

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 SUPPLEMENTAL REPLY BRIEF

Derek E. Gronquist
#943857 B-B-305
Wash. St. Penitentiary
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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2016 NOV 28 PM 12:40

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Petitioner Derek E. Gronquist files this Supplemental Reply Brief pursuant to the Court's October 6, 2016 order. The Supplemental Response of the Department of Corrections (Supplemental Response) admits that the holdings in St. Peter v. Rhay, 56 Wn.2d 297 (1960) and Personal Restraint of Paschke, 61 Wn.App. 591 (1991) apply to Mr. Gronquist's sentences and that confinement maximum expiration dates (Max Ex Date) for consecutive sentences are calculated from the earned release date (ERD) of each previous sentence. Supplemental Response at 2-3. Despite those concessions, the Department of Corrections (DOC) contends that Mr. Gronquist's Max Ex Dates are "correctly calculated" because he was sentenced to "community custody" that "tolls" "[t]he Max Ex [c]lock." *Id.*, at 1 & 4-9. The Court should reject that contention. It is misleading: Gronquist was not sentenced to "community custody;" the authorities cited are not applicable; and is unsupported argument that conflicts with the evidence before the Court.

I. DOC'S CONCESSIONS THAT ST. PETER AND PASCHKE APPLY TO MR. GRONQUIST AND THAT MAX EX DATES ARE CALCULATED FROM THE EARNED RELEASE DATE OF EACH PREVIOUS SENTENCE CONTROLS THIS CASE

DOC calculated the Max Ex Dates for Mr. Gronquist's sentences consistent with St. Peter and Paschke as June 2, 2003; November 17, 2009; and June 2, 2016. Petitioner's Opening Brief (Opening Brief) at 2-3; Petitioner's Reply Brief (Reply) at 1-2. In 2012, a DOC employee changed the Max Ex Date for Count I to June 5, 2016; Count II to April 20, 2019; and Count III to May 31, 2022. Reply at 2-3; Second Supplemental Declaration of Derek Gronquist in Support of Personal Restraint Petition (Second Supplemental Declaration) at Exhibit 1.

When Gronquist complained, DOC asserted: (1) the first and second sentences "stopped" when he was released to subsequent sentences, because "[w]e are saying they can't be serving on two consecutive sentences at one time"; (2) State v. Acrey authorized it to "toll or stop" confinement;¹ (3) Max Ex Dates are calculated by combining the sentence on each consecutive cause and "add[ing] this time to [the] start date that you were admitted to prison"; (4) Gronquist's three 114 month terms of confinement are "the exact same

¹DOC subsequently abandoned this position, admitting that "Acrey does not apply." Ex. 16.

total sentence" as "an offender who is received with a sentence of 342 months"; and (5) time added to each cause is "remaining confinement" from previous sentences. Ex. 13, 14, 16, 18 & 20.²

Gronquist appraised DOC of the holdings in St. Peter and Paschke and how the alteration of his Max Ex Dates conflicted with those decisions. Ex. 11, 15, 17 & 19. The only official to acknowledge St. Peter and Paschke claimed they were "not relevant." Ex. 18. Responding to this petition, DOC claimed: (1) "Gronquist's three 114-month sentences equate to" 342 months, that when added to the "start date of February 28, 1995, results in a [Max Ex Date] of May 31, 2022"; and (2) Max Ex Dates are "calculated from the maximum expiration date of his [previous] confinement term." Response of the Department of Corrections (Response) at 1, 3-4 & 7.

In a stunning reversal, DOC now admits that St. Peter and Pascke apply to Mr. Gronquist's sentences and that "the Max Ex start date" for each term of confinement "is the ERD of the [previous] sentence." Supplemental Response at 2-

²"Ex." refers to exhibits attached to the Declaration of Derek Gronquist, subjoined to the Opening Brief at Attachment A.

3. Those concessions vitiate every previous justification for the alteration of Gronquist's Max Ex Dates. They control the disposition of this case and require the Court to grant this petition.

