13
<i>In re Pers. Restraint of Gronquist</i> , 138 Wn.2d 388, 978 P.2d 1083 (2009).....	12
<i>State v. Brown</i> , 142 Wn.2d 57, 11 P.3d 818 (2000).....	19, 20
<i>State v. McCormick</i> , 166 Wn.2d 689, 213 P.3d 32 (2009).....	14
<i>State v. Simmons</i> , 152 Wn.2d 450, 98 P.3d 789 (2004).....	19

Washington Court of Appeals Decision

<i>Grisby v. Herzog</i> , 190 Wn. App. 786, 362 P.3d 763 (2015).....	passim
<i>In re Pers. Restraint of McKay</i> , 127 Wn. App. 165, 110 P.3d 856 (2005).....	passim

U.S. Supreme Court Decisions

<i>Gagnon v. Scarpelli</i> , 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).....	1, 4, 15
<i>Morrissey v. Brewer</i> , 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).....	7
<i>One Lot Emerald Cut Stones v. United States</i> , 409 U.S. 232, 93 S. Ct. 489, 34 L. Ed. 2d 438 (1971).....	13
<i>Wolff v. McDonnell</i> , 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).....	7

Other Federal Court Decisions

Kennedy v. Southern California Edison Co.,
268 F.3d 763 (9th Cir. 2001) 8

Statutes

RCW 9.94A.662 18
RCW 72.01.090 18
RCW 72.09.130 19

Rules

RAP 13.4..... 1, 2, 6, 17

Other Authorities

WAC 137-28-350 2, 16, 17

I. IDENTITY OF RESPONDING PARTY AND DECISION BELOW

Respondent Matthew Schley answers the State's Motion for Discretionary Review of the Court of Appeals decision, which applied settled precedent in reaching both holdings. First, relying on *In re Pers. Restraint of McKay*, 127 Wn. App. 165, 170, 110 P.3d 856 (2005), the Court of Appeals held DOC applied a constitutionally inadequate burden in revoking Mr. Schley's DOSA sentence. Second, the court held DOC unconstitutionally denied Mr. Schley notice of his right to request counsel under *Grisby v. Herzog*, 190 Wn. App. 786, 796-97, 805-06, 362 P.3d 763 (2015), and *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

In its motion for discretionary review, DOC manufactures a conflict where none exists. The application of settled precedent does not warrant review under any RAP 13.4 criteria.

However, if the Court disagrees and grants discretionary review, Mr. Schley moves the Court to accept review of two additional issues: (1) whether DOC exceeded its authority to impose only a single sanction when it imposed three distinct punishments for Mr. Schley's alleged fighting, and (2) whether DOC exceeded its statutory authority by revoking Mr. Schley's Drug Offender Sentencing Alternative

(DOSA) based on alleged fighting that was unrelated to chemical dependency.

II. ISSUES FOR CROSS-MOTION FOR REVIEW

1. Where one incident leads to multiple in-custody violations, WAC 137-28-350 authorizes DOC to impose only a single sanction. Did DOC exceed its authority by imposing three distinct punishments for Mr. Schley's alleged fighting? RAP 13.4(b)(4), 13.5A.

2. The Legislature has granted DOC limited authority to revoke a court-imposed DOSA sentence. This authority does not extend to conduct unrelated to chemical dependency treatment. Did DOC exceed its authority by revoking Mr. Schley's DOSA based on alleged fighting that was unrelated to chemical dependency? RAP 13.4(b)(4), 13.5A.

III. COUNTERSTATEMENT OF FACTS

Having pled guilty, Matthew Schley is serving concurrent DOSA sentences agreed to by the State and entered by the Superior Court. App. 1-22 (judgments).¹ Under these sentences, he was to

¹ The Court of Appeals Slip Opinion and the brief of Amici Curiae the Defender Initiative and Columbia Legal Services are attached to this Answer. Other portions of the record are attached to Mr. Schley's Court of Appeals brief in a consecutively-paginated appendix referred to as "App." The Answer also cites to the single-volume report of proceedings filed in the Court of Appeals and attached to DOC's motion for discretionary review.

spend 29.75 months undergoing chemical dependency treatment while incarcerated. *Id.* He then would serve out the remainder of his sentence, an additional 29.75 months, in the community on community custody under conditions to ameliorate his chemical dependency. *Id.*

Once he was incarcerated, DOC informed Mr. Schley that he would be terminated from the program if he acted violently. App. 23-26. Approximately a week later, he was charged with a serious infraction for fighting based on anonymous reports. App. 27. Mr. Schley contended there had been no fight, but that he had received the scratch to his lower back in his sleep. *Id.*; *accord* RP 15-17 (Schley told psychiatrist about injury that derived from exiting bunk during sleep). Evidence was presented at a DOC disciplinary hearing and Mr. Schley was found guilty under the “some evidence” standard. App. 27; RP 6-7, 27-28. The finding was upheld in an internal review. App. 61 (disciplinary hearing appeal decision); RP 29-30.

Mr. Schley was automatically terminated from the chemical dependency treatment program due to this serious infraction. App. 28; *see* RP 22-23.

A hearing officer refused to reevaluate the evidence underlying the termination from treatment and revoked Mr. Schley’s DOSA. RP

6-7, 15-21, 33-35; App. 36. Mr. Schley was ordered to serve the remainder of his sentence, both 29.75-month halves, in DOC custody.

An appeals panel affirmed the revocation, emphasizing it lacked jurisdiction to review the infraction or its evidentiary underpinnings. App. 42-54. A risk management director affirmed the appeals panel and hearing officer's decisions. App. 55-60.

Mr. Schley filed a personal restraint petition and the Court of Appeals held the procedure employed violated settled law, in two regards. Slip Op. at 1-11. First, the Court of Appeals held that DOC failed to apply the constitutional burden of proof, a preponderance of the evidence, as affirmed in *McKay*, to the facts underlying the DOSA revocation. Slip Op. at 4-9. The fighting infraction was found by only "some evidence," yet it necessarily resulted in the revocation of the DOSA sentence. Slip Op. at 8-9. The court held DOC had to prove the fighting that resulted in the DOSA revocation by a preponderance of the evidence. *Id.*

The Court of Appeals also held that DOC failed to comply with the due process requirements of *Grisby* and *Gagnon* when it notified Mr. Schley he did not have the right to request counsel and failed to determine whether counsel should be provided. Slip Op. at 9-11. DOC

conceded “it would advise Mr. Schley that he had a right to request counsel” on remand. Slip Op. at 11.

Because it remanded for a new hearing on these bases, the Court of Appeals denied Mr. Schley’s two alternative grounds for reversal. Slip Op. 11-13.

IV. ARGUMENT IN OPPOSITION TO DISCRETIONARY REVIEW

The Court of Appeals held DOC’s DOSA revocation hearing failed to comply with settled precedent in two basic regards—it applied the wrong burden of proof and failed to notify Mr. Schley of his right to request an attorney. Each failing independently merited remand.

Mr. Schley’s DOSA revocation hearing failed to comport with due process because the hearing officer accepted findings made in an infraction hearing to only the some evidence standard as proof by a preponderance of the evidence sufficient to revoke the DOSA sentence. In its motion, DOC still contends its procedure satisfies due process.

DOC also failed to notify Mr. Schley he had the right to ask for counsel—in fact, DOC’s standard notice advised there is no right.

DOC’s motion for discretionary review ignores the settled precedent and seeks to create a conflict where none exists.

A. DOC ignores that the Court of Appeals cogently applied settled precedent.

1. Relying on a prior finding established by ‘some evidence’ does not satisfy the preponderance standard required by due process as confirmed in *McKay*

Precedent plainly holds that the “proper standard of proof at DOSA revocations is a preponderance of the evidence.” *In re Pers. Restraint of McKay*, 127 Wn. App. 165, 170, 110P.3d 856 (2005). DOC agrees that the preponderance of the evidence standard applies at a DOSA revocation hearing and that a preponderance finding must be “founded upon verified facts and accurate knowledge.” DOC Br. of Resp. at 6 (citing *McKay*, 127 Wn. App. at 170).

Yet, DOC’s motion for discretionary reviews cites to *McKay* only once, only in its factual statement, and only in reference to the Court of Appeals decision. MDR at 8. DOC’s deliberate downplaying of precedent is a red flag. *McKay* controls and adherence to the 2005 decision does not satisfy any basis for review under RAP 13.4(b).

Application of the preponderance of the evidence standard is compelled by constitutional due process. Those facing DOSA revocation have “a significant liberty interest in the expectation of community custody as opposed to incarceration, including the ability to

be with family and friends, be employed or attend school, and to live a relatively normal life.” *McKay*, 127 Wn. App. at 170; *accord Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (due process protections required where grievous loss is at stake); *Wolff v. McDonnell*, 418 U.S. 539, 556-61, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (discussing due process protections). Our society likewise “has a stake in whatever may be the chance of restoring [Mr. Schley] to normal and useful life within the law.” *Id.* (quoting *Morrissey*, 408 U.S. at 484).

The Court of Appeals simply enforced the settled due process standard—a preponderance of the evidence. Looking at Mr. Schley’s DOSA revocation hearing, the Court held DOC did not apply a preponderance of the evidence standard. Instead, DOC revoked Mr. Schley’s DOSA sentence under the lesser “some evidence” standard.

