

No. 94971-9

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

DEREK E. GRONQUIST,

Petitioner.

REPLY IN SUPPORT OF MOTION FOR DISCRETIONARY REVIEW

Derek E. Gronquist
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Petitioner Derek Gronquist files this reply in support of his Motion for Discretionary Review.

I. DOC Failed to Comply With the Court's Order.

The Court ordered the Department of Corrections (DOC) to provide "a clear and precise calculation of the sentence start dates and 'release' dates for each of the three sentences" that is consistent with its "concession that the maximum expiration date calculation begins on the date the offender has completed the first sentence (or in this case, first two sentences)." Ruling at 2-3, entered 11/17/17.

DOC failed to provide such specificity. See Answer to Motion for Discretionary Review (Answer). What has been provided is perhaps the most opaque, confused, and contradictory set of calculations to date. Worse, the calculations fail to comport with DOC's concession that confinement maximum expiration dates (Max Ex Date) are calculated from the day a prisoner begins serving each consecutive term of confinement. Compare *Id.*, with Supplemental Response of the Department of Corrections (Supplemental Response) at 2-3.

If the Court wants a clear and precise calculation that is consistent with the law and

DOC's concession, it need look no further than the 2008 calculation. Ex. 7.¹ That calculation lists the start and release dates for each term of confinement as:

COUNT I

Start Date.....02/28/1995
Credit for Time Served.....453 days
Earned Release Date.....08/05/2000
Maximum Expiration Date.....06/02/2003

COUNT II

Start Date.....08/05/2000
Earned Release Date.....05/20/2007
Maximum Expiration Date.....02/03/2010

COUNT III

Start Date.....05/20/2007
Early Release Date.....09/18/2013
Maximum Expiration Date.....11/17/2016

Ex. 7.

In addition to its accuracy and correctness, there are compelling reasons for the Court to rely exclusively on the 2008 calculation. Mr. Gronquist is requesting the Court to take judicial notice of the opinion and evidence entered in Personal Restraint of Jensen, 2012 Wash.App. LEXIS 2033,²

¹"Ex" refers to the exhibits attached to the Declaration of Derek Gronquist, subjoined to Petitioner's Opening Brief at Attachment A.

²This Court has stated that it "will" take judicial notice of the opinion and evidence entered in a prior case under these circumstances. Election Contest Filed by Coday, 156 Wn.2d 458, 500 n.3 (2006).

which held that Double Jeopardy (and DOC's own policies), prohibit DOC for altering release dates after an inmate has been released to a subsequent sentence. Under Jensen, the 2008 calculation is conclusive and binding. Enforcing the 2008 calculation would conserve the judicial resources needed to address all of DOC's contradictory, shifting, and false claims, and is consistent with judicial estoppel, which prohibits DOC from taking contradictory positions regarding Max Ex Date calculations in an effort to mislead the Court.³ The 2008 calculation is what this Court should follow and enforce.

II. DOC's "Factual" Statements.

The "Statement of the Case" provided by DOC is false, misleading, and largely unsupported.

A. Good Time Versus Maximum Expiration Date.

DOC contends that "[g]ood conduct time has no effect on a maximum expiration date." Answer at 2-

³ Judicial estoppel applies when: (1) a party's later position is clearly inconsistent with its earlier position; (2) acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled; and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Estate of Hambleton, 181 Wn.2d 802, 833 n.5 (2014).

3 § II(A). That statement is true for an individual sentence, but false for consecutive sentences. In the context of consecutive terms of confinement, this Court has observed that such "[t]erms of imprisonment are substantially affected by "good time[.]" "St. Peter v. Rhay, 56 Wn.2d 297, 299 (1960). Good time affects Max Ex Dates of consecutive terms of confinement by setting the "start date" for each subsequent sentence earlier. Because the term of confinement starts earlier, its Max Ex Date is earlier than if the inmate released on the Max Ex Date of a previous sentence. St. Peter, 56 Wn.2d at 299-300; Personal Restraint of Paschke, 61 Wn.App. 591, 594-595 (1991).

