

No. 94971-9

No. 74899-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Personal Restraint Petition of:

DEREK E. GRONQUIST,

Petitioner.

PETITIONER'S REPLY BRIEF

Derek E. Gronquist
#943857 B-B-305
Wash. St. Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99326

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A. CLARIFICATION OF FACTS.¹

On February 17, 1995 the King County Superior Court sentenced petitioner Derek E. Gronquist to three consecutive 114 month terms of confinement. Exhibit 1 § 4 2.² Following the Supreme Court's order to recalculate Mr Gronquist's terms of confinement in Personal Restraint of Smith & Gronquist, 139 Wn.2d 199, 986 P.2d 131 (1999), the Department of Corrections (DOC or Department) **correctly** calculated his terms of confinement as:

COUNT I (Cause AB)

START DATE..... 02/28/1995
Credit for Time Served.....453 days
Earned Release Date..... 08/05/2000
MAXIMUM EXPIRATION DATE.....06/02/2003 ³

¹When this action was filed, the cause of the alteration to Mr. Gronquist's confinement maximum expiration date was not entirely clear. It appeared to have been an error that occurred following the 2008 breach of the Supreme Court's order in Personal Restraint of Smith & Gronquist 139 Wn.2d 199, 986 P.2d 131 (1999). The facts surrounding the alteration have now become somewhat clearer. For that reason, and because the DOC attempts to confuse the issues even further, Mr. Gronquist presents this clarification of facts.

²"Exhibit" refers to the exhibits attached to the Declaration of Derek Gronquist, subjoined to Petitioner's Opening Brief at Attachment A.

³The DOC agrees that the confinement maximum expiration date on Count I (Cause AB) is June 2, 2003, Response of the Department of Corrections at 3, but continues to cite to records that list the maximum expiration date for that cause as April 5, 2016 Response at Exhibit 2, page 2, and Exhibit 4.

COUNT II (Cause AC)

START DATE.....08/05/2000
Earned Release Date.....05/20/2007
MAXIMUM EXPIRATION DATE.....02/03/2010

COUNT III (Cause AD)

START DATE..... 05/20/2007
Earned Release Date.....09/18/2013
MAXIMUM EXPIRATION DATE.....11/17/2016

Exhibit 7 (emphasis added).

In 2010 and 2012, Mr. Gronquist received restorations of good time which re-set the start date for Count II at April 17, 2000, and Count III at December 2 2006.⁴ Exhibit 9; Declaration of Derek Gronquist at 7. Those restorations should have resulted in the confinement maximum expiration date for Count II being set at November 17, 2009, and Count III at June 2 2016 - 114 months after each term began. Id.

In 2012 - without notice or an opportunity to be heard - DOC Statewide Correctional Records Manager Wendy Stigall implemented a "programming change" to the DOC's OMNI computer database, which re-set Mr. Gronquist's confinement maximum expiration date on Count I (Cause AB) to June 5,

⁴The Department agrees that Mr. Gronquist received these good time restorations, and that they re set the start dates for Counts II & III Response at 4.

2016; Count II (Cause AC) to April 20, 2019; and Count III (Cause AD) to May 31, 2022.⁵ Exhibits 8, 10, 13 & 14; Response at Exhibit 2, page 2, and Exhibit 4.

When Mr. Gronquist discovered and reported the alteration of his confinement maximum expiration dates, Coyote Ridge Corrections Center Records Technician Calla Perkins admitted that she "can't prove the [altered] time in OMNI is correct." Exhibit 13 at 6. Ms. Stigall intervened, stating that "[h]is prison max ex is correct[,]" because:

Any time they spend on the consecutive sentence stops the original sentence. So basically he served on AB, the max ex is calculated by taking the sentence length 114 months and subtracting the jail time of 453 days. When he transfers to AC, his time stops on AB because it is consecutive, when he transfers to AD the time on AB is still stopped and the max ex on AC is also stopped at that point. Basically the time is tolling although we don't use tolling as a prison term, just field. We are saying they can't be serving on two consecutive sentences at one time. So if you expand the max ex calculations on the View J & S Prison page you will see that AB is extended by 4752 days (4/17/2000 to 04/21/2013). AC is only extended by the amount of time he was serving on AD, 2332 days (1/02/06 to 04/21/13).