To revoke a DOSA, due process requires more than just any evidence in the record, it requires that the evidence make the underlying events more likely than not to actually exist. A preponderance finding must be supported by “verified facts . . . and accurate knowledge.” *Morrissey*, 408 U.S. at 484. It requires a

showing that is more probable than not. *Kennedy v. Southern California Edison Co.*, 268 F.3d 763, 770 (9th Cir. 2001).

On the other hand, the “some evidence” standard is minimal. The “some evidence” standard permits findings as long as they are supported by “any evidence in the record.” *McKay*, 127 Wn. App. at 169 (emphasis in original). If there is any scintilla of evidence to support it, a finding may be made.

Therefore, findings supported by some evidence do not satisfy the more rigorous preponderance of the evidence standard.

The hearing officer relied on findings supported only by some evidence in revoking Mr. Schley’s DOSA. Slip Op. at 5-6. Using the some evidence standard, a hearing officer found Mr. Schley guilty of fighting, a 505 infraction. App. 27; *see* App. 36 (noting some evidence standard was applied at infraction hearing). The existence of this infraction alone caused Mr. Schley to be terminated from his in-prison chemical dependency treatment program. App. 29; RP 10-13; Slip Op. at 6. In turn, his DOSA sentence was revoked because he had been administratively terminated from treatment. App. 30-41; RP 22-23, 33-35; Slip Op. at 6.

In short, “[t]he essential fact for DOSA revocation was resolved at the infraction hearing for fighting.” Slip Op. at 6. And it was resolved under the some evidence standard.

After the some evidence-based finding of the 505 infraction, that evidence was never reevaluated or held to the higher preponderance of the evidence standard. RP 6-7, 19-21. In fact, the revocation hearing officer “asked Mr. Schley if he understood that the major infraction #505 was not the matter at hand for this current [DOSA revocation] hearing process and that the evidence presented during the major infraction hearing concerning the #505 could not be in essence re-heard today.” App. 36; *accord* RP 6-7, 19-21 (stating in part, “I can do absolutely nothing about the mere fact that you were found guilty by another hearing officer and your appeal was upheld. . . . I can’t do anything with that.”). The hearing officer’s decision credits the fact of the infraction as the “most significant witness testimony and evidence presented at the hearing.” App. 37.

The hearing officer also found that the infraction “met the expectations of DOC’s policies for addressing infractions.” *Id.* That is, it was proved to the minimal level: a scintilla of evidence supported it.

RP 28 (testimony at hearing by CUS Lawson, “I absolutely believe that there was some evidence there that he participated in a fight.”), 33.

Because this constitutes findings supported by less than a preponderance of the evidence, the decision does not comport with due process.

DOC, however, argues that the preponderance standard is satisfied simply by attenuation and repetition. It argues that the DOSA revocation was based on sufficient evidence because it was based on Mr. Schley’s termination from treatment not upon an infraction for fighting. The circular argument is unpersuasive.

The termination from treatment was based on the 505 infraction and that termination was the reason for Mr. Schley’s revocation. App. 29-30 (showing fighting led to administrative termination of treatment program); App. 31-32, 35 (showing DOSA revocation based on termination from treatment). The infraction was based simply upon the minimal some evidence standard. This some-evidence finding set in motion a cascade of predetermined events—administrative termination from treatment and DOSA revocation—during which the evidence was never reevaluated and the higher preponderance standard was never applied.

The DOC Appeals Panel summarized the problem here: “because [some evidence showed Mr. Schley] violated a mandatory treatment program requirement and [he was] terminated from [his] chemical dependency treatment program, the Hearing Officer had no other option but to revoke your DOSA sentence.” App. 54 (emphasis added); *see* App. 60 (decision of Risk Management Director affirming Hearing Officer and Appeals Panel decisions); *cf.* RP 11-13 (DOC argues for revocation based on fighting infraction that caused termination from treatment).

McKay and the Court of Appeals decision here adequately resolves the problem. This Court’s review is unnecessary.

2. DOC unavailingly attempts to recast the issue presented.

DOC suggests that the hearing officer’s decision to revoke Mr. Schley’s DOSA was based solely on the prior determination that Mr. Schley had been terminated from treatment. But in this attempted recasting, DOC purposefully obfuscates that termination from treatment and revocation were direct outcomes of the “some evidence” finding that Mr. Schley had committed an infraction for fighting. As the Court of Appeals correctly held, “the basis for the termination from the treatment program was a determination in a prior proceeding that

Schley had been involved in a fight That finding was proved using the ‘some evidence’ standard.” Slip Op. at 1. “[T]he inevitable result of a finding of guilt [by some evidence] at Schley’s infraction hearing was revocation of his DOSA.” Slip Op. at 5. “The essential fact for DOSA revocation was resolved at the infraction hearing” by some evidence. Slip Op. at 6.

3. DOC’s allegation of conflict with *Gronquist* and *McCormick* is manufactured

The State contends *In re Pers. Restraint of Gronquist* supports review because it conflicts with the Court of Appeals opinion.

However, as the Court of Appeals discussed, that case is inapposite.

Compare MDR at 13-14 (relying on *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 978 P.2d 1083 (2009)) *with* Slip Op. at 6-8.

Gronquist relates to a subsequent hearing for a serious infraction based on four prior findings of minor infractions. *Gronquist* is distinguishable from this case in two important regards.

First, the liberty interest of Gronquist—facing 10 days’ loss of good time and 5 days’ segregation—is significantly less than Mr. Schley’s, who faced an addition 29.75 months’ incarceration.

Accordingly, the process due Mr. Schley is distinct from that due Mr. Gronquist.²

Gronquist is not controlling for an additional reason. The administrative burden to the State was more significant in that case than it is here—despite DOC’s protestations. DOC was immediately aware that DOSA revocation was a necessary consequence of a founded infraction for fighting. Thus, DOC could have subjected the infraction finding to the preponderance standard or consolidated the hearings. In *Gronquist*, on the other hand, the four minor infractions were separated in time and the serious infraction resulted only after the fourth had occurred.

² As it did in the Court of Appeals, DOC seeks to analogize the reliance on a finding proved to a lower standard to the use of prior convictions as a predicate element. MDR at 14-15. A predicate offense may be used at a subsequent proceeding requiring the same or a lower burden of proof. But the converse does not follow—Mr. Schley cannot be precluded from challenging, at a hearing to which he was entitled to proof by a preponderance of the evidence, a prior finding made to a lesser standard of proof. *See e.g., One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 93 S. Ct. 489, 34 L. Ed. 2d 438 (1971) (because of “difference in burdens of proof, an adjudication of the issues in a criminal case does not constitute an adjudication on the preponderance-of-the-evidence burden applicable in civil proceedings”); *Beckett v. Dep’t of Soc. & Health Serv.*, 87 Wn.2d 184, 186-87, 550 P.2d 529 (1976) (differing burdens of proof at separate proceedings preclude application of doctrine of collateral estoppel) *overruled on other grounds by In re Detentions of McLaughlin & Gilman*, 100 Wn.2d 832, 676 P.2d 444 (1984).

As the Court of Appeals aptly held, these distinctions each factor into the due process analysis, rendering *Gronquist* and Schley patently distinct. *McKay*, on the other hand, is on point (although ignored by DOC).

Likewise, DOC's reliance on *State v. McCormick* is misplaced. 166 Wn.2d 689, 213 P.3d 32 (2009). The *McCormick* Court reviewed the mens rea requirement for a violation of a term of community custody imposed pursuant to a sex offender alternative sentence. *Id.* at 697, 699-705. The case did not involve DOC proceedings, the burden of proof, or bootstrapping a prior finding resting on a lesser burden to a subsequent determination requiring a higher standard is required. Once again, *McKay* is on point and *McCormick* is not.

B. DOC conceded it would provide the required notice of the right to request counsel on remand, so there is no issue for this Court to review.

DOC has a clear duty to consider whether a particular individual is entitled to counsel in a DOSA revocation hearing and to notify that individual of the right to request counsel. *Grisby v. Herzog*, 190 Wn. App. 786, 796-97, 805-06, 362 P.3d 763 (2015).

DOC's motion conveniently ignores its failure to notify Mr. Schley of his right to request counsel, even after *Grisby* affirmed that

constitutional requirement in 2015. *Gagnon v. Scarpelli* held almost 50 years ago that an individual must be informed of his or her right to request counsel; yet, DOC did not provide Mr. Schley with notice. 411 U.S. 778, 790, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973).

In fact, as amici noted, DOC notified Mr. Schley he did not have the right to counsel. App. 32 (telling Schley that, aside from an interpreter, “no other person may represent you in presenting your case); Br. of Amici Curiae the Defender Initiative and Columbia Legal Services at 6-11 (attached). This “notice” contravened *Gagnon* and *Grisby*.³

The Court of Appeals, accordingly, remanded with instructions that Mr. Schley be notified of his right to request counsel. As the Court of Appeals noted, DOC conceded that if the matter was remanded for a new hearing it would provide Mr. Schley with notice of his right to request an attorney. Slip Op. at 11. Thus, there is no controversy or conflict for this Court to review.

³ *Amici*'s brief further discusses how “DOC has acknowledged that the form it was using and the procedures it is using to revoke inmates’ DOSA status are inadequate and do not comply with the law.” Br. of Amici Curiae at 15. Yet, DOC has failed to implement constitutional measures to provide notice and access to counsel. *Id.* at 13-15.

