

No. 94280-3

NO. 73872-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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

Petitioner,

FILED  
Aug 10, 2016  
Court of Appeals  
Division I  
State of Washington

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

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PETITIONER/APPELLANT'S REPLY BRIEF

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A. SUMMARY OF ARGUMENT IN REPLY

Matthew Schley's DOSA sentence was revoked in error because the Department of Corrections (DOC) hearing officer relied on a lower standard of proof than constitutionally required, he was not afforded his due process right to counsel, the revocation exceeded the hearing officer's authority to impose a single sanction for a single incident, even if that incident constitutes multiple violations, and DOC is not authorized to revoke a DOSA based on conduct unrelated to chemical dependency. Mr. Schley has properly raised each of these errors. The revocation should be reversed on any one of them.

B. ARGUMENT IN REPLY

- 1. Because Mr. Schley's DOSA was revoked based on facts proved by 'some evidence,' the constitutionally-required preponderance of the evidence standard was not satisfied.**

Due process mandates 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); *see* Const. art. I, § 3; U.S. Const. amend. XIV. The preponderance standard is required because we have "an interest in ensuring that DOSA revocations are founded upon verified facts and accurate knowledge." *McKay*, 127 Wn. App. at 170

The DOSA sentence was “created to encourage offenders to participate in drug treatment while incarcerated” and to resolve underlying addiction-based roots of crime by confining Mr. Schley to prison for treatment during half his sentence and releasing him to community custody with treatment conditions for the second half of the sentence. *McKay*, 127 Wn. App. at 168; App. at 4, 15 (judgments); RCW 9.94A.662(1).

The preponderance standard is one of the limitations on DOC’s authority to revoke the DOSA sentence, where revocation results in confinement for the full sentence and cancels substance-abuse treatment opportunities. RCW 9.94A.662(3).

DOC agrees that the preponderance of the evidence standard applies at the DOSA revocation hearing and that a preponderance finding must be “founded upon verified facts and accurate knowledge.” DOC Resp. at 6 (citing *McKay*, 127 Wn. App. at 170).

This Court held the preponderance standard applies to protect the critical due process rights at stake, including Mr. Schley and society’s interest in a proper chance at substance-abuse reform. A preponderance requires a showing that is more probable than not. *Kennedy v. Southern California Edison Co.*, 268 F.3d 763, 770 (9th

Cir. 2001). Due process requires more than just any evidence in the record to revoke a DOSA sentence; it requires that the evidence makes the underlying events more likely than not to actually exist. *See* RP 7 (hearing officer indicates DOC’s “evidence will need to meet the standard of 51 percent more evidence than not”).

DOC, however, argues that the preponderance standard is satisfied simply by attenuation and repetition. *Resp.* at 7-8. 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. *Id.* This circular argument does not hold water.

The termination from treatment was based on the 505 infraction and that termination was the support 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. 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. This some-evidence based finding set in motion a cascade of events—

administrative termination from treatment and DOSA revocation— during which the evidence was never reevaluated and the higher preponderance standard was never reapplied.

Applying a preponderance label to the DOSA revocation hearing here is like applying lipstick to a pig. The infraction has always only been subject to the some evidence standard. It caused automatic termination from substance abuse treatment. *See* App. 29-30. There was no reevaluation of the evidence. The pig is still a pig. The pig remained a pig when, at the DOSA revocation hearing, the hearing officer found the termination from treatment occurred by a preponderance of the evidence. App. 38. The hearing officer committed the same mistake as DOC. She found that the some evidence was satisfied for the 505 infraction, that it was affirmed on appeal (by a panelist reviewing application of the some evidence standard), that it led to automatic termination from chemical dependency treatment, and “there’s where they have met the preponderance standard.” RP 33-35; *see* App. 35-36, 38 (revocation based on administrative termination from treatment caused by fighting). Like DOC, the hearing officer illogically and improperly found that the

more you look at the some evidence standard, the more it becomes a preponderance.