Exhibit 13 (emphasis added).

⁵ These alterations imposed a 267 month, 28 day, term of confinement on Count I; a 224 month term of confinement on Count II; and a 183 month, 27 day, term of confinement on Count III. Response at Exhibit 4.

Ms. Perkins subsequently informed Mr. Gronquist that the alteration of his confinement maximum expiration dates was due to "State v. Acrey," which authorized DOC to "toll or stop" consecutive sentences. Exhibit 14. Mr. Gronquist then requested DOC Secretary Bernard Warner to "personally intervene in Ms. Stigall's conduct and set my Max Ex Date at June 2, 2016," emphasizing:

State v. Acrey, 97 Wn.App. 784, 988 P.2d 17 (1999), has absolutely no application to how a Max Ex Date on a consecutive sentence is calculated. . . The case that dictates how Max Ex Dates are calculated for consecutive sentences like mine is Personal Restraint of Paschke, 61 Wn.App. 591, 811 P.2d 694 (Div. 1 1991). In that case, like mine, prison officials attempted to prolong confinement on the final consecutive sentence by grafting time from a previously served term onto it. Following the Supreme Court's decision in St. Peter v. Rhay, 56 Wn.2d 297, 352 P.2d 806 (1960), the court held that prison officials could not re-open or re-use time remaining on previously served consecutive sentences to extend a Max Ex Date on the final consecutive sentence.

Exhibit 15.

Ms. Stigall responded to Mr. Gronquist's complaint by conceding that "Acrey does not apply," but continuing to assert that "the calculations that are currently being used for maximum expirations dates are correct" based upon "stoppage time," or the new claim that:

The maximum expiration date is the sentence length (in your case three 114 month sentences

for a total of 342 months), minus the day for day jail credits. You then add this time to your start date that you were admitted to prison on 2-28-95. When you do the math you will see that the total is 05/31/22.

Exhibit 16 (emphasis added).

Mr. Gronquist again requested Secretary Warner to intervene in Ms. Stigall's conduct, and "personally answer: (1) whether the Department of Corrections (DOC) is wilfully defying the judicial decisions entered in Paschke and St. Peter; and (2) whether you are acting with the intent to subject me to confinement past the maximum term of confinement imposed by my sentencing court."

Exhibit 17. Brian Tinney, Assistant Secretary for DOC's Administrative Operations Division, responded that Paschke and St. Peter "are not relevant," and that Gronquist's three consecutive 114 month terms of confinement are "the exact same total sentence" as "an offender who is received with a sentence of 342 months that has no consecutive relationships."

Exhibit 18.

Mr. Gronquist then filed a grievance over the alteration of his confinement maximum expiration dates "contrary to the terms of [his] Judgment and Sentence and the holding in Paschke, and in the absence of any legal authority." Exhibit 20. The

response to that grievance asserted "[y]our MAX ERD⁶ is correct at 05/31/2022[,]" because:

The confinement time that you are spending on AC⁷ is "stoppage time" on AB. The remaining confinement time that you are spending on AD is "stoppage time" on AC. This extends the maximum expiration date on AC to 04/05/2016, AB to 04/10/2019, and then AD remains 05/31/2002.

Id.

Mr. Gronquist appealed from that response, emphasizing that "[t]erms of confinement only "stop" when an inmate escapes. See RCW 9.94A.171(1)" and that "Washington courts have clearly held that sentences continue to run, notwithstanding release to serve a subsequent consecutive sentence." First Supplemental Declaration of Derek Gronquist in Support of Personal Restraint Petition, Exhibit 2 (citing Paschke). Washington State Penitentiary Records Management Supervisor G. Randolph contacted Mr. Gronquist regarding his grievance, handed him a

⁶ "ERD is an acronym for "Earned Release Date," which is substantially different from a confinement maximum expiration date.