B. Maximum Expiration Date Calculation Method and Analysis, and Explanation for Changes.

1. Maximum Sentence Expiration Calculation.

DOC contends that its current Max Ex calculation is June 2, 2003 for Count I; November 30, 2012 for Count II; and May 31, 2022 for Count III. Answer at 3-4 § II(B)(1). Of those dates, DOC and Gronquist agree that the Max Ex Date for Count I is June 2, 2003. *Id.*; Petitioner's Reply Brief at 1 n.3. DOC's computer calculation, however, lists the Max Ex for Count I as April 5, 2016. Answer at

Appendix D. That date is 267 months and 28 days from the sentence's start date - 154 months more than the 114-month term imposed by the sentencing court and 148 months more than the 10-year statutory maximum for Class B felonies. Compare Answer at Appendix D with Ex. 1 at 1 & 3 and RCW 9A.20.021(1)(b).

DOC claims that the Max Ex Dates for Counts II and III are calculated "from the maximum expiration date of [each preceding] confinement term." Answer at 4 (emphasis added). That claim is unsupported by evidence and conflicts with DOC's concession that Max Ex Dates are calculated from the day Gronquist began serving each consecutive term of confinement.⁴ Supplemental Response at 2-3. DOC's assertion is also belied by the record. Each of its calculations list the "start date" as the day Mr. Gronquist began serving each consecutive term of confinement. Answer at Appendix D, G & H.

2. Explanation of Prior Calculations.

DOC asserts that it originally calculated Mr. Gronquist's sentences as a single 342 month term of

⁴ Unsupported assertions taken in opposition to controlling authority are not worthy of judicial consideration. RAP 10.3(a)(6); Holland v. City of Tacoma, 90 Wn.App. 533, 538 (1998).

confinement with a Max Ex Date of July 18, 2022; then as October 8, 2016 in 1999; and November 17, 2016 in July of 2008. Answer at 5 § II(B)(2). On March 2, 2012 DOC "incorporated 'stoppage time' into its electronic calculations" which, it claims, "moved [Gronquist's] Max Ex date back to May 31, 2022, as originally calculated in 1995." Answer at 5-6 § II(B)(2); Ex. 13 & 14.

DOC's claim that Mr. Gronquist has only a single Max Ex Date for his three consecutive sentences is disingenuous at best. As the Jensen court recognized, DOC's policies treat consecutive terms of confinement as separate and distinct sentences. 2012 Wash.App. LEXIS 2033 at ¶¶ 15-16 & 30. Each of DOC's calculations have individual Max Ex Dates for each term of confinement. Answer at Appendix D, G & H. Deceptively, DOC attaches an undated "legal face sheet" and claims that it "originally hand calculated his Max Ex at July 18, 2022." Answer at Appendix E. That document, however, does not show any calculations - just a date without explanation. Even if we assume the document is correct, it is of no consequence. When Gronquist was admitted to DOC he had not earned good time, nor been released early to a subsequent

sentence. When DOC released Gronquist early from Count I to Count II, and from Count II to Count III, the Max Ex Dates for the later sentences moved back in time to reflect the date each term of confinement began. Ex. 7; St. Peter, 56 Wn.2d at 299-300; Paschke, 61 Wn.App. at 594-595.

For the 1999 calculation, DOC attached the calculation for Count III - omitting calculations for Counts I and II. Compare Answer Appendix G with Appendix H. Nevertheless, the 1999 Max Ex Date of October 8, 2016 is very close to the 2008 calculation of November 17, 2016. Ids. Those calculations demonstrate that during the nine-year period between the correction of Gronquist's release dates mandated by Personal Restraint of Smith, 139 Wn.2d 199 (1999), through service of Counts I and II, and after Gronquist's release to Count III DOC calculated the Max Ex Date for Count III as late 2016.

DOC contends that it changed Mr. Gronquist's Max Ex Dates after August 2008⁵ to "incorporate[] 'stoppage time' into its electronic calculations." Answer at 5. The only authority DOC cites for that

⁵ The change occurred on March 2, 2012. Ex. 13 & 14.

conduct is Ms. Stigall's imagination. *Id.* More importantly, DOC fails to explain how it could "stop" terms of confinement that had been served prior to the change, and which DOC's own records state had "expired." Ex. 7. Neither DOC nor the courts possess such authority. Jensen, 2012 Wash.App. LEXIS 2033 at ¶ 33; State v. Jennings, 45 Wn.App. 858, 860 (1986).

3. Earned Early Release Date Calculations.

DOC contends, in the absence of citation to the record or authority, that early release dates (ERD) "remain fluid until an offender actually releases from custody." Answer at 6 § II(B)(3). This Court has rejected that claim. St. Peter, 56 Wn.2d at 299 (holding that such a practice would "create an anomalous situation").