The 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; *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). 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. In turn, his DOSA sentence was revoked because he had been administratively terminated from treatment. App. 30-41; RP 22-23, 33-35.

The proper question, and the only meaningful one, is whether Mr. Schley was appropriately terminated from treatment. This requires

the hearing officer to look at the underlying facts and decide whether an infraction occurred by a preponderance of the evidence. Otherwise, the due process protections ordered by this Court in *McKay* would be hollow. Repeating the process and getting further removed from the initial infraction does not change the simple basis for the infraction—some evidence—into the more rigorous preponderance of the evidence standard.

DOC seeks to argue that if this Court were to reexamine the evidence at the 505 infraction hearing, it would reach the same conclusion on guilt. DOC Resp. at 12-13. However, this Court need not, and should not, determine whether Mr. Schley actually committed fighting. Rather, the pertinent point is that the procedural protections this Court set in *McKay* are important in all DOSA revocation hearings including this where DOC can easily conjure a scintilla of evidence that Mr. Schley engaged in fighting, but cannot necessarily show that it is more probable than not that he did so. Mr. Schley contested the evidence presented at the hearing. The disciplinary finding relied on confidential sources to which Mr. Schley had no access, and no opportunity to cross-examine. He was unrepresented. On that record, neither this Court nor the hearing officer could determine whether Mr.

Schley committed fighting by a preponderance of the evidence. The matter should be remanded for a hearing under the proper standard.

Perhaps in an attempt to distance itself from the chain of events that actually occurred—the finding of fighting led to an administrative termination from the treatment program which in turn caused revocation of the DOSA—DOC tries to focus on a loss of custody resulting from the infraction, rather than the infraction itself. *Compare* App. 29-30 (“Schley was administratively terminated from the [treatment program] due to . . . violence against another community member”), App. 31-32, 35 (revocation of DOSA sentence under consideration for administrative termination from treatment program), App. 38-39 (DOSA revoked due to fighting that caused administrative termination) *with* DOC Resp. at 2, 3 (stating placement in segregation, rather than fighting, made Schley non-compliant with terms of treatment program), 4. But loss of custody did not trigger the DOSA revocation, the finding of violence against another community member did. App. 29, 35-36.

DOC also argues that due process is satisfied when the some evidence finding in a disciplinary proceeding establishes the preponderance of the evidence for a DOSA revocation because the

proceedings are separated. DOC Resp. at pp.8-9 n.2. But DOC cannot lessen the burden by holding separate proceedings. The findings necessary to revoke Mr. Schley's DOSA sentence must be established by a preponderance of the evidence, even if they were only shown by some evidence in a separate proceeding for a separate purpose. In *McKay*, the petitioner's DOSA sentence was revoked during a hearing in which the Court found some evidence showed McKay had committed two infractions, failing to participate in chemical dependency treatment and causing an innocent person to be penalized or proceeded against by lying. 127 Wn. App. at 167. The hearing officer applied the some evidence standard to the infractions and "Commenting that 'McKay is inappropriate for the DOSA sentencing,' the hearing officer revoked McKay's DOSA sentence." *Id.* at 167-68. This Court held that a proceeding that could result in revocation of a DOSA sentence must be subject to the preponderance of the evidence. 127 Wn. App. at 168-70. The same is true here.

Where the infraction, if true, must lead to termination from treatment and termination from treatment to revocation of the DOSA, the facts of the infraction must be proved by a preponderance of the evidence in the DOSA revocation hearing (whether or not consolidated

with the infraction hearing) to satisfy due process. Otherwise, the finding cannot be based upon verified facts and accurate knowledge. *McKay*, 127 Wn. App. at 168-70. *McKay* does not hold, or even imply, that DOC can fracture proceedings to circumvent the process due to DOSA recipients and owed to our society, which shares a stake in the outcome.