⁷ Mr. Gronquist was not serving Cause AC at this time. According to DOC's own records, Cause AC "EXPIRED" on February 3, 2010. Exhibit 7. As of December 2, 2006, Mr. Gronquist was only serving time on Cause AD. Exhibit 9.

document titled "Offender Management Network Information," and stated that it "explained" how his confinement maximum expiration dates were calculated. Id. Ms. Randolph stated that Mr. Gronquist's confinement maximum expiration dates were changed in 2012 due to Ms. Stigall's implementation of "stoppage time." When Mr. Gronquist asked what "stoppage time" was, how it worked, and what law authorized it Ms. Randolph responded that she "did not know," that "everything was done pursuant to the direction of Ms. Stigall," and she was "powerless to even question her actions." Id., at 2.

Mr. Gronquist filed another appeal, emphasizing: "[t]here is no such thing as "stoppage time[,]"" and that his confinement maximum expiration dates could not be changed "years after [the first two sentences] expired in full." Id., at Exhibit 2, page 2. Once again, Ms. Stigall responded to Mr. Gronquist's complaint, stating:

You were sentenced to a total of 114 months on 3 separate counts to be served consecutively. This totals 342 months (10,407 days). Subtract the 453 days of jail credit and that leaves 9,954 days to serve for your maximum expiration date. No earned release time is applied to the Max ex. Since these counts are all consecutive any time you are spending on consecutive matters is calculated as "stoppage time" which is equal to the way

"tolling" time is applied to field sentences. This applies to both the confinement and supervision portions of your sentence. You are only eligible for credit if you are actually serving on the cause.

Second Supplemental Declaration of Derek Gronquist
in Support of Personal Restraint Petition at
Exhibit 1.

On March 21, 2016 Mr. Gronquist filed this petition challenging Ms. Stigall's alteration of his confinement maximum expiration dates. On May 23, 2016, the Court ordered DOC to file a response to the petition. The Department filed its response on June 15, 2016, which abandons Ms. Stigall's "stoppage time" position but claims the confinement maximum expiration date of May 31, 2022 "is correct," for two reasons: (1) it has converted or "equates" Mr. Gronquist's three consecutive 114 month sentences to a single 342 term of confinement; or (2) that confinement maximum expiration dates are calculated from the maximum expiration date of the previous sentence, rather than from the date each consecutive sentence started. Response at 2-7.

The Department has not submitted any evidence indicating that such methodology is, in fact, how it calculates confinement maximum expiration dates

for consecutive sentences, and the record before the Court belies its claims. Exhibit 7. The DOC has also failed to cite any authority which authorizes such conduct, and does not discuss - much less than distinguish - the long-standing precedent which rejects both positions.⁸ Response at 1-7.

B. ARGUMENT WHY RELIEF SHOULD BE GRANTED.⁹

I. THE DEPARTMENT OF CORRECTIONS DOES NOT POSSESS THE AUTHORITY TO CONVERT THREE CONSECUTIVE 114 MONTH SENTENCES INTO A SINGLE 342 MONTH TERM OF CONFINEMENT

The DOC contends that it has either converted or "equate[s]" Mr. Gronquist's three consecutive

⁸ The DOC's unsupported arguments taken in direct opposition to controlling authority violates RAP 10.3(a)(6) and CR 11. Such "[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Holland v. City of Tacoma, 90 Wn.App. 533, 538, 954 P.2d 290 (1998); Joy v. Dept. of Labor & Industries, 170 Wn.App. 614, 629, 285 P.3d 187 (2012), review denied, 176 Wn 2d 1021 (2013). This Court should not reward DOC's sanctionable conduct by entertaining its frivolous contentions.

⁹ DOC misstates the burden of proof, contending: "in challenges to a prison's time-credit calculations, it is a petitioner's burden to show that the DOC's actions were so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding so as to work to the offender's prejudice." Response at 5 (citing In re Grantham, 168 Wn.2d 204, 215, ¶ 13, 227 P.3d 285 (2010)). Grantham held that prisoners **do not** need to make such a showing. Grantham, 168 Wn.2d at 208-214; Personal Restraint of Albritton, 143 Wn.App. 584, 590-591, 180 P.3d 790 (Div. 1 2008)(applying same holding, pre-Grantham, to petition challenging DOC's calculation of a term of confinement).