Further, DOC failed its constitutionally-mandated duty because to determine whether Mr. Schley was entitled to counsel. *Grisby*, 190 Wn. App. at 805-06 (DOC must determine right to counsel on a case-by-case basis); Br. of Amici Curiae the Defender Initiative and Columbia Legal Services at 11-12 (also noting DOC’s systemic history of denying counsel).

DOC argues Mr. Schley was not entitled to counsel because the issues below were “not complex.” MDR at 16. But as the Court of Appeals noted, it is only DOC who viewed and set forth the issues as “not complex.” Slip Op. at 10-11. If DOC had complied with due process, it would have realized the issues were indeed complex.

V. CROSS-MOTION FOR DISCRETIONARY REVIEW

If the Court grants review of either of DOC’s issues, it should also grant review of two alternative grounds for vacating DOC’s DOSA revocation, which Mr. Schley raised below.

A. The Court should grant review of DOC’s authority to impose three sanctions—an infraction, termination from treatment and DOSA revocation—for a single incident of fighting.

If the Court grants review, it should also review whether the DOSA revocation exceeds DOC’s authority to impose a single sanction for a single incident. WAC 137-28-350 provides that “If the hearing

officer determines that more than one violation occurred as a result of the same incident, he/she shall not impose sanctions for the separate violations, but shall consider them together and impose penalties based on the most serious violation in the group.” Based on a single incident of alleged fighting, three discrete sanctions were imposed against Mr. Schley. First, he was found guilty of fighting, a 505 serious infraction, and subjected to 15 days segregation and loss of 15 days good conduct time. Second, DOC terminated Mr. Schley from his in-custody chemical dependency treatment program. Finally, Mr. Schley’s DOSA sentence was revoked, causing him to be incarcerated for an additional 29.75 months that he should be entitled to spend in the community.

Imposing three sanctions for a single act of fighting violates WAC 137-28-350. The hearing officer accordingly exceeded her authority when she revoked Mr. Schley’s DOSA; he had already been sanctioned twice. On this additional basis, the DOSA revocation should be reversed. RAP 13.4(b), 13.5A.

B. The Court should grant review of the issue of first impression whether DOC's statutory authority to administratively terminate DOSA participants extends to disciplinary infractions entirely unrelated to chemical dependency recovery.

If the Court grants review, it should also review the important issue of first impression whether DOC's authorization to administratively terminate DOSA participants extends to violations wholly unrelated to chemical dependency.

The Legislature provides that “[a]n offender . . . who is administratively terminated from the [drug offender sentencing alternative] 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); *McKay*, 127 Wn. App. at 168 (citing former version of statute). The provision demonstrates the Legislature contemplated administrative termination from the program. *Id.* Chapter 9.94A RCW does not delineate bases for administrative termination from the program. However, the Legislature has granted DOC authority “to make its own rules for the proper execution of its powers.” RCW 72.01.090.

With regard to prison disciplinary procedures, the Legislature has authorized DOC to adopt a system that links an inmate's behavior

and participation in work and education with the receipt or denial of earned early release days and other privileges. RCW 72.09.130(1); *State v. Simmons*, 152 Wn.2d 450, 455, 98 P.3d 789 (2004); *State v. Brown*, 142 Wn.2d 57, 60, 11 P.3d 818 (2000). This provision “deals only with maintaining internal prison discipline by creating a system of incentives for conforming behavior and disincentives for nonconforming behavior.” *Brown*, 142 Wn.2d at 62. DOC’s infraction policy, under which Mr. Schley was sanctioned with 15 days segregation plus loss of 15 days good conduct time, fulfills this delegation of authority. The Legislature, however, has not authorized DOC to revoke a DOSA sentence based on non-program related activity.

The Legislature cannot be deemed to have authorized DOC, based on unrelated conduct, to override the sentencing court’s determination that the offender and society will be best served by the offender completing appropriate substance abuse treatment. *See McKay*, 127 Wn. App. at 169-70 (discussing joint interest in successful DOSA sentences). This is not to say that DOC cannot implement policies and rules to regulate the assaultive conduct of inmates. DOC has implemented a series of policies and rules, such as the 505

infraction and attendant sanctions imposed on Mr. Schley. Chapter 137-28 WAC. An infraction is the appropriate way to deal with the general conduct of prisoners. DOC “must still exercise delegated authority under the restraints of the statutes delegating the authority.” *Brown*, 142 Wn.2d at 62. The ultimate penalty of revoking an offender’s DOSA—a penalty that harms not only the offender, but our society at large—must be limited to grievous circumstances related to chemical dependency.

VI. CONCLUSION

DOC’s motion for discretionary review should be denied because the State cannot dispute the Court of Appeals’ rigorous application of precedent. Instead, DOC resorts to arguing the square peg of this case should fit into the round hole of other authority. The peg does not fit.

DATED this 20th day of April, 2017.

Respectfully submitted,

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APPENDIX

Published Opinion of Court of Appeals

Pages 1-13

Brief of Amici Curiae of the Defender Initiative
and Columbia Legal Services

Pages 14-end

APPENDIX

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

IN RE PERSONAL RESTRAINT OF)	No. 73872-1-1
)	
)	DIVISION ONE
)	
MATTHEW RAY DOUGLAS SCHLEY,)	PUBLISHED OPINION
)	
Petitioner.)	FILED: <u>February 21, 2017</u>

SPEARMAN, J. — 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 this case, Matthew Schley's DOSA sentence was revoked when the State proved by a preponderance of the evidence that he had been terminated from the required substance abuse treatment program. But the basis for the termination from the treatment program was a determination in a prior proceeding that Schley had been involved in a fight, which was a violation of program rules. That finding was proved using the "some evidence" standard applicable to proceedings involving alleged infractions of prison rules. Though

No. 73872-1-1/2

these very same facts established the basis for Schley's DOSA revocation they were not proved by a preponderance of the evidence. We agree with Schley that the failure to do so denied him due process and grant his personal restraint petition.

FACTS

Matthew Schley pleaded guilty to first degree theft and second degree burglary. The court imposed two concurrent DOSA sentences of 50 and 59.5 months, half to be served in prison and half in community custody. After the sentence, Schley signed a "DOSA agreement" and a chemical dependency treatment form. The DOSA agreement stated that Schley "may be 'administratively' terminated from the DOSA chemical dependency treatment program" for "[a]ny major infraction that causes a change in custody level or the violation of condition(s) outlined in the CD [chemical dependency] Treatment Participation Requirements DOC 14-039" Br. of Appellant, App. at 23. Chemical dependency treatment form DOC 14-039 notified Schley that "[t]he following behaviors WILL result in termination from the Department's CD treatment program: 1. Any threat or act of violence toward staff or another patient." Br. of Appellant, App. at 25 (formatting omitted).

Schley entered the chemical dependency treatment program at the Olympic Corrections Center on January 22, 2015. According to anonymous reports, Schley taunted another prisoner in the treatment program by calling him "Mr. DOSA." Br. of Appellant, App. at 27. After the other prisoner responded,

No. 73872-1-1/3

Schley swung at him and missed. He grabbed the other prisoner's throat and arm, and the two fought. Schley received minor injuries, including cuts, scrapes, and red marks. He was charged with fighting and placed in segregation for 15 days.

At his prison infraction hearing, Schley contended that there was no fight. He supplied five witness statements corroborating that there was no fight. He explained that the marks on his body were minor injuries from exiting his bunk. Under the "some evidence" burden of proof, Schley was found guilty of fighting based on confidential witness reports and physical marks on his body. The disciplinary findings were affirmed on appeal.

On February 10, 2015, Schley was administratively terminated from the chemical dependency treatment program due to the fighting infraction. The Department of Corrections (Department) then sought to revoke Schley's DOSA because he had been terminated from chemical dependency treatment.

At his DOSA revocation hearing, Schley again argued that no fight had occurred. He also argued that to revoke his DOSA, the fighting offense must be reevaluated under a preponderance of the evidence standard. The hearing officer did not reevaluate the evidence of fighting. Schley's DOSA was revoked because he had been terminated from the chemical dependency treatment program. As a result, Schley had to serve the remainder of his sentence in

No. 73872-1-I/4

custody.¹ The DOSA revocation was affirmed by an appeals panel and the risk management director.

Schley filed a personal restraint petition to reinstate his DOSA sentence. This court appointed counsel to submit additional briefing.

DISCUSSION

Burden of Proof

Schley argues that the Department violated his due process rights by using facts proved by "some evidence" at his fighting infraction hearing to establish a DOSA violation by a preponderance of the evidence.

To obtain relief in a personal restraint petition, a petitioner must prove that he is being restrained and that the restraint is unlawful. RAP 16.4(a). A petitioner's restraint is unlawful if his sentence violates the United States or Washington Constitution. RAP 16.4(c)(2).

The legislature enacted the drug offender sentencing alternative to provide a treatment-oriented alternative to the standard sentence. State v. Kane, 101 Wn. App. 607, 609, 5 P.3d 741 (2000). Under the DOSA program, an offender serves less time in prison and more time in community custody while undergoing substance abuse treatment. RCW 9.94A.660(5)(a), (b); State v. Grayson, 154 Wn.2d 333, 337-38, 111 P.3d 1183 (2005). DOSA is conditioned on successful

¹ Schley's judgment and sentence states that "[i]f the defendant fails to complete the Department's special drug offender sentencing alternative program or is administratively terminated from the program, he/she shall be reclassified by the Department to serve the balance of the unexpired term of sentence." Br. of Appellant, App. at 4.