DOC claims that Mr. Gronquist's ERD is September 4, 2000 for Count I; March 6, 2007 for Count II; and July 9, 2013 for Count III. Answer at 6. Elsewhere, DOC states that the ERD for Count I is August 10, 2000;⁶ February 4, 2007 for Count II; and June 14, 2013 for Count III. Answer at 8 §

⁶ DOC does not explain the five-day discrepancy between the ERD of Count I (8/5/2000) and the start date of Count II (8/10/2000). See Answer at Appendix D.

II(C) and Appendix D. It claims those calculations are based upon Gronquist's loss or failure to earn 155 days of early release credits during Count I; 61.25 days during Count II; and 4.33 days during Count III. Answer at 7-8. Those amounts yield a 77.58 day discrepancy from DOC's hand calculation showing the loss of 15 days on Count I; 108 days on Count II, and 20 days on Count III. Ex. 8 & 9.

DOC also claims, falsely, that "Gronquist failed to release on his ERD due to his failure to meet the requirements for early release." Answer at 8 § II(B)(3) (emphasis added). Mr. Gronquist has been confined since his ERD due to the DOC's arbitrary, capricious, and unlawful conduct, as discussed in Section III(A) below.

C. Basis for Continued Custody.

DOC claims that it released Mr. Gronquist from Counts I and II "only provisionally," and that if Gronquist "violated the terms of his sentence, the DOC could return him to his original prison term." Answer at 9 § C. DOC cites Former RCW 9.94A.205(1) for this proposition, without evidentiary support. Id. None of DOC's records show that it has "returned" Gronquist to a previous sentence, and this Court has held that it cannot. Answer at

Appendix D, G & H; St. Peter, 56 Wn.2d at 299-300.

Former RCW 9.94A.205(1) governs violations of community custody. Mr. Gronquist has never been released to the community, and cannot serve a period of community custody from prison. State v. Donaghe, 172 Wn.2d 253, 265-266 (2011). Former RCW 9.94A.205(1) also requires notice, a hearing, entry of written findings, and imposition of a specific sanction for such a violation. Laws of 1988, ch. 153, Sec. 4; Personal Restraint of McNeal, 99 Wn.App. 617 (2000). Absent the unsupported assertion of counsel, Mr. Gronquist has never been alleged to have violated any condition of his sentence, and DOC has failed to provide any evidence of a violation.

D. Community Custody Release.

DOC contends that it "is unable to provide definitive 'release' dates for Gronquist's community custody term at this time." Answer at 9-10 § D. That statement is misleading.

There cannot be any start or end date for community custody. Gronquist was not sentenced to "community custody" under the Laws of 2008, ch. 231 §§ 6, 12 & 28. Rather, he was sentenced to a 24-month term of community placement, as DOC

acknowledges. Ex. 1 at Appendix H; Answer at 1-2 & 8. Because Gronquist has not been released to the community "in lieu of" early release, and his terms of confinement have all expired, any period of community placement will consist of post-release supervision. Donaghe, 172 Wn.2d at 265-266.

DOC is correct about being unable to provide start and release dates for post-release supervision. See Personal Restraint of Brooks, 166 Wn.2d 664, 671-672 (2009). Despite Mr. Gronquist's current unlawful detention, any period of post-release supervision tolls until he is released from confinement. Donaghe, 172 Wn.2d at 265-266.

DOC should be able to inform the Court of the amount of post-release supervision it expects Mr. Gronquist to serve. State v. Franklin, 172 Wn.2d 831, 839-841 (2011). The Judgment is ambiguous on this point. If the 24-month period was imposed on the "parent" Cause I, it would consist of the six-month period between the Max Ex Date of Count I and the 10-year statutory maximum for that offense. Ex. 1; RCW 9A.20.021(1)(b); Brooks, 166 Wn.2d at 672. If the 24-month period was imposed upon each count, it would consist of three consecutive six-month terms. As the Judgment is ambiguous, the rule of

lenity should require the shorter term. State v. Weatherwax, 188 Wn.2d 139, 155 (2017).

III. DOC's Legal Arguments.

A. DOC's Refusal to Release Gronquist Early.

Why DOC has not released Mr. Gronquist since his ERD is not at issue in this petition. This petition only challenges DOC's 2012 enlargement of Max Ex Dates. See Personal Restraint Petition. The matter is at issue, however, in a fully-briefed petition pending in Division One of the Court of Appeals.⁷ COA Cause Number 77131-1-I. That petition was originally filed in this Court out of concern over delay and arbitrary dismissal. S.Ct. No. 94724-4, Motion to Retain Jurisdiction.