114 month sentences into a single "342 month" or "10,407 day" term of confinement. Response at 5 & 7. Based upon this conversion, DOC claims that it properly calculated Mr. Gronquist's confinement maximum expiration date from February 28, 1995 (the date he was received by DOC) to the end of the 342 month term of confinement. Id.

This Court has clearly held that the Department does not possess the authority to alter, amend, or usurp the terms of a judgment and sentence. In Dress v. Department of Corrections, 168 Wn.App. 319, 279 P.3d 875 (Div. 1 2012), the DOC "formed the opinion" that an inmate should have been sentenced to consecutive terms of confinement, rather than the concurrent term imposed by the sentencing court. It subsequently "informed" the inmate that she would not be released from confinement on her release date, because it had decided to "correct" her judgment to impose consecutive terms of confinement. Dress, 168 Wn.App. at 322-325. Following a long strand of "well-established principles" and "persuasive authority," the Court condemned the DOC's conduct and affirmed the lower court's order releasing Dress from confinement, holding:

The relevant case law is clear that DOC has no authority to correct or ignore a final judgment and sentence, even if it is erroneous.

Dress, 168 Wn.App. at 327-329.

In this case, DOC claims that it has converted Mr. Gronquist's three consecutive 114 month sentences into a single 342 month sentence. Like Dress, the DOC does not possess the authority to alter the terms of the judgment and sentence in this way. Its calculation of Mr. Gronquist's confinement maximum expiration date based upon this conduct is, therefore, unlawful.

It should be noted that there is no evidentiary support for the DOC's claim. All of the DOC's own records list Mr. Gronquist's sentences as individual 114 month terms of confinement, and treat them as such for early release and maximum expiration date calculations. Exhibits 7 & 9; Response at Exhibits 2 & 4. None refer to them being or "equating to" a single 342 month term of confinement. *Id.* The only basis for this claim is the post hoc assertion of Ms. Stigall and her supervisor. Exhibits 16 & 18. Whether this is an issue of DOC altering the terms of Mr. Gronquist's judgment, or simply an excuse created after the-

fact, the unlawfulness remains the same.

II. CONFINEMENT MAXIMUM EXPIRATION DATES FOR CONSECUTIVE SENTENCES ARE CALCULATED FROM THE DATE THE INMATE BEGAN SERVING EACH CONSECUTIVE TERM OF CONFINEMENT, NOT FROM THE CONFINEMENT MAXIMUM EXPIRATION DATE OF THE PREVIOUS TERM OF CONFINEMENT

The Department admits that "good time credits affected the start time of [Mr. Gronquist's] consecutive counts," but nevertheless contends that early release credits have "no effect on his maximum expiration date" because that "date does not change based on early release credits." Response at 3, 4 & 6 Based upon this position, the DOC contends that confinement maximum expiration dates of consecutive sentences are calculated from the confinement expiration date of the previous sentence, rather than from the date each sentence began:

Broken down by count, the Department credited Gronquist's first 3,469 day sentence with a total of 453 presentence credits. Exhibit 4. Subtracting 453 days from 3,469 leaves 3,016 days to serve on Gronquist's first count per the judgment and sentence. Adding 3,016 days to Gronquist's first start date of February 28, 1995 results in a maximum expiration date of June 2, 2003. This is the maximum date Gronquist could be required to serve in prison on the first 114-month (3,469 day) sentence. This date, June 2, 2003, is the date Gronquist would be released but for his consecutive counts.¹⁰ Gronquist's second maximum expiration date is calculated from the maximum expiration date of his first confinement term. Adding 3,469 days to June 2, 2003 results in a maximum expiration date of

November 30, 2012. The maximum expiration date for count three is calculated by adding 3,469 days to the maximum expiration date from count two. This results in a maximum expiration date on count three of May 31, 2022.

Response at 4 (emphasis added).