No. 73872-1-1/5

participation in chemical dependency treatment. An offender who fails to complete or is administratively terminated from the program must serve the unexpired term of his or her sentence in custody. RCW 9.94A.662(3). The Department may revoke a DOSA for administrative termination from a substance abuse treatment program. WAC 137-25-030. An offender will be terminated from substance abuse treatment if he or she is found guilty of a fighting infraction under WAC 137-25-030 505. In an infraction hearing, the Department reviews allegations under a "some evidence" burden of proof. In re Pers. Restraint of Grantham, 168 Wn.2d 204, 216, 227 P.3d 285 (2010). But a DOSA revocation must be proved by a preponderance of the evidence. In re Pers. Restraint of McKay, 127 Wn. App. 165, 170, 110 P.3d 856 (2005).

In McKay, the offender was in a chemical dependency treatment program while serving the prison-based portion of her DOSA sentence. She was charged with two infractions. In a single hearing, the hearing examiner applied a "some evidence" standard of proof, found McKay guilty of both infractions, and revoked her DOSA. Id. at 167-68. This court found that "the serious nature of a proceeding resulting in revocation of a DOSA sentence requires a preponderance of the evidence standard of proof." Id. at 168.

Here, the Department bifurcated Schley's hearings process, considering the infraction at one hearing and the DOSA revocation at a later hearing. But the inevitable result of a finding of guilt at Schley's infraction hearing was revocation of his DOSA. First, Schley was found guilty of a fighting infraction based on a

No. 73872-1-1/6

"some evidence" burden of proof. The inescapable result of that finding was Schley's termination from his chemical dependency treatment program.

Termination from the chemical dependency treatment program led to a DOSA revocation hearing at which revocation of Schley's DOSA sentence was the only possible outcome. The hearing officer described the issue at the hearing: "What was proven to me is that the program terminated you, and you being terminated, that qualifies for a DOSA revocation." Verbatim Report of Proceedings at 37.

Thus, Schley's DOSA was revoked.

The DOSA revocation hearing did not resolve any genuine issue of fact by a preponderance of the evidence. The DOSA hearing officer limited her finding to whether chemical dependency treatment was terminated. The essential fact for DOSA revocation was resolved at the infraction hearing for fighting. Schley's DOSA was functionally revoked once he was found guilty of fighting by "some evidence" at the infraction hearing.

Citing In re Personal Restraint of Gronquist, 138 Wn.2d 388, 978 P.2d 1083 (1999), the Department argues that Schley's fighting infraction cannot be reevaluated with a heightened burden of proof in his DOSA revocation hearing. In Gronquist, an offender was found guilty of four "minor" infractions and was subsequently charged with the "serious" infraction of collecting four minor infractions. Id. at 390-91. The court held that Gronquist could not challenge prior minor infractions in the serious infraction hearing. Id. at 403. But Gronquist is not

No. 73872-1-1/7

controlling because, here, Schley's liberty interest is significantly greater and, thus, so too are the due process rights that attach to the proceeding.

We determine what process is due in a particular situation by examining (1) the individual's liberty interest, (2) the value of the proposed procedural safeguard to protect against erroneous deprivation of that interest, and (3) the State's interest, including administrative and financial burdens of the proposed procedure. In re Pers. Restraint of Bush, 164 Wn.2d 697, 705, 193 P.3d 103 (2008) (citing Mathews v. Eldridge, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). In Gronquist, the liberty interest at stake in the hearing for the serious infraction was 10 days' loss of good time and 5 days' segregation. A prisoner has a liberty interest in earning good time credits such that minimum due process rights attach. Gronquist, 138 Wn.2d at 397. Minimum due process requires that the Department review allegations under a "some evidence" burden of proof. Grantham, 168 Wn.2d at 216.

By contrast, at stake at Schley's DOSA revocation hearing was the loss of over two and one half years in the community. In addition, while Gronquist enjoyed the possibility of earning back some or all of his lost good time credits, the deprivation for Schley was irrevocable. Thus, Schley enjoys greater due process protections, including a hearing structured to assure that the fighting finding is based on verified facts and accurate knowledge. McKay, 127 Wn. App. at 168-69 (citing Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) and quoting In re Pers. Restraint of McNeal, 99 Wn. App. 617, 628,

No. 73872-1-1/8

994 P.2d 890 (2000)). We conclude that due to the different liberty interests at stake, revocation of Schley's DOSA sentence is subject to greater due process protections than the prisoner was entitled to in Gronquist.

An additional concern in Gronquist was the substantial administrative burden and practical ability to rehear four general infractions occurring over a six-month period for each of the many serious infraction hearings conducted by the Department. Those concerns are not present in this case. Here, the Department was well aware that once Schley was charged with the single incident of fighting, the inexorable result, if he was found to have committed the infraction, would be termination from the treatment program and revocation of his DOSA sentence. Given the inevitability of this process, there is minimal additional burden on the Department to apply the appropriate burden of proof at the initial infraction hearing.

We conclude that the Department violated Schley's due process rights by using facts proved by "some evidence" at his infraction hearing to establish his DOSA revocation by a preponderance of the evidence. While bifurcating the infraction and DOSA revocation hearings appears to comply with our holding in McKay, in fact it turns the DOSA revocation proceeding into a mere formality. At that hearing, the Department bore the burden of proving by a preponderance of the evidence a fact that was utterly indisputable: that Schley had been terminated from treatment. It is a pretense to suggest that such a hearing provides the due process protections that attach to the liberty interest at risk in a DOSA revocation

No. 73872-1-1/9

proceeding. We hold that under McKay, proof of a fact that necessarily results in revocation of a DOSA sentence must be by a preponderance of the evidence.

Right to Counsel

Schley contends that the Department violated his due process rights by failing to inform him, prior to the DOSA revocation hearing, that he could request the appointment of counsel, and that the Department had a duty to determine on a case-by-case basis whether the request should be granted. He argues that had he been so informed, he would have requested counsel and that the request should have been granted. In support of this argument, Schley relies on Grisby v. Herzog, 190 Wn. App. 786, 362 P.3d 763 (2015). In that case, we held that under the due process clause of the United States Constitution, the Department has "a clear duty to consider the right to counsel on a case-by-case basis in community custody violation hearings"² Id. at 811; U.S. CONST. amends. V, XIV, § 1.

The Department does not appear to dispute Schley's argument that under Grisby, he had a right to be informed that he could request legal representation at the hearing. The Department's primary argument appears to be that "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." Br. of Resp't at 14. We reject this argument because, as Schley points

² We note that at the time of his alleged violation, Grisby was serving the out of custody portion of his DOSA sentence. However, neither party addresses whether this is a material distinction from the circumstances here, where, at the time of his alleged violation, Schley was still serving the in-custody portion of his sentence. Accordingly, we assume, for purposes of this case, that the distinction is immaterial.

No. 73872-1-I/10

out, we will not presume waiver of a constitutional right where the State cannot show it was made knowingly, intelligently, and voluntarily. See e.g., Miranda v. Arizona, 384 U.S. 436, 470-71, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Here, the evidence is virtually indisputable that Schley was advised before the hearing that he did not have the right to request counsel. The Department has not shown that Schley knowingly waived that right.³

The Department also argues that even if the notice was deficient, any error was harmless because if Schley had requested counsel, the request would have properly been denied. The Department contends that because the only issue at Schley's revocation hearing was whether he had been terminated from the treatment program, the issue was not sufficiently complex to warrant the appointment of counsel.

The Department is correct that as conducted below, the only issue was whether Schley had been terminated from the treatment program. As we have

³The Department's claim that the notice it gave to Schley was sufficient to apprise him of the right to request counsel is meritless. The only notice Schley received on that issue was as follows:

You have the following rights:

- ♦ To present your case to the Hearing Officer. . . . However, no other person may represent you in presenting your case. There is no statutory right to an attorney or counsel and without prior written approval from the Hearings Program Administrator, no attorney will be permitted to represent you.

Br. of Appellant, App. at 31-32. The thrust of the notice, under any reasonable reading, is that in a DOSA revocation hearing, neither an attorney nor any other persons are permitted to provide assistance to an inmate. We reject the Department's argument that the notice may be read to imply otherwise.

No. 73872-1-I/11

discussed, the evidence supporting that allegation was irrefutable and the presence of a lawyer, no matter how skillful, would have made no difference. But Schley is entitled to a new revocation hearing at which the factual issues underlying the fighting allegation will be determined under the proper standard of proof. Those issues are more complex than the limited issue of whether Schley was terminated from treatment.⁴

Finally, we note that at oral argument, counsel for the Department conceded that if this case was remanded for a new hearing, it would advise Schley that he had a right to request counsel. In light of that concession, we assume that the Department will do so. Then, if counsel is requested, the Department must decide, in the first instance, whether an appointment is warranted based on the issues presented at the new hearing. We need not and do not decide that issue here.

