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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Personal Restraint Petition of:

MATTHEW DOUGLAS SCHLEY,

Petitioner.

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**REPLY TO ANSWER TO  
MOTION FOR DISCRETIONARY REVIEW**

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## I. INTRODUCTION

The Department of Corrections revoked Schley's Drug Offender Sentencing Alternative (DOSA) sentence because a preponderance of the evidence proved that Schley had been terminated from the treatment program. The Court of Appeals found the Department violated due process because it did not prove by a preponderance of the evidence the historical facts underlying clinical staff's decision to terminate treatment; namely, that Schley had been infraacted for fighting with another inmate. Having concluded that the hearing required more than proof of termination from treatment, the court also concluded that Schley was denied the limited right to request counsel at the revocation hearing.

In response to the Department's motion for discretionary review, Schley argues that the Court of Appeals simply applied settled precedent. Schley argues that because the Department revoked his sentence for fighting with another inmate, due process required the Department to prove the fight by a preponderance of the evidence. In his cross-motion, Schley similarly argues that the Department improperly sanctioned him three times for the fight, and improperly revoked his DOSA sentence for a disciplinary infraction unrelated to chemical dependency treatment. But Schley's arguments, like the lower court's decision, miscomprehend the very basis for the revocation of the DOSA sentence.

The Department did not revoke the DOSA sentence because Schley fought with another inmate. The Department did not sanction Schley three times for fighting, and did not revoke the DOSA sentence for a reason unrelated to his drug treatment. The Department revoked the DOSA sentence because a preponderance of the evidence proved that clinical staff had terminated Schley from the drug treatment program. Since RCW 9.94A.662(3) mandates revocation when the offender is terminated from the treatment program, and the Department found by a preponderance of the evidence that Schley had been terminated from treatment, the revocation complied with due process.

## **II. REPLY ARGUMENT**

### **A. Schley's Arguments Show the Court of Appeals Misunderstood What Facts the Department Must Prove by a Preponderance in Order to Revoke a DOSA Sentence under RCW 9.94A.662**

Schley argues that the Court of Appeals simply applied the settled precedent of *In Re McKay*, 127 Wn. App. 165, 110 P.3d 856 (2005) when the court held that due process required proof by a preponderance of the evidence that Schley fought with another inmate. But like the Court of Appeals, Schley misunderstands both *McKay* and the facts that must be proven at a DOSA revocation hearing under RCW 9.94A.662. Even under *McKay*, due process requires proof only of Schley's termination from treatment, not proof that he previously fought with another inmate.

In *McKay*, the Department had applied only the “some evidence” standard in DOSA revocation hearings. *McKay*, 127 Wn. App. at 167-68. McKay had been charged both with a serious prison infraction (making a fake death threat) and with failing to participate in treatment. *Id.* at 167. Unlike here, where Schley had separate hearings for his fighting infraction and DOSA revocation, the Department conducted a single hearing on both of the charges for McKay. *Id.* at 167-68. At the hearing, McKay admitted her guilt of the serious prison infraction, but denied she had failed to participate in treatment. *Id.* at 167. Applying the “some evidence” standard, the hearing officer found McKay guilty of both the fake death threat and failing to participate in treatment. *Id.* at 167-68. Applying the “some evidence” standard, the hearing officer determined that McKay’s failure to participate in treatment warranted revocation. *Id.* at 168.

The *McKay* court held that the Department’s application of the “some evidence” standard to revoke a DOSA sentence violated due process. *McKay*, 127 Wn. App. at 168-170. The *McKay* court held that the hearing officer must apply the preponderance of the evidence standard when determining that McKay’s failure to participate in treatment warranted revocation of her DOSA sentence. *Id.* The *McKay* court directed the Department to apply the preponderance of the evidence standard in a new DOSA revocation hearing. *Id.* at 170.

Contrary to Schley's argument and the court's decision below, *McKay* did not require the Department to apply the preponderance standard in determining whether McKay had committed the behavior at issue in the serious prison infraction (making a false death threat). *McKay*, 127 Wn. App. at 168-70. On the contrary, the *McKay* court recognized, "Prison disciplinary actions which result in the loss of good time credits do not require the same level of due process, because of the important government interest in maintaining order in a prison through prompt hearings and imposition of punishment." *Id.* (citing *Wolff v. McDonnell*, 418 U.S. 539, 561-62, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)). While the *McKay* court required the Department to determine the DOSA revocation by a preponderance of the evidence, the *McKay* court never held that the Department in a DOSA revocation hearing must prove by a preponderance of the evidence the behavior underlying a serious prison infraction.

Like the court, Schley misunderstands the facts relevant to his DOSA revocation. This misunderstanding is evidenced by Schley's arguments in support of his cross-motion, where he mistakenly argues that the Department improperly sanctioned him three times for fighting, and improperly revoked his DOSA sentence for a reason unrelated to drug treatment (*i.e.* fighting). The relevant fact is not that Schley fought with another inmate, but that he was terminated from the treatment program.