If the Court is concerned by DOC's conduct in refusing to release Mr. Gronquist since his ERD, it has the power to join that petition with this one for a decision on the merits, and Mr. Gronquist moves the Court to do so. RAP 4.4. DOC should not

⁷ The petition chronicles a five-year voyage through DOC's arbitrary, capricious, and unlawful enforcement of the "prior approved residence" requirement. It alleges that the condition to "[r]eceive prior approval for living arrangements and residence location" is unconstitutionally vague in violation of the 14th Amendment to the U.S. Constitution. See Ex. 1 at Appendix H, Condition 6; and Petitioner's Opening Brief filed in COA Cause 77131-1-I.

be permitted to accuse Mr. Gronquist of wrongdoing, when its wrongdoing is so acute that it abstained from responding to that petition. See record in COA Cause 77131-1-I.

B. DOC's 2012 Max Ex Date Calculations.

DOC claims that it "correctly" re-calculated Mr. Gronquist's Max Ex Dates in 2012 by aggregating three consecutive 114-month sentences into a single 342 month (10,407 day) term of confinement; crediting that term with 453 days spent in pre-judgment detention; and calculating "Gronquist's maximum expiration date of May 31, 2022 . . . from his start date of February 28, 1995." Answer at 12. As discussed in Section II(B)(2) above, none of DOC's calculations treat Mr. Gronquist's three consecutive sentences as a single term of confinement. Each sentence has its own start, ERD, and Max Ex Date. Answer at Appendix D & H.

DOC fails to cite any authority which authorizes it to combine Mr. Gronquist's sentences in the way it suggests. Worse, the Court of Appeals has held that neither case law, statute, nor DOC's own policies "provide that multiple consecutive sentences are treated as a single, aggregate term of imprisonment." Jensen, 2012 Wash.App. LEXIS 2033

at ¶¶ 15-16, 30 & 33. Mr. Gronquist's consecutive sentences are separate and distinct, as his Judgment and the 2008 calculation clearly state. *Id.*; Ex. 1 at 1 & 3; Ex. 7.

DOC fails to cite any authority which authorizes it to enlarge Max Ex Dates after a term of confinement has been served. Every authority is to the contrary. *St. Peter*, 56 Wn.2d at 299-300; *Paschke*, 61 Wn.App. at 594-595; *Jennings*, 45 Wn.App. at 860. Such conduct is so egregious that it offends the constitutional prohibition against double jeopardy.⁸ *Jensen*, 2012 Wash.App. LEXIS 2033 ¶ 33.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits "multiple punishments for the same offense." *State v. Hardesty*, 129 Wn.2d 303, 313-314 (1996). The multiple punishment prohibition is violated by sentence adjustments that upset an offender's legitimate expectation of finality in his sentence. *Id.* Whether a defendant has a

⁸ It is appropriate for Mr. Gronquist to raise double jeopardy because DOC's Answer argues that it properly followed statutory law in re-calculating and enlarging Mr. Gronquist's Max Ex Dates. RAP 10.3(c); *Jensen*, 2012 Wash.App. LEXIS 2033 ¶ 18 n.7.

legitimate expectation of finality is influenced by "factors such as completion of the sentence, passage of time, pendency of an appeal, . . . or a defendant's misconduct in obtaining the sentence." Id., at 311.

Mr. Gronquist gained a legitimate expectation of finality in the sentences imposed on Counts I and II when his incarceration on those sentences ended on August 5, 2000 and May 20, 2007. Ex. 7; United States v. Arrellano Rios, 799 F.2d 520, 525 (9th Cir. 1986) (expectation of finality arises upon completion of sentence); St. Peter, 56 Wn.2d at 299-300 (sentence complete upon release to consecutive sentence). That expectation is not diminished by Gronquist's incarceration on another sentence. United States v. Silvers, 90 F.3d 95, 101-102 (4th Cir. 1996) (expectation of finality in concurrent sentences despite still being incarcerated on longer sentence); Warnick v. Booher, 425 F.3d 842, 846 (10th Cir. 2005) (expectation of finality may arise in early release credits earned on prior consecutive sentence).