Scope of the Department's Authority

Schley argues that the Department exceeded its authority by imposing three sanctions for a single incident of fighting. He contends that WAC 137-28-350 authorizes the Department to impose only one sanction for multiple violations arising out of a single incident. Schley counts three sanctions for fighting: 15 days' segregation, termination from chemical dependency treatment,

⁴ To the extent the Department relies on In re Personal Restraint of Price, 157 Wn. App. 889, 240 P.3d 188 (2010), to suggest that an allegation of fighting is insufficiently complex to warrant appointment of counsel, we note that the nature of the allegation is not the determinative factor. The particular facts of each case must be taken into account.

No. 73872-1-I/12

and DOSA revocation that caused additional incarceration. While precipitated by fighting, each sanction arose out of a distinct incident: fighting, change in custody status, and termination from chemical dependency treatment. We find that the Department acted within its authority under WAC 137-28-350(2) because Schley's sanctions arose from distinct incidents.

Schley further argues that the Department's authority to revoke a DOSA under RCW 9.94A.662(3) does not give it the discretion to revoke a DOSA for conduct that is unrelated to chemical dependency. The Department must exercise delegated authority under the restraints of the statutes delegating the authority. State v. Brown, 142 Wn.2d 57, 62, 11 P.3d 818 (2000). The Department may revoke a DOSA if an offender "fails to complete the program or is administratively terminated from the program" RCW 9.94A.662(3). The grounds for administrative termination are not defined, but the Department has a broad grant of authority to administer its prisons. This includes a system that rewards good behavior with "increases or decreases in the degree of liberty granted the inmate within the programs operated by the department" RCW 72.09.130(1). The Department has authority to manage participation in chemical dependency treatment with rules about prisoner behavior. This authority is encompassed by the legislature's grant of authority for the Department to "administratively terminate[]" a prisoner from DOSA. We conclude that the Department did not exceed its statutory authority to administratively terminate Schley from chemical dependency treatment and thereby revoke his DOSA.

No. 73872-1-I/13

We grant Schley's personal restraint petition. On remand, Schley is entitled to a new DOSA violation hearing at which the Department shall apply a preponderance of the evidence standard to the fighting allegation.

Remanded.

WE CONCUR:

Leach, J.

Speerman, J.

Cox, J.

No. 73872-1-I

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

IN RE: THE PERSONAL RESTRAINT OF
MATTHEW RAY DOUGLAS SCHLEY,
Petitioner

BRIEF OF AMICUS CURIAE OF THE
DEFENDER INITIATIVE AND COLUMBIA LEGAL SERVICES

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TABLE OF CONTENTS

A. IDENTITY AND INTEREST OF AMICUS..... 1

B. STATEMENT OF THE CASE AND INTRODUCTION..... 4

D. ARGUMENT 5

 1. DOC Did Not Comply with Due Process Right to Counsel.....5

 2. Mr. Schley is Likely Presumptively Entitled to the Assistance of counsel.....11

 3. DOC Has Yet to Implement the *Grisby* Decision.....13

 4. This is a Matter of Public Interest.....15

E. CONCLUSION..... 17

Appendix.....p.19 et.seq.

TABLE OF AUTHORITIES

Washington Supreme Court Cases

In re Dependency of A.K.,
162 Wn.2d 632, 174 P.3d 11 (2007).....3

In re Blackburn,
168 Wn.2d 881, 886, 232 P.3d 1091, 1094 (2010).....8

State v. Dodd,
120 Wn.2d 1, 25 ,838 P.2d 86, 98 (1992).....10

In re Dependency of MSR,
174 Wn.2d 1, 271 P.3d 234 (2012).....3

State v. Norris,
121 Wn.2d 1024, 854 P.2d 1085 (1993).....2

Washington Court of Appeals Decisions

State v. Flores,
No. 32507-5-III.....1

Grisby v. Herzog,
190 Wn. App. 786, 362 P.3d 763 (2015).....2, 4, 5, 8, 9, 11,
.....12,13,14,15

In re Pers. Restraint of McNeal
99 Wn. App. 617, 635, 994 P.2d 890 (2000).....4, 5, 8

Mt. Vernon v. Weston,
68 Wn. App. 411, 844 P.2d 438 (1992).....2

United State Supreme Court Cases

Gagnon v. Scarpelli,
411 U.S. 778, 789-91, 93 S.Ct 1756, 36 L. Ed. 2d 656
(1973)..... 5, 6, 7, 9, 10, 11, 12

Morrissey v. Brewer,
408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).....10

Decisions of Other Courts

Hickman v. Arkansas Bd. Of Pardons & Paroles,
361 F. Supp. 864, 867 (E.D. Ark. 1973).....10, 11

Hurrell-Harring v. New York,
No. 518072 (2014).....2

Shead v. Quatsoa,
486 F.2d 694, 696 (7th Cir. 1973).....9

Cresci v. Schmidt,
419 F. Supp. 1279, 1282 (E.D. Eis. 1976).....10

State v. Shambley,
281 Neb. 317, 327, 795 N.W.2d 884, 893 (2011).....9

Other

Washington State Institute of Policy,
*Washington's Drug Offender Sentencing Alternative: Update
on Recidivism Findings*,
http://www.wsipp.wa.gov/ReportFile/961/Wsipp_Washingtons-Drug-Offender-Sentencing-Alternative-An-Update-on-Recidivism-Findings_Full-Report.pdf (December 2006)..16, 17

A. IDENTITY AND INTEREST OF AMICI

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 most recently in Division III of the Washington Court of Appeals in *State v. Flores*, No. 32507-5-III.

The Director of the Defender Initiative, Professor Robert C. Boruchowitz, has significant experience in issues relating to the right to counsel. He has been a law professor for more than nine 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 appeared at every level of state and federal court and has spoken at conferences around the country on right to counsel issues. 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 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, 854 P.2d 1085 (1993), the first published Washington appellate court opinion to refer to defender standards.

He chairs the Subcommittee 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 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. Columbia Legal Services' Institutions Project is deeply involved in issues relating to the right to counsel through legislative advocacy, individual representation, and community outreach and education. The Institutions Project frequently hears from people in the Department of Corrections (DOC) through their intake system. Often times, prisoners contact the Institutions Project 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

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

revocation hearing and appeal of their revocation *pro se*. The Institutions Project is concerned about the fairness of the DOSA revocation hearing process administered by DOC. DOSA revocations result in longer sentences, removal from necessary drug and alcohol treatment, delayed reunification with families, and a stop gap toward a fair second chance. This amicus fits square within the Institutions Project's reentry and ending the overreliance on incarceration priorities.

J Columbia Legal Services and the Institutions Project have a long history of amicus advocacy including, for example, in the cases of *In re Dependency of A.K.*, 162 Wn.2d 632, 174 P.3d 11 (2007), and *In re Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012), as corrected (May 8, 2012).

B. STATEMENT OF THE CASE AND INTRODUCTION

Mr. Schley filed a personal restraint petition on April 20, 2015, challenging the revocation of his DOSA sentence. He challenged the revocation on several bases, including the DOC hearing officer's "misinterpretation of appellate cases" including *In re Pers. Restraint of McNeal*, 99 Wn. App. 617, 635, 994 P.2d 890 (2000). His counsel has filed a brief raising several issues, including the following:

The Department of Corrections (DOC) violated Mr. Schley's due process rights when it failed to inform him that he had a right to

request counsel and failed to make a case-by-case determination as to whether he was entitled to appointed counsel.

Petitioner's Opening Brief at 2.

Amici will limit this brief to the issue of the right to counsel in DOC revocation proceedings.

The Court of Appeals has clearly held, finding the state's interpretation of *McNeal, supra*, to be incorrect:

The Department has a clear duty to determine on a case-by-case basis whether offenders facing revocation of community custody are entitled to appointed counsel under *Scarpelli, Grisby v. Herzog*, 190 Wn. App. 786, 813, 362 P.3d 763, 776 (2015).

Because the DOC did not advise Mr. Schley that he could request a case-by-case determination of the right to counsel in his case, it denied his due process right to that determination, in violation of the holding in *Grisby v. Herzog*. Because DOC in fact advised Mr. Schley that he had *no right to a lawyer*, and because DOC did not do a determination whether to appoint him one, the personal restraint petition should be granted and Mr. Schley should be provided a new hearing, with counsel to be provided once a determination is made that he needed counsel.

C. ARGUMENT

1. DOC Did Not Comply with Due Process Right to Counsel

The notice of rights that DOC gave to Mr. Schley before his revocation hearing categorically stated that other than an interpreter if needed, “no other person may represent you in presenting your case.” It stated that he had various rights, including:

- ▶ **To present your case to the Hearing Officer. If there is a language or communication barrier, the Hearing Officer will appoint a person qualified to interpret or otherwise assist you. However, no other person may represent you in presenting your case. There is no statutory right to an attorney or counsel and without prior written approval from the Hearings Program Administrator, no attorney will be permitted to represent you.**

Exhibit 12, Response of Department of Corrections.

The State in its brief argued: “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.” Brief of Respondent at 14. The State cited *Gagnon v. Scarpelli*, 411 U.S. 778, 789-91, 93 S.Ct. 1756, 36 L. Ed. 2d 656 (1973), but it misapprehends the import of *Gagnon* and disregards the clear language of the opinion requiring advice of the right to request counsel. The Court wrote:

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; or (ii) that, even if the violation is a matter of public record or is uncontested, 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. 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. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record.

Gagnon v. Scarpelli, 411 U.S. 778, 790-91 [emphasis added].