This methodology is "a legal impossibility under applicable Washington law." United States v. Gilcrist, 106 F.3d 297, 300 (9th Cir. 1997). In St. Peter v Rhay, 56 Wn.2d 297, 352 P.2d 806 (1960), a prisoner was sentenced to a maximum of 15--years for second degree burglary on October 1, 1943. Before he was released, the prisoner was convicted of escape and second degree assault and sentenced to concurrent ten year terms of confinement, to be served consecutively to the burglary sentence. The prisoner received good time credits, and was paroled from the burglary sentence to the escape and assault sentences on January 31, 1948. On March 3, 1958 the prisoner's parole was revoked and he was ordered to serve the remainder of his 15 year burglary sentence. St. Peter, 56 Wn.2d at 300.

The prisoner filed a writ of habeas corpus contending that he was unlawfully confined beyond

¹⁰This statement is patently false, as DOC's own records show that it released Mr. Gronquist from his first term of confinement on April 17, 2000. Exhibits 9 & 10.

the confinement maximum expiration dates of both consecutive terms. Prison officials argued that St. Peter was lawfully confined, because he had only served six and one half years of the 15 year burglary sentence prior to being paroled to the consecutive sentences due to the award of good time credits. Relying upon statutes in effect since 1897, the Supreme Court rejected the prison officials position and ordered St. Peter's release from confinement, holding:

This state, in common with many others, has had a long experience with time credits for good behavior, commonly called "good time," as a disciplinary device. Indeed, it has been shown to be well-nigh indispensable to prison management. "Terms of imprisonment" are substantially affected by "good time," but penalties as prescribed by law and pronounced in the sentence of the court are fixed and unchanging.

If "term of imprisonment" were to mean the penalty prescribed by statute rather than actual imprisonment, the sentence for a subsequent felony could not start when an inmate was released with allowance for "good time," but instead, would commence only after he had been at large for the length of his "good time" allowance. This would create an anomalous situation.

St. Peter, 56 Wn.2d at 299.

Applying this holding, the Supreme Court held that St. Peter's 15-year burglary sentence began on October 1, 1943, continued to run despite parole to a consecutive sentence, and expired 15 years later,

on October 8, 1958.¹¹ His 10-year escape and assault sentences began on January 31, 1948, when he was paroled from the burglary sentence to those sentences, and expired ten years later on January 31, 1958. Because St. Peter was confined beyond the maximum expiration dates of both of sentences, the Court granted the writ and ordered his release from confinement. St. Peter, 56 Wn 2d at 300.

Personal Restraint of Paschke, 61 Wn.App. 591, 811 P.2d 694 (1991), applied St. Peter to the question of how to calculate confinement maximum expiration dates for consecutive sentences. There, Mr. Paschke was sentenced to consecutive 10, 20, and 10 year terms of confinement. Recognizing that a "sentence continues to run notwithstanding parole[,]" and that "the term of a subsequent felony sentence begins when the inmate's actual imprisonment for the earlier offense ends," the Court of Appeals held:

Mr. Paschke began serving his 10-year sentence for the 1972 abduction on March 13, 1972. His maximum release date on that conviction was March 12, 1982. The sentence for his carnal knowledge conviction was to run

¹¹The additional eight days is the amount of time St. Peter was at large during his escape. St. Peter, 56 Wn.2d at 300.

consecutive to the abduction sentence. On June 20, 1974 he was paroled to, and began serving, his 20 year maximum sentence for the 1972 carnal knowledge conviction. His maximum release date for that sentence is June 19, 1994. . . . Paschke began serving his 10 year sentence for the 1979 rape conviction on October 15, 1983. His maximum release date on that charge is not later than October 14, 1993. . . . Thus, the latest date Mr. Paschke can be held is June 19, 1994 [the maximum expiration date of his 20 year term].¹²

Paschke, 61 Wn.App. at 594-595 (emphasis added).

Mr. Gronquist began serving his first 114 month (9½ year) term of confinement on February 28, 1995,¹³ was credited with 453 days spent in pre-judgment detention, and has a confinement maximum expiration date of June 2, 2003. Exhibit 7; Response at 2-3. On April 17, 2000 the DOC released Gronquist from the first term of confinement to begin serving his second 114 month term of confinement. Exhibit 9. The maximum expiration date on that second term of confinement is November 17, 2009. On December 2, 2006 the DOC released Mr.