II. DOC'S NEW ARGUMENT THAT MR. GRONQUIST WAS SENTENCED TO "COMMUNITY CUSTODY" THAT TOLLS "THE MAX EX CLOCK" IS FALSE, UNSUPPORTED, AND RELIES UPON INAPPLICABLE AUTHORITIES

In an attempt to avoid the holdings in St. Peter and Paschke, DOC asserts that Gronquist was sentenced to "community custody" that "tolls" "[t]he Max Ex [c]lock." Supplemental Response at 3-7. This new argument does not rely on evidence or citations to the record, and is contrary to previous claims made by DOC. It is an argument created by counsel lacking any good faith basis, unworthy of consideration. RAP 10.3(a)(6); CR 11.

Terms of confinement do not toll when an individual is transferred from one sentence to another. RCW 9.94A.171(1)(confinement tolls when prisoner "absented himself ... from confinement without the prior approval of [DOC]."); State v. Flores-Serpas, 89 Wn.App. 521, 523-24 (Div. 1 1998)(offender did not "absent himself" by INS detention and deportation); Paschke, 61 Wn.App. at 594 (a "sentence continues to run" when released

to consecutive sentence). Gronquist did not "absent himself" from confinement when DOC released him from one sentence to another. Ex. 7; Personal Restraint of Roach, 150 Wn.2d 29, 36 (2003)(prisoner did not "absent himself" from custody when DOC erroneously released him). If Gronquist's terms of confinement could be tolled in the manner urged by DOC, RCW 9.94A.171(1) would authorize it in clear and unambiguous terms.

Rather than address RCW 9.94A.171(1), DOC conflates "community custody" with "confinement" and asks the Court to infer a tolling provision from statutes governing community custody. Supplemental Response at 4-5. But the Court can not infer a tolling provision or apply a statute out of context. Flores-Serpas, 89 Wn.App. at 524.

Mr. Gronquist was not sentenced to "community custody" under RCW 9.94A.701 and the Laws of 2008, ch. 231. Rather, he was sentenced to "community placement" under Former RCW 9.94A.120(8)(b) and the Laws of 1990, ch. 3 § 705. Ex. 1 at 3. The statutes DOC cites - RCW 9.94A.707 & 9.94A.171(3) - only apply to persons sentenced to community custody after July 1, 2009. Laws of 2008, ch. 231 §§ 6, 12 & 28; State v. Donaghe, 172 Wn.2d 253,

258 n.5 (2011)(community placement governed by law in effect on date of crime)(citing RCW 9.94A.345). Because Gronquist was not sentenced to community custody after July 1, 2009, RCW 9.94A.707 and RCW 9.94A.171(3) may not be applied to him.³

While community placement under Former RCW 9.94A.120(8)(b) can consist of community custody or postrelease supervision, those terms are not interchangeable. Former RCW 9.94A.030(7); Laws of 1988, ch. 153 § 1(4); Donaghe, 172 Wn.2d at 257 n.2. Under Former RCW 9.94A.120(8)(b) "community custody" is "that portion of an inmate's sentence of confinement in lieu of early release time served in the community. . ." Donaghe, 172 Wn.2d at 265 (quoting Former RCW 9.94A.030(3))(emphasis added). It begins when an inmate is transferred to the community. Id. "Postrealese supervision" is "that portion of an offender's community placement that is not community custody." Id., (quoting

³The case law DOC cites is not applicable. State v. Acrey, 97 Wn.App. 784 (1999) held that a term of community placement on one concurrent sentence did not extend confinement on another. State v. Cameron, 71 Wn.App. 653 (1993) held that postrealese supervision tolls while confined on a longer concurrent sentence). State v. Jones, 172 Wn.2d 236 (2011) held that excess confinement cannot offset a community custody obligation, under 2008 statutes not applicable here.

Former RCW 9.94A.030(21). It begins when an inmate is released from total confinement. Id., at 265-266.

Because Gronquist has not been transferred to the community, his community placement consists of the 24-month period of postrelease supervision imposed by the sentencing court. Id. It is that period of supervision that tolls, not his terms of confinement. Donaghe, 172 Wn.2d at 265 (transfer from DOC to civil detention was not release to community so community placement consisted of postrelease supervision that tolls until release from total confinement). Because Gronquist's community placement does not consist of community custody, DOC's attempt to link that term to confinement it alleges "remains" on Counts I and II fails.