Not only did the DOC not inform Mr. Schley of his right to request counsel, but also it affirmatively told him no one could represent him and that he had “no statutory right to an attorney or counsel”. The rights advice form was silent on due process constitutional rights, and without explaining how one could request prior written approval from the Hearings Program Administrator, DOC was counting on the inability of layperson prisoners to make distinctions and to be able to obtain such approval.

The clear implication of the “rights” advice was that Mr. Schley had no right to anyone to help him.

In holding that DOC must clearly allege the facts and legal elements in an effort to revoke community custody for an alleged violation of an “obey all laws” condition, the Washington Supreme Court wrote:

An offender whose liberty is in jeopardy should not be misled, subjected to guessing games, or asked to hit a moving target. The realization of these dangers would harm the individual's protected interest in liberty and society's interest in rehabilitating law-abiding offenders.

In re Blackburn, 168 Wn.2d 881, 886, 232 P.3d 1091, 1094 (2010).

This same principle should require that DOC not mislead a prisoner on the fundamental right to counsel.

It also is clear from the DOC's conduct in the *Grisby* case that even when a prisoner had a lawyer seeking to obtain prior written approval, the Attorney General's office would intervene and preclude any legal representation. Mr. Grisby was facing revocation of his community custody status and return to prison. His pro bono lawyer (Amicus Counsel Boruchowitz), wrote to the Department asking to represent him at his revocation hearing. Despite a hearing officer having told Mr. Grisby that there was a procedure by which he could request approval of having counsel present, the Attorney General said that was not possible.

Although the hearing officer and appeals panel had indicated there was a procedure for requesting the right to be represented by counsel at the hearing, Larson's letter categorically negated that possibility. She stated, "In a DOSA revocation hearing, there is no right to counsel. *In re Pers. Restraint of McNeal*, 99 Wn. App. 617, 635, 994 P.2d 890 (2000)."

Grisby v. Herzog, *supra*, 190 Wn. App. 786, 792.

Mr. Grisby sought relief by petition for writ of mandamus which was granted by the Snohomish County Superior Court, which directed DOC to permit Mr. Grisby's counsel to represent him. At the revocation hearing, counsel was able to obtain Mr. Grisby's release to a treatment

program. *Grisby, supra*. This Court affirmed the case-by-case right to counsel.

It is hypocritical and disingenuous for the State now to suggest that it was Mr. Schley's burden to request a right that the State had told him he did not have.

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 (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 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. *Cresci v. Schmidt*, 419 F. Supp. 1279, 1282 (E.D. Wis. 1976).

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)[emphasis added].

Another federal court emphasized that the state department of corrections must make sure that inmates understand their rights:

Plaintiffs have raised the issue, and the Court must emphasize, that the suggested rules, regulations and forms filed here are of little value if parolees are not made fully aware of their content and meaning. Many of the inmates of the Arkansas Department of Correction are illiterate and the burden rests with defendants to insure that the parolee facing revocation be made acutely aware of what will occur at each and every stage of the revocation process and of his rights in relation thereto.

Hickman v. Arkansas Bd. of Pardons & Paroles, 361 F. Supp. 864, 867 (E.D. Ark. 1973).

Addressing the state's failure to develop policies implementing the decisions in *Gagnon*, supra, and *Morrissey v. Brewer*, 408 U.S. 471, 92

S.Ct. 2593, 33 L.Ed.2d 484 (1972), the Court in language appropriate for this case wrote: "Defendants should change their rules, regulations and forms to accommodate the parolee's right to request counsel." *Hickman*, 361 F. Supp. 864, 868.

2. Mr. Schley is Likely Presumptively Entitled to the Assistance of Counsel

Mr. Schley's right to counsel may be presumed because it is reasonable to find that he made colorable claims when denying the alleged violation and the argument against revocation could be considered "complex or difficult to present." *Grisby*, 190 Wash. App at 803-4, see also *Gagnon*, 411 U.S. 790-91. In *Grisby*, the Court states that "the case-by-case evaluation requirement is imposed because there are occasions when, by virtue of the offender's individual circumstances, he would be deprived of procedural due process if counsel were not appointed to present his case." *Grisby*, 190 Wn. App. at 805. Although the Court in *Gagnon* was unwilling to provide precise criteria in determining when the appointment of counsel was necessary to meet due process requirements, the Court established a presumption in favor of appointment of counsel in certain circumstances. An individual is presumptively entitled to an attorney under *Gagnon* when, in pertinent part:

the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he had not committed the alleged violation of the conditions upon which he is at liberty, or (ii) that, even if the violation is a matter of public record or is uncontested, 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.

Id. at 803-4 (citing *Gagnon*, 411 U.S. 790-91).

Here, the hearing officer could have found that Mr. Schley made a timely and colorable claim that he did not commit the alleged violation that resulted in his DOSA revocation. 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. Thus, Mr. Schley's claim for denying the alleged violation could meet the requirements under the first prong of the *Gagnon* presumption test thereby requiring DOC to provide him with counsel.

The reasons against revocation may also be considered complex or difficult to present under the circumstances.² The Court in *Gagnon* does

² *Grisby* does not appear to limit the question of complexity to violations that are uncontested or a matter of public record. See *Grisby*, 190 Wash.App. 803. Furthermore, under *Gagnon* the standard for presumption of one's right to counsel is neither strict nor exhaustive. Rather the Court provides general guidelines for determining whether counsel should be appointed. In fact, the Court states that "[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements." *Gagnon*, 411 U.S. at 790.

not provide a standard for what qualifies as a complex or difficult argument. However, it is reasonable to conclude that the facts and legal arguments in Mr. Schley's case are complex. First, the hearing officer should have conducted Mr. Schley's DOSA revocation hearing by examining whether the alleged infraction occurred by preponderance of the evidence. The record demonstrates that it is questionable whether the hearing officer even knew or understood the difference in the standard of proof for infractions and DOSA revocations. Second, Mr. Schley does not have the necessary legal training to identify and argue the error made by DOC when examining the standard of proof necessary to revoke his DOSA. Third, Mr. Schley had neither the ability to fairly dispute the evidence against him nor cross-examine confidential sources. Appointed counsel could have challenged the complex legal and evidentiary issues as well as more effectively demonstrated a colorable rationale to mitigate the need for revocation in this case.

3. DOC Has Yet to Implement the *Grisby* Decision

Amici counsel met with Department of Corrections and Attorney General representatives in June 2016 to discuss what actions they had taken to implement the *Grisby* decision, which this Court issued October

26, 2015. Other than making plans for a pilot project in two locations in the fall of 2016, DOC had done nothing to provide for even advising inmates of their right to request counsel and in fact was still using an “advice” form that said there is no right to counsel.

In an email June 10, 2016, the Department advised amici counsel that “we will be updating this form to notify offenders of the right to request counsel and to have a case-by-case review for counsel.” (The complete email exchange is included in the Appendix to this brief).³ On July 20, 2016, the Department representative advised by email, “I agree that we need to change the Notice of Allegations, Hearing, Rights, and Waiver form.” (Appendix A)

By email August 15, 2016, DOC advised, “Yes, we’ve removed the incorrect language from the notice form.” On August 28, 2016, and again on September 20, 2016, amici counsel asked for a copy of the new notice form. On September 20, 2016, approximately eleven months after the *Grisby* decision, DOC responded, “I will certainly send you the updated notice form once it is finalized.” (Appendix A) The DOC

³ Amici anticipate that counsel for the State may seek to strike the email exchange presented here. We note that the Washington Supreme Court has considered evidence presented by amici in reaching decisions. *See, e.g., State v. Dodd*, 120 Wn.2d 1, 25, 838 P.2d 86, 98 (1992). This Court should consider this email exchange to provide context for DOC’s approach to the right to counsel issue.

representative also wrote, "I agree with you that the *Grisby* decision needs to be implemented statewide as soon as possible. We hope this short term pilot will help us launch the statewide roll out more effectively."

(Appendix A)

In effect, DOC has acknowledged that the form it was using and the procedures it is using to revoke inmates' DOSA status are inadequate and do not comply with law.

DOC planned to have a pilot project in two locations, Nisqually Jail and Asotin County Jail. But as of September 20, 2016, they did not have attorneys contracted to provide representation.

Given the failure of DOC to honor this Court's decision in *Grisby*, it is important to grant the personal restraint petition herein to make clear that this Court will provide relief to inmates who have been denied their right to counsel.

4. This is a Matter of Public Interest.

Mr. Schley's circumstance is not an isolated one. There are several men and women who are similarly-situated. For example, the Institutions Project was recently contacted by a client whose DOSA was revoked without notice to a right to counsel on a case-by-case basis. In fact, the individual was provided with a similar Notice of Allegations, Hearing, Rights and Waiver Form as Mr. Schley that states, in pertinent

part: "There is no right to an attorney or counsel." (Appendix B) The notice was served one day before the client was scheduled for release.⁴ In addition, the individual participated in the required DOSA classes for seventeen weeks – five weeks more than required. As a result, Mr. Schley and many others who were not notified that they have a right to counsel on a case-by-case basis are removed from programs that will help them with rehabilitation and successful reentry back into the community. As can be imagined, their ability to rebut evidence presented by DOC officers and address complex questions of facts and law is a battle lost from the start.