DOC inappropriately analogizes this case to *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 978 P.2d 1083 (1999) and the use of prior convictions at sentencing. DOC Resp. at 9-10. Neither circumstance deals with using a finding made by a lower standard of proof to establish a finding on a more substantial burden. In the context of criminal sentencing, the situation is reversed—a conviction proved beyond a reasonable doubt (a higher standard) can be used in a sentencing proceeding where the standard is a preponderance of the evidence (a lower standard). *State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986). Moreover, such prior convictions cannot be used if they are unconstitutional on their face. *Id.* *Gronquist* also does not aid DOC's argument because there the petitioner sought to challenge underlying general infractions proved to the same standard as the serious infraction, for which other heightened procedures were

required. But unlike here, in that case the infractions leading to the serious infraction at issue were proved to the same degree. Here, on the other hand, only some evidence supported Mr. Schley's infraction for fighting but the DOSA revocation had to be proved by a preponderance of the evidence.

Mr. Schley cannot be collaterally estopped from challenging his fighting infraction at the DOSA hearing when that infraction was based on a lower standard of proof. *E.g.*, *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235, 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).

The order revoking Mr. Schley's DOSA sentence should be reversed because the hearing officer applied a lower standard than the constitutionally-required preponderance of the evidence standard.

**2. The DOSA revocation must be reversed on the additional basis that Mr. Schley was not informed of his right to a case-by-case determination of whether he was entitled to counsel.**

DOC violated its constitutionally-mandated duties when it failed to consider whether Mr. Schley was entitled to counsel and failed to inform Mr. Schley he had the right to request counsel. *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) (individual must be informed of his right to request counsel, triggering agency's case-by-case determination); *Grisby v. Herzog*, 190 Wn. App. 786, 796-97, 805-06, 362 P.3d 763 (2015) (DOC must determine right to counsel on a case-by-case basis).

Although *Gagnon* holds that an individual must be informed of his or her right to request counsel, DOC did not so inform Mr. Schley. In fact, the notice of hearing for Mr. Schley's DOSA revocation notifies Mr. Schley he did not have the right to counsel.

You have the following rights: . . .

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.

App. 32 (emphasis added). This “notice” contravenes *Gagnon* and *Grisby*.

DOC claims Mr. Schley cannot enforce his right to a case-by-case determination because he did not request counsel. DOC Resp. at 14. However, if DOC never informs inmates of their right to request counsel, the right to a case-by-case determination of the right to counsel is an empty one. Thus, in *Gagnon*, the United States Supreme Court held the government agency must inform the party of his or her right to request counsel. 411 U.S. at 790 (“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.”). *Gagnon* is consistent with the notion that an individual must be apprised of his constitutional rights before he or she can be said to have waived them. *E.g.*, *Miranda v. Arizona*, 384 U.S. 436, 465, 467-68, 470-71, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966) (abdication of constitutional privilege not made knowingly or competently where individual was not apprised of the right); *City of Seattle v. Klein*, 161 Wn.2d 554, 556, 166 P.3d 1149 (2007) (“The only means by which such an individual constitutional right in Washington may be relinquished is by a voluntary, knowing, and intelligent

waiver.”). Mr. Schley’s lack of request for counsel cannot be held against him where he was not informed of the right and, in fact, DOC’s notice implied he lacked any such right.

DOC’s additional argument that Mr. Schley was not entitled to counsel here is belied by the record. *See* DOC Resp. at 14-15. Mr. Schley contested the allegation that he engaged in fighting. *Gagnon*, 411 U.S. at 790 (noting a colorable claim that the alleged violation had not been committed as a basis for providing counsel). The fighting allegation relied upon evidence from confidential sources, to whom Mr. Schley was denied access that his attorney could have gained. App. 27. Only through an attorney could Mr. Schley have examined these witnesses and presented a truly meaningful defense. Appointed counsel also would have been more skilled in presenting disputed facts, proposing questions for examining witnesses, and assembling or refuting documentary evidence. *Gagnon*, 411 U.S. at 786-87. As this Court recognizes, “The ‘unskilled or uneducated’ individual in [revocation proceedings] may no doubt have difficulty in presenting his version of disputed facts where it requires the examination or cross-examination of witnesses or presentation of documentary evidence.”