¹² DOC applied this exact methodology to calculate Mr. Gronquist's confinement maximum expiration dates prior to Mr. Stigall's alteration of them. See Exhibit 7.

¹³ DOC uses the start date of February 28, 1995 for Gronquist's first term of confinement. Applying the 453 days spent in pre-judgment detention places the actual start date at December 7, 1993, the date upon which he was arrested. Regardless of the date used, both parties agree that the confinement maximum expiration date on Count I is June 2, 2003. Exhibit 7; Response at 3.

Gronquist from the second term of confinement to begin serving his third 114 month term of confinement.¹⁴ Id. The confinement maximum expiration date on that third and final term of confinement is June 2, 2016. Thus, the latest that Mr. Gronquist can be confined is June 2, 2016. Pascke and St. Peter, supra.

DOC's response fails to mention that Ms. Stigall changed Mr. Gronquist's confinement maximum expiration dates in 2012 - years after the first and second sentences "expired;" in 2003 and 2010 respectively. As with the other conduct of the Department, such retroactive alteration of the terms of confinement of expired sentences is expressly prohibited by long standing precedent State v Jennings, 45 Wn.App. 858, 860, 728 P.2d 1064 (1986)(court lacked jurisdiction to alter term of confinement after maximum expiration date); and St Peter, supra.

¹⁴ Such releases "do not result from a meaningless administrative exercise" and "have a very significant legal effect in that they allow a prisoner to end incarceration for one sentence and start serving a subsequent term of imprisonment for a different and consecutive sentence." Gilcrist, 106 F.3d at 301.

¹⁵ DOC's own records state that these sentences "EXPIRED" years before Ms. Stigall altered the confinement maximum expiration dates. Exhibit 7.

Finally, the Department cites, without explanation RCW 9.94A.589(5) for the unremarkable proposition that "all periods of total confinement shall be served" before any partial confinement, community supervision or other conditions of any sentence." Response at 7. In making this assertion, the DOC overlooks the fact that Mr. Gronquist has served "all periods of total confinement." He is now confined - unlawfully - beyond "all periods of total confinement" imposed by the trial court.

III. THE DEPARTMENT OF CORRECTIONS HAS NEITHER RESPONDED TO NOR OPPOSES MR. GRONQUIST'S MOTIONS FOR ACCELERATED REVIEW AND RELEASE PENDING CONSIDERATION OF THE PETITION

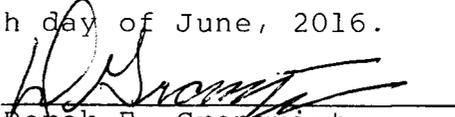
The DOC has failed to file any response to Mr. Gronquist's motion for accelerated review and motion for release from confinement pending consideration of this petition. Because both motions are uncontested, and this case is controlled by binding precedent, Mr. Gronquist requests this Court to grant the motions, accelerate review, and order his immediate release from confinement.

C CONCLUSION.

Long-standing Washington law controls how confinement maximum expiration dates of consecutive

sentences are calculated, not the capricious whim of a single DOC employee. As the undisputed record before the Court shows that a single state officer - Wendy Stigall - surreptitiously altered Mr. Gronquist's confinement maximum expiration dates in the absence of any process, legal authority, and in willful defiance of clearly established judicial precedent, this Court should order the DOC to re-set Mr. Gronquist's confinement maximum expiration date for Count I at June 2, 2003, Count II at November 17, 2009, Count III at June 2, 2016, and release him from confinement immediately.

Submitted this 29th day of June, 2016.


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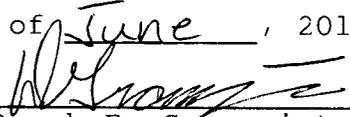
DECLARATION OF SERVICE

Derek E. Gronquist declares under penalty of perjury under the laws of the state of Washington that on this day I deposited a properly addressed envelope in the internal legal mail system of the Washington State Penitentiary, and made arrangements for postage, containing: Petitioner's Reply Brief. Said envelope(s) were addressed to:

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Richard D. Johnson
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Dated this 30th day of June, 2016.



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2016 JUL 13 PM 12:00
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