The statute expressly mandates the Department to revoke the DOSA sentence if the offender is terminated from the treatment program. RCW 9.94A.662(3) (“An offender who fails to complete the program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing court.”). Under the statute, the fact to be proven by a preponderance of the evidence at the DOSA hearing was not whether Schley had previously fought with another inmate. The fact to be proven was whether clinical staff had terminated Schley from the drug treatment program. RCW 9.94A.662(3); *McKay*, 127 Wn. App. at 169 n. 12 (recognizing that the Department may revoke the DOSA sentence if the offender fails to participate in treatment); *see also State v. McCormick*, 166 Wn.2d 689, 705, 213 P.3d 32 (2009) (holding the court may revoke Special Sex Offender Sentencing Alternative if the defendant fails to complete treatment).

The Department did not sanction Schley three times for fighting, and did not revoke the DOSA sentence for fighting. The hearing officer properly determined by a preponderance of the evidence that Schley had been terminated from the treatment program and that his termination warranted revocation of the DOSA sentence. The Department complied with *McKay* and due process.

**B. Schley Cannot Avoid the Conflict Between the Decision Below and *In Re Gronquist*, 138 Wn.2d 388, 978 P.2d 1083 (2009)**

Schley tries to distinguish *Gronquist* by comparing the level of the liberty interests at stake in his case and *Gronquist*. But this Court did not decide *Gronquist* based upon the level of the liberty interest at issue in the case. On the contrary, the Court rejected the argument that the presence of a greater liberty interest in a subsequent hearing alters the analysis of the process required to use a finding from a prior hearing in a later hearing. The *Gronquist* Court rejected the argument that due process provides the right to relitigate a prior prison infraction if the level of process required in the subsequent hearing is greater than the level of process due in the prior hearing. *Id.* at 398. In fact, the *Gronquist* Court recognized the same rule applied even in criminal cases, which involve the highest possible liberty interest. *Id.* at 402-04.

Schley also tries to distinguish *Gronquist* by continuing to mistakenly argue that the Department revoked his DOSA sentence because of fighting. But as argued above, the Department did not revoke the sentence because Schley was guilty of fighting. The Department revoked the sentence because he was terminated from treatment. Regardless of whether Schley fought with another inmate, his termination from treatment still warranted the revocation of the DOSA sentence.

**C. Schley was not Entitled to Counsel in Light of the Issue to be Decided at the DOSA Revocation Hearing**

Schley argues that this Court need not consider the right to counsel issue because the Department “conceded” it would inform him of the right to request counsel if the Court of Appeals remanded for a new hearing. Schley also contends the Department “conveniently ignores its failure to notify Mr. Schley of his right to request counsel, even after *Grisby* affirmed that constitutional requirement in 2015.” Answer, at 14-15.<sup>1</sup> But Schley fails to point out that his hearing occurred before *Grisby*, at a time when the Court of Appeals had long held there was no right to counsel in such hearings. *In re McNeal*, 99 Wn. App. 617, 994 P.2d 890 (2000). The notice provided to Schley complied with then existing case law, and the Department’s acknowledgement that it would advise Schley of the right to request counsel under *Grisby* if the case is remanded does not prevent this Court’s review of the issue.

Schley fails to show that he was denied the right to counsel. Continuing with his mistaken understanding of the relevant issues in the DOSA revocation hearing, Schley argues that the issues in the hearing “were indeed complex.” Answer, at 16. But Schley fails to otherwise

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<sup>1</sup> Schley has appended a copy of the amicus brief filed below to bolster his argument regarding notice of the right to request counsel under *Grisby v. Herzog*, 190 Wn. App. 786, 362 P.3d 763 (2015).

respond to the Department's argument that the hearing is not complex, and there was no right to counsel, because the hearing involved only the issue of termination from treatment, not the issue of fighting. Schley also fails to respond to the Department's argument that even if the hearing involved the issue of fighting, the case still was not complex.

The appointment of counsel will probably be undesirable and constitutionally unnecessary in most DOSA revocation hearings. *See Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S.Ct. 1756, 36 L. Ed. 2d 656 (1973). Due process does not provide a right to counsel if the case is not complex and the offender appears capable of speaking effectively for himself. *Id.* at 790-91. Here, even if the hearing properly involved the issue of whether Schley fought with another inmate, the hearing was not complex. Rather, it would involve a straightforward factual issue; *i.e.*, whether Schley fought with another inmate. Determination of such an issue does not present a complex case. *In re Price*, 157 Wn. App. 889, 906, 240 P.3d 188 (2010) (counsel is not required in the absence of complex case that involved evidentiary or legal subtleties, but instead involves straightforward factual determinations about the alleged violations and the credibility of witnesses).

Under the circumstances of this case, Schley cannot show a violation of the limited due process right to counsel.

### III. CONCLUSION

For the reasons stated above and in the motion for discretionary review, the Department respectfully requests that the Court grant review and reverse the decision of the Court of Appeals.

DATED this 22nd day of May, 2017.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on the date below I caused to be electronically filed the REPLY TO ANSWER TO MOTION FOR DISCRETIONARY REVIEW with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 22nd day of May, 2017, at Olympia, WA.

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