*Grisby*, 190 Wn. App. at 805 (quoting *State v. McNeal*, 99 Wn. App. 617, 637-38, 994 P.2d 890 (2000) (Webster, J., dissenting in part)).

DOC argues that counsel was not required if the question was simply whether Mr. Schley had been terminated from the substance abuse program. DOC Resp. at 14-15. But United State Supreme Court precedent holds counsel should be provided if “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.” *Gagnon*, 411 U.S. at 790. Counsel here could have helped Mr. Schley present information mitigating the need for revocation of the DOSA. Moreover, the proceeding at issues bore heavy consequences—the potential loss of 29.75 community custody and participation in the DOSA treatment programs. Therefore, even under DOC’s limited view, counsel should have been provided.

DOC attempts to liken this case to that of *In re Price*, 157 Wn. App. 889, 240 P.3d 188 (2010). DOC Resp. at 15. In *Price*, this Court held an attorney was not required for a community custody violation hearing because the case involved no “evidentiary or legal subtleties,” the petitioner was able to review all the evidence against him and to call witnesses. 157 Wn. App. at 906. As discussed, Mr. Schley’s

hearing did involve evidentiary and legal subtleties. *Price* also precedes *Grisby*, which resolved the question left open by the *Price* court by holding that the right to counsel must be determined on a case-by-case basis even if no statute specifically authorizes the appointment of counsel. *Compare Price*, 157 Wn. App. at 906 *with Grisby*, 190 Wn. App. at 803-05 (discussing question left open in *Price* and resolving it in appeal from DOSA revocation hearing).

The Court should reverse the revocation and hold that, on remand, DOC must first consider whether Mr. Schley is entitled to counsel before it holds a new hearing under the proper preponderance of the evidence standard.

**3. DOC concedes by not responding to Mr. Schley's argument that the DOSA revocation exceeds DOC's authority where two other sanctions were also imposed for this single incident of fighting.**

As set forth in Mr. Schley's opening brief, the DOSA revocation must be reversed because it exceeds DOC's authority to impose a single sanction for a single incident. WAC 137-28-350 ("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.”); Op. Br. at 16-18.<sup>1</sup> Mr. Schley was found guilty of fighting and sanctioned by way of infraction (punishment one); that infraction caused him to be administratively terminated from treatment (punishment two); and that termination in treatment led to revocation of his DOSA sentence (punishment three). Such piling of sanctions is prohibited by WAC 137-28-350.

DOC does not respond to this argument. Its lack of response should be treated as a concession. *State v. Ward*, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005).

**4. The Legislature has not authorized DOC to revoke court-imposed DOSA sentences on grounds unrelated to program conduct.**

DOC claims that because it has authority to revoke a DOSA sentence, its authority is limitless. DOC Resp. at 16. But the Legislature’s grant of authority is not limitless. DOC “must still 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 ultimate penalty of revoking an offender’s DOSA—a penalty which harms not only the offender, but our society at large—must be limited to circumstances related to chemical dependency. The

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<sup>1</sup> Mr. Schley also raised this argument in his statement of additional authorities filed on May 29, 2015.

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).

Of course, DOC can implement policies and rules to regulate the assaultive conduct of inmates. And it has done so by implementing 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, such as fighting. The revocation of a DOSA sentence imposed to ameliorate Mr. Schley's substance abuse exceeds the bounds of reason as well as the Legislature's authority.

DOC also makes another attempt to argue Mr. Schley's DOSA was not revoked for fighting but for termination from treatment. DOC Resp. at 16. But the fighting infraction was the only basis for administratively terminating Mr. Schley from treatment. *E.g.*, App. 29-30 ("Schley was administratively terminated from the [treatment program] due to . . . violence against another community member"). Thus the two are one in the same. The DOSA revocation was a direct

consequence of the “some evidence” finding of fighting. DOC cannot circumvent logic, constitutional privileges, and its authority by holding separate proceedings.