Regardless of what DOC's attorney now claims, DOC did not toll Mr. Gronquist's terms of confinement. Gronquist was sentenced to three 114 month terms of confinement. Exhibit 1 at 3 § 4.2. DOC's current Max Ex Date calculation, however, imposes terms of confinement of 267 months, 28 days on Count I; 224 months on Count II; and 183 months, 27 days on Count III. Second Supplemental

Declaration at Exhibit 1. If DOC was "tolling" the terms of confinement, each term would be 114 months. If that time tolled, DOC would be transferring Gronquist from one count to the next as each expired - as attempted in St. Peter and Paschke, supra. But DOC did not do that. Rather, it enlarged 114-month terms of confinement to 183, 224 and 267 months respectively. Second Supplemental Declaration at Exhibit 1. Since that time, DOC has asserted numerous excuses for that conduct - none of which claimed that terms of confinement toll because of community custody. Exhibits 13, 14, 16, 18 & 20.

DOC also cites RCW 9.94A.589(5) for the proposition that:

If the community custody portion of the parent cause were not tolled while the offender served his confinement on the child cause, the offender would effectively serve part of his consecutive sentence concurrently, contravening RCW 9.94A.589(5) and his judgment and sentence.

Supplemental Response at 5.

DOC attempts to read a tolling provision into RCW 9.94A.589(5) that is not there. RCW 9.94A.589(5) simply states that "all periods of total confinement shall be served before any . . . community supervision. . ." But Mr. Gronquist has

served "all periods of total confinement." Those periods expired on June 2, 2003; November 17, 2009; and June 2, 2016. Reply at 2-3. In addition, DOC's argument is the same as the one rejected as "anomalous" by St. Peter under a virtually identical statute and set of facts. Compare St. Peter, 56 Wn.2d at 299 with Supplemental Response at 5.

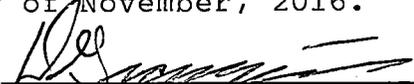
While DOC agrees that St. Peter and Paschke apply to Gronquist "because the relevant statutory language governing consecutive sentences is essentially the same under both schemes," it takes the opposite position: "this rule applies to pre-SRA indeterminate sentences, not SRA determinate sentences, because of a unique distinction between parole and community custody." Supplemental Response at 2-3 & 7-9. That position is based on the false community custody claim and statutes that govern sentences imposed after July 1, 2009, as discussed above. It is also frivolous. See Opening Brief at 10-12 (discussing why St. Peter and Paschke apply to SRA sentences).

If the legislature intended terms of confinement to toll when an inmate is released from one sentence to another, it would have said

so. The fact that the legislature has only directed terms of confinement to toll when a prisoner "voluntarily absents" himself from confinement demonstrates that it did not intend the strained inference urged by DOC. DOC also would not have previously calculated Gronquist's Max Ex Dates in accord with St. Peter and Paschke, Exhibit 7, or would now be able to cite a statute that clearly authorized its 2012 alteration.

Because DOC concedes that St. Peter and Paschke apply to Mr. Gronquist's sentences and that Max Ex Dates are calculated from the ERD of each previous sentence, the Court should grant this petition and require DOC to re-set the Max Ex Date for Count I as June 2, 2003; Count II as November 17, 2009; Count III as June 2, 2016; and to release him from confinement immediately.

Dated this 18th day of November, 2016.



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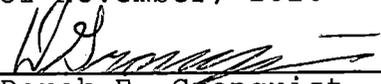
DECLARATION OF SERVICE

Derek 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 Supplemental Reply Brief. Said envelope(s) was directed to:

Annie L. Yu
Assistant Attorney General
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Dated this 20th day of November, 2016


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November 18, 2016

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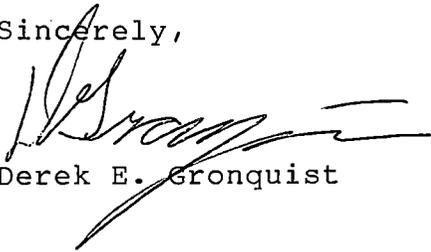
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Re: Personal Restraint Petition of Derek E. Gronquist,
COA Cause No. 74899-8-I

Dear Mr. Johnson,

Please find enclosed for filing the original and one copy of Petitioner's Supplemental Reply Brief requested by the Court's October 6, 2016 order. The original is on top, separated from the copy by a colored piece of paper.

Sincerely,


Derek E. Gronquist