Thousands of people participate in prison and residential DOSA programs in the state of Washington. "The legislative intent of DOSA is to increase the use of effective treatment for substance abusing individuals, thereby reducing recidivism." Washington State Institute of Policy, *Washington's Drug Offender Sentencing Alternative: Update on Recidivism Findings*, http://www.wsipp.wa.gov/ReportFile/961/Wsipp_Washingtons-Drug-Offender-Sentencing-Alternative-An-Update-on-Recidivism-Findings_Full-Report.pdf (December 2006). In 2006, the Washington

⁴ The Institutions Project was provided numerous documents to demonstrate this client's circumstances. Throughout June and July 2016, his DOC paperwork shows that his release audit was completed and warrants were cleared for release to CCP/DOSA on July 26, 2016 in Spokane, WA. In fact, the DOC documents indicate that on the date of scheduled release – July 26, 2016 – he would have been twenty-five days past his initial DOSA early release date of July 1, 2016.

State Institute for Policy estimated that 40.5 percent of DOSA-eligible participants would be reconvicted for a new felony within three years of release from prison without DOSA. *Id.* Individuals who turn over a new leaf and gain control of their addictions begin a meaningful path of maintaining housing and securing employment – avenues toward overcoming poverty, reducing recidivism, and moving toward decarceration.

Ultimately, the absence of counsel in DOSA revocation hearings can render catastrophic results – longer sentences, loss of necessary drug treatment, and delayed reunification with family, among other things – for numerous inmates. Thus, the benefit of participating in the DOSA program is invaluable and the process by which people are removed should be handled with great care and due process.

D. CONCLUSION

This Court should grant the personal restraint petition and order a new hearing to be preceded by a determination of Mr. Schley's need for

appointed counsel.

Respectfully submitted,



Robert C. Boruchowitz WSBA # 4563
Nick Allen WSBA #42990
Rhona Taylor WSBA # 48408

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

The Defender Initiative
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Seattle, WA 98122-1090, Telephone: 206 398 4151
Columbia Legal Services
101 Yesler Way, Suite 300
Seattle, WA 98104
(800) 542-0794

Appendix A

DECLARATION

I, Robert C. Boruchowitz, declare, based upon my good faith knowledge and belief, as follows:

1. The attached Appendix A is a true and correct copy of email messages I exchanged with a Department of Corrections representative.
2. On September 21, 2016, I wrote to the Department representative to let her know that I was working on an amicus brief in the case of IN RE: P.R.P. OF SCHLEY, No. 73872-1- I and I planned to refer in my brief to our email exchange.
3. I have received no response to my September 21, 2016, email message.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.



Robert C. Boruchowitz

DATED AND SIGNED this 27th day of September, 2016.

From: **Soliz, Dominga (DOC)** dsoliz@DOC1.WA.GOV
Subject: RE: Offender notice form
Date: September 20, 2016 at 2:13 PM
To: robert boruchowitz rcboru@aol.com
Cc: nick.allen@columbialegal.org, Waterland, Keri L. (DOC) klwaterland@DOC1.WA.GOV

Mr. Boruchowitz,

I'm sorry for my late response to your email. We are working to get the processes in place for attorney representation at hearings.

To answer your questions, unfortunately, we do not track data on how often an offender on supervision waives the right to be present or waives the hearing altogether. Anecdotally, it happens very rarely; only about once for every 1000 hearings.

I will certainly send you the updated notice form once it is finalized.

I appreciate the suggestions for posting the attorney recruitment. We will post with those entities, if possible. We will send you a notice of the recruitment announcement that you can pass along to lawyers who may be interested.

We do not have the attorneys contracted yet for Nisqually Jail and Asotin County Jail. We hope to have contracts in place soon.

I agree with you that the *Grisby* decision needs to be implemented statewide as soon as possible. We hope this short term pilot will help us launch the statewide roll out more effectively.

Please let me know if you have any other questions or concerns.

Thanks,
Dominga

From: Rcb [mailto:rcboru@aol.com]
Sent: Tuesday, September 20, 2016 7:00 AM
To: Soliz, Dominga (DOC) <dsoliz@DOC1.WA.GOV>
Cc: nick.allen@columbialegal.org; Waterland, Keri L. (DOC) <klwaterland@DOC1.WA.GOV>
Subject: Re: Offender notice form

Dear Ms. Soliz:

I am wondering whether you have had a chance to see my email of August 28 and the questions I asked there.

Thank you.
Bob Boruchowitz

On Aug 28, 2016, at 3:15 PM, robert boruchowitz <rcboru@aol.com> wrote:

Dear Ms. Soliz,

Thank you for your message. Please excuse my delay in responding. I have been out of town on various work projects.

I am interested in how often an inmate waives the right to be present or waives the hearing altogether.

I would appreciate seeing the new notice form.

I suggest you post the announcement for attorneys with the Washington Defender Association and the Washington Association of Criminal Defense Lawyers, as well as sending it to Columbia Legal Services and the three Washington State law schools.

Who will be the attorneys for your two planned sites in September?

I would like to make clear that in my view it is not OK to wait until January to implement the Grisby decision statewide.

Thank you again for responding.

Sincerely,
Bob Boruchowitz

On Aug 15, 2016, at 9:39 AM, Soliz, Dominga (DOC)
<dsoliz@DOC1.WA.GOV> wrote:

Good morning, Mr. Boruchowitz.

I have some answers to your questions below, plus a couple of questions for you.

Hearings data – The data table reflects the number of full hearings for Prison DOSA, CCP, and CCI offenders organized by the county in which the offender is supervised. I'm not sure what you mean by "hearings 'waived' by inmates." Do you mean hearings where the offender waived the right to be present?

Attorney recruitment – The draft client services contract is currently under review and is close to finalization. I'll send it to you once it is finalized. We will be posting an "available to all" announcement after we have the contract ready.

Notice – Yes, we've removed the incorrect language from the notice form.

Statewide roll out – Our plan is to roll out staff training and provide counsel statewide in January, following an assessment of the pilots and any necessary adjustments to the new process.

I'm writing to give you an update on our process toward implementing the requirements of the *Grisby* decision. We have been approved to begin pilot programs at the Nisqually Jail and Asotin County Jail starting in September. These locations were selected because a large number of hearings are conducted at the Nisqually Jail and because we also want to test the new process in a rural location on the east side of the state. The pilot programs are intended to run for a limited time to help us identify any adjustments that should be made before a statewide roll out. We are developing the process and contracts for appointing attorneys to represent offenders at hearing.

I agree that we need to change the Notice of Allegations, Hearing, Rights, and Waiver form. We can send you a revised form that we will use for the pilot locations. Also, the data you requested is attached. The table shows the number of hearings over the last 6 months by county for the offenders eligible for revocation (under a DOSA sentence) or return to prison (under a Community Custody Prison or Community Custody Inmate sentence). Please let me know if you'd like any additional data or information.

I'm happy to meet with you to discuss the new process or to answer any questions. Please just let me know.

Thanks,
Dominga

Dominga Soliz
Offender Change Division · Department of Corrections
7345 Linderson Way SW; MS: 41103 · Tumwater, WA 98501
Phone: 360-789-8399
Email: dsoliz@doc1.wa.gov

From: Rcb [<mailto:rcboru@aol.com>]
Sent: Monday, July 18, 2016 6:42 AM
To: Soliz, Dominga (DOC) <dsoliz@DOC1.WA.GOV>
Cc: nick.allen@columbialegal.org; King, Dan R. (DOC) <drking@DOC1.WA.GOV>
Subject: Re: Offender notice form

Dear Ms. Soliz:

Thank you for your email and for meeting with us.

Do you have suggestions for where we might post the announcement for attorneys?

Thanks,
Dominga

Dominga Soliz

Offender Change Division · Department of Corrections
7345 Linderson Way SW; MS: 41103 · Tumwater, WA 98501
Phone: 360-789-8399
Email: dsoliz@doc1.wa.gov

From: robert boruchowitz [<mailto:rcboru@aol.com>]
Sent: Saturday, August 06, 2016 7:36 AM
To: Soliz, Dominga (DOC) <dsoliz@DOC1.WA.GOV>
Cc: nick.allen@columbialegal.org; King, Dan R. (DOC) <drking@DOC1.WA.GOV>; Waterland, Keri L. (DOC) <klwaterland@DOC1.WA.GOV>
Subject: Re: Offender notice form

Dear Ms. Soliz:

Thank you for sending this.

I do have a number of questions.

Does your list of hearings by reporting county indicate hearings held in that county or hearings for people whose cases began in that county?

Does it include hearings "waived" by inmates?

**Have you issued an RFP for attorneys to represent inmates?
If so, could you please send me a copy?**

Have you stopped using the notice that contains incorrect advice?

When do you plan to provide counsel state-wide?

Thank you again.

Sincerely,
Bob Boruchowitz

On Jul 20, 2016, at 3:39 PM, Soliz, Dominga (DOC) <dsoliz@DOC1.WA.GOV> wrote:

Dear Mr. Boruchowitz.

I am quite concerned that the form you are using to advise inmates of their rights explicitly tells them they have no right to counsel. This is in stark violation of the Court of Appeals opinion.

As I have received nothing further from you, I infer that you still have not changed the form to advise people of their case by case right to counsel. I also have not received the data on hearings by county.

It has now been nearly nine months since the Court of Appeals opinion.

Please advise us when you plan to implement the Court's opinion.

Thank you.