**5. The issues have been properly raised and should be reviewed in this personal restraint petition.**

DOC’s argument that claims two and four above should not be considered is legally incorrect. *See* DOC Resp. at 13.

DOC cites *In re Yates*, 183 Wn.2d 572, 576, 353 P.3d 1283 (2015) to argue Mr. Schley did not properly raise these additional bases for reversing the DOSA revocation. *Yates* does not support DOC’s argument for two reasons. First, in *Yates* the petitioner did not raise the noted arguments until his reply brief. 183 Wn.2d at 575-76. Therefore, the unfairness the Court was concerned with was the State’s lack of opportunity to respond to the arguments. *Id.* at 576. Mr. Schley, on the other hand, raised these issues in the supplemental brief ordered by this Court, which was the first brief in which Mr. Schley was represented by counsel. DOC, moreover, has had the opportunity to respond. Second, *Yates* does not support DOC’s argument because the *Yates* court reviewed the newly-raised issues just as this Court should. *Id.*

DOC’s reliance on *State v. Ice*, 138 Wn. App. 745, 158 P.3d 1228 (2007) suffers from a similar flaw. The *Ice* court declined to

reach an issue that was raised for the first time in the petitioner's reply brief. 138 Wn. App. at 748 n.1. Mr. Schley does not raise new issues in his reply brief. Rather, at appointed counsel's first opportunity in the court-ordered supplemental brief, Mr. Schley set forth additional grounds for relief challenging the same DOSA revocation proceeding and based on the same record. DOC had an opportunity to reply in its response brief, and no prejudice to DOC can be claimed. The issues are fairly before this Court and should be determined on their merits.

*Yates* and *Ice* are distinguishable on another significant ground. The petitioners in those cases challenged their criminal conviction, for which the direct appeal process was fully available. *Yates*, 183 Wn.2d at 574; *Ice*, 138 Wn. App. at 748. Mr. Schley, on the other hand, challenges the prison discipline system. Here there has been "no final judgment of a court." *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 212, 227 P.3d 285 (2010). Mr. Schley challenges the decision of an "executive officer" and the personal restraint petition is his only "meaningful mechanism for judicial review." *Id.* Because the personal restraint petition is a prisoner's only opportunity for judicial review, our courts do not apply the heightened threshold requirements generally applicable to collateral attacks. *Id.* at 212-13 (discussing, among other

cases, *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298-99, 88 P.3d 390 (2004)).

This petition is Mr. Schley's only means to obtain judicial review of DOC's DOSA revocation proceeding. Judicial economy would be disserved if he were required to file a separate petition to raise alternative arguments supporting the unlawfulness of the same proceeding. Counsel has already been appointed for Mr. Schley in this PRP, the record is the same for all arguments raised herein, the judicial review process has begun, and DOC has had a fair opportunity to respond. The issues are squarely before this Court and these issues should be reviewed on their merits.

### C. CONCLUSION

This Court should grant Mr. Schley petition and reverse the DOSA revocation on one or more of the following grounds (1) the hearing officer relied on the some evidence standard, rather than the stricter preponderance of the evidence standard, to find sufficient basis for revocation, (2) Mr. Schley was denied his right to counsel, (3) the

revocation is a multitudinous sanction in violation of WAC 137-28-350, and (4) the DOSA revocation exceeds DOC's authority by being premised on conduct unrelated to chemical dependency.

DATED this 10th day of August, 2016.

Respectfully submitted,

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Attorney for Petitioner/Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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IN RE THE PERSONAL RESTRAINT PETITION OF	)	
	)	
MATTHEW SCHLEY,	)	NO. 73872-1-I
	)	
Petitioner.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ALEX KOSTIN, AAG OFFICE OF THE ATTORNEY GENERAL PO BOX 40116 OLYMPIA, WA 98504-0116	(X) ( ) ( )	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] MATTHEW SCHLEY 746992 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 10<sup>TH</sup> DAY OF AUGUST, 2016.

X \_\_\_\_\_ 

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