Sincerely,

Bob Boruchowitz

On Jun 10, 2016, at 5:10 PM, Soliz, Dominga (DOC) <dsoliz@DOC1.WA.GOV> wrote:

Bob and Nick,

Thank you for meeting with us earlier this week to discuss the *Grisby* case and our progress toward implementing the decision.

I'm writing to follow up on your request for the Notice of Allegations, Hearing, Rights, and Waiver form that is currently being given to offenders before hearing. As I mentioned, we will be updating this form to notify offenders of the right to request counsel and to have a case-by-case review for counsel.

I've also asked for the data you requested showing the number of revocation/return hearings by county. I'll forward it to you once I receive it.

Sincerely,
Dominga

Dominga Soliz

Offender Change Division · Department of Corrections
7345 Linderson Way SW; MS: 41103 · Tumwater, WA
98501

Phone: 360-789-8399

Email: dsoliz@doc1.wa.gov

The Washington Department of Corrections is increasing the security level for email messages containing

confidential or restricted data. A new Secure Email Portal is being implemented. Outbound email messages from DOC staff that contain confidential or restricted data will be routed to the portal. A notification of the secured message will be delivered to the recipient.

Click on the following web link for more information.

<http://www.doc.wa.gov/business/secureemail.asp> <09-231.docx>

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Click on the following web link for more information.

<http://www.doc.wa.gov/business/secureemail.asp> <Hearings by County for DOSA, CCP, and CCI Offenders.xlsb>

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Click on the following web link for more information. <http://doc.wa.gov/information/secure-email.htm>

Appendix B





**NOTICE OF ALLEGATIONS,
HEARING, RIGHTS, AND WAIVER**

Offender Name	DOC #	Date	Present Location
		7/25/2016	

Type of Hearing: (Check all that apply)

<input type="checkbox"/> Community Custody	<input type="checkbox"/> DOSA	<input type="checkbox"/> Misdemeanor/Gross Misdemeanor
<input type="checkbox"/> Community Custody Maximum (CCM)	<input type="checkbox"/> DOSA Deportation Dispositional	<input type="checkbox"/> Negotiated Sanction
<input checked="" type="checkbox"/> 762 DOSA Revocation	<input type="checkbox"/> FOS	

Type of Allegation: (Check one)

Violation of Community Custody conditions.

Violation of your Drug Offender Sentencing Alternative (DOSA) sentence.
WAC 762 Failure To complete or administrative termination from a DOSA Substance Abuse Treatment Program

A valid ICE deportation order was issued on _____, thereby making you ineligible for the DOSA previously granted.

You are hereby notified that a Department hearing is scheduled for:

Hearing Date	Time	<input checked="" type="checkbox"/> a.m.	Location	Cause #(s)
7/27/2016	10:00	<input type="checkbox"/> p.m.	Unit 10 Support Services	

- The Department intends to present the following documents/reports and/or call the following witnesses during the hearing:
1. Initial Serious Infraction Report Citing Infraction #762 dated 7/19/2016
 2. Felony Judgement and Sentencing Warrant of Commitment and Appendices.
 3. DOC 14-042 Substance Use Disorder Prison DOSA Agreement
 4. DOC 14-039 Substance Use Disorder Treatment Participation Requirements
 5. DOC 14-044 Substance Use Disorder Discharge Summary and Continued Care Plan
 6. Doc 14-065 Chemical Dependency Progress Notes: 6/9/2016-7/7/2016
 7. DOC 14-173 Substance Use Disorder Individual Service Plans: 3/22/16, 5/12/2016, 6/28/2016
 8. CePrison "Kiosk" Messages 6/19/16-7/16/16
 9. Offender Management Network Information (OMNI) Offender Program History Printout
 10. CDPT Hanson, Jeremy A. and/or SHS Program Manager Velasquez, Alicia or Designee
 11. CC2 Odem, Michael "Scott" if available.
 12. Custody Facility Plans for current incarceration.
 13. Chronological Entries for current cause/incarceration.

If you are found guilty at hearing, the Department may respond by:

For Community Custody hearings:

1. Imposing the existing supervision plan,
2. Imposing the existing supervision plan, with increased monitoring, treatment, or programming,
3. Placing me in Work Release or total confinement in a jail or Prison, as well as imposing the existing supervision and any additional reporting or program enhancement, or
4. Recommending that the sentencing court, if appropriate and/or applicable, take further action.
5. Revoking the sentence structure to require that the remaining balance of the original sentence be served in a jail or Prison. (Prison DOSA only)
6. Imposing up to the remaining return time to be served in a jail or Prison. (CCP/CCI only)

For 762 DOSA revocation hearings:

1. Recommending transfer to another facility, or
2. Reclassifying/revoking the sentence structure in this case to require that the remaining balance of the original sentence be served.

You have the following rights:

- ◆ To receive written notice of the alleged violations or ICE deportation order.
- ◆ To have an electronically recorded hearing, conducted within 5 business days of service of this notice. However, if you have not been placed in confinement, the hearing will
- ◆ To be present during all phases of the hearing. If you waive your right to be present at the hearing, the Department may conduct the hearing in your absence and may impose sanctions that could include loss of liberty.
- ◆ To present your case to the Hearing Officer. If there is a language or communication barrier, the Hearing Officer will

be conducted within 15 calendar days of service of this notice.

- ◆ To have a neutral Hearing Officer conduct your hearing.
- ◆ To examine, no later than 24 hours before the hearing, all supporting documentary evidence which the Department intends to present during the hearing.
- ◆ To admit to any or all of the allegations. This may limit the scope of the hearing.
- ◆ To have witnesses provide written or telephonic testimony on your behalf. The Hearing Officer may exclude individuals from the hearing for specifically stated reasons, and the facility may exclude the public for safety, security, or capacity concerns. The Hearing Officer may require a witness to testify outside of your presence when there is a substantial likelihood that the witness will not be able to give effective, truthful testimony or would suffer significant psychological or emotional trauma if required to testify in your presence. In either event, you may submit a list of questions to ask the witness(es). Testimony may be limited to evidence relevant to the issues under consideration.
- ◆ To request a continuance of the hearing.

ensure that someone is appointed to interpret or otherwise assist you. However, no other person may represent you in presenting your case. There is no right to an attorney or counsel.

- ◆ To confront and cross-examine witnesses testifying at the hearing.
- ◆ To testify during the hearing or remain silent. Your silence will not be held against you.
- ◆ To receive a written Hearing and Decision Summary Report specifying the evidence presented, a finding of guilty or not guilty, and the reasons supporting findings of guilt, and the sanction imposed, immediately following the hearing or, in the event of a deferred decision, within 2 business days unless you waive this timeframe.
- ◆ To obtain a copy of the electronic recording of the hearing by sending a written request to: Department of Corrections, P.O. Box 41103, Olympia, WA 98504-1103.
- ◆ To appeal a sanction to the Appeals Panel, in writing, within 7 calendar days of your receipt of the Hearing and Decision Summary. You may also file a personal restraint petition to appeal the Department's final decision through the Court of Appeals.
- ◆ To waive any or all of the rights listed.

DEPARTMENT OF CORRECTIONS
APPEALS PANEL
P.O. Box 41103
Olympia, WA 98504-1103

I have read and understand the allegation(s), the hearing notice, and my rights as described:

Offender Signature	Date	Time
	7-25-16	1:50 PM
Witness Signature/Position	Date	Time
	7/25/16	1:50 PM

Admission to Allegations/Waiver of Presence at Hearing

In admitting to the allegation(s) or waiving my presence at the hearing, I understand that the Department may still schedule and conduct a hearing. I further understand that if I am found guilty, the Department may respond as described above.

I admit to the following allegations:

Offender Signature	Date	Time
Witness Signature/Position	Date	Time

I waive my right to appear at the hearing.

Offender Signature	Date	Time
Witness Signature/Position	Date	Time

CCO/TYPIS/09-231
DATE

The contents of this document may be eligible for public disclosure. Social Security Numbers are considered confidential information and will be redacted in the event of such a request. This form is governed by Executive Order 00-03, RCW 42.56, and RCW 40.14.

CERTIFICATE

I certify that I mailed a copy of the foregoing Brief of Amicus Curiae to

ALEX KOSTIN, WSBA #29115
Assistant Attorney General
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
Postage prepaid, on September 27, 2016.

I emailed a copy by agreement to Marla Zink, Marla@washapp.org.



Robert C. Boruchowitz
Attorney for Amicus The Defender Initiative
September 27, 2016

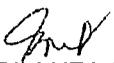
DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 94280-3**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

petitioner Alex Kostin, AAG
[Alexk@atg.wa.gov]
Office of the Attorney General

respondent

Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 20, 2017

WASHINGTON APPELLATE PROJECT

April 20, 2017 - 4:08 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94280-3
Appellate Court Case Title: Personal Restraint Petition of Matthew Ray Douglas Schley
Superior Court Case Number: 14-1-01874-2

The following documents have been uploaded:

- 942803_20170420160757SC784829_6619_Answer_Reply.pdf
This File Contains:
Answer/Reply - Answer to Motion for Discretionary Review
The Original File Name was washapp.org_20170420_150536.pdf

A copy of the uploaded files will be sent to:

- wapofficemail@washapp.org
- marla@washapp.org
- Alexk@atg.wa.gov
- greg@washapp.org
- correader@atg.wa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Marla Leslie Zink - Email: marla@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

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