The passage of time only strengthens Mr. Gronquist's expectation of finality. His terms of confinement on Counts I and II were served as of

2000 and 2007. Ex. 7. Those sentences expired on June 2, 2003 and February 3, 2010. Id.; St. Peter, 56 Wn.2d at 300. DOC's enlargement of those sentences in 2012 - twelve and five years after they had been served, and nine and two years after they had expired - is far too late. Jennings, 45 Wn.App. 858, 860 (1986)(court lacked jurisdiction to alter term of confinement after Max Ex Date); St. Peter, supra (parole board could not return an inmate to a term of confinement that had expired).

Mr. Gronquist did not invite DOC to alter his Max Ex Dates through an appeal or fraud. Rather, the enlargement was due to a "programming change" to DOC's computer database. Ex. 13-14. More importantly, Mr. Gronquist's Max Ex Dates were correctly calculated in 2008. Ex. 7; Paschke, 61 Wn.App. at 594-595; St. Peter, 56 Wn.2d at 299-300. The double jeopardy clause absolutely prohibits DOC from increasing a correct sentence after it has been served. Hardesty, 129 Wn.2d at 310 (citations omitted).

In Jensen, DOC sought to enlarge terms of confinement after an inmate had been released to his final consecutive sentence. 2012 Wash.App. LEXIS 2033 ¶¶ 23-24. One of the justifications

provided was that DOC could "aggregate" consecutive sentences into a single term of confinement for sentence computation purposes. Id., at ¶¶ 25-27 & 30. The Court of Appeals held that DOC could not aggregate consecutive sentences, and its enlargement of release dates after the inmate had been released to a subsequent consecutive term of confinement violated the Double Jeopardy Clause. Jensen, at ¶¶ 30 & 33. Collateral estoppel should bar DOC's attempt to relitigate those issues.⁹

DOC's 2012 calculation is clearly erroneous, and unlawful. See Section II(B)(1) above. Even if it wasn't, double jeopardy prohibits DOC from changing Mr. Gronquist's Max Ex Dates after he was

⁹ Collateral estoppel clearly applies. City of Arlington v. Central Puget Sound Growth Management Hearings Board, 164 Wn.2d 768, 792 (2008)(test). The issues are identical, Standlee v. Smith, 83 Wn.2d 405, 408 (1974)(issues identical when they involve "substantially the same bundle of legal principles that contributed to the rendering of the first judgment"); Jensen ended in a final judgment, State v. Vasquez, 148 Wn.2d 303, 308 (2002)(final judgment where there has been "a final determination regarding the claim or issue."); DOC was the respondent in Jensen, and therefore a party or in privity, Loveridge v. Fred Meyer, 125 Wn.2d 795, 764 (1995)(privity when entity "was in actual control of the litigation, or substantially participates in it"); and DOC had a full and fair hearing on the merits, Thompson v. Department of Licensing, 138 Wn.2d 783, 795-796 (1999)(no injustice where the party "received a full and fair hearing on the issue in question.").

released from previous terms of confinement, and the common law prohibits DOC from changing the Max Ex Dates of terms of confinement that had expired prior to 2012, as discussed above.

C. Confinement Does Not Toll as DOC Suggests.

DOC contends that RCW 9.94A.707; RCW 9.94A.171(3); RCW 9.94A.589(5); State v. Acrey, 97 Wn.App. 784 (1999); State v. Cameron, 71 Wn.App. 653 (1993); and State v. Jones, 172 Wn.2d 236 (2011) "supports" its retroactive enlargement of Gronquist's terms of confinement. Answer at 12-17.

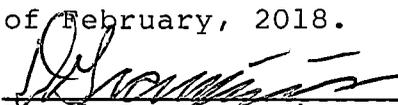
If DOC's actions were lawful it would not be asking the Court to infer a tolling provision from inapplicable authorities and a convoluted argument which confuses community supervision with terms of confinement, something the Court cannot do. State v. Flores Serpas, 89 Wn.App. 521, 524 (1998)(court cannot infer a tolling provision or apply a tolling statute out of context). The authorities cited by DOC govern community based supervision, which have no application to Mr. Gronquist or the question at issue. Mr. Gronquist has previously provided briefing on why those authorities have no application to his terms of confinement, and he incorporates them herein by reference. Motion for

Discretionary Review at 14 n.14 & 16-18;
Petitioner's Supplemental Reply Brief at 4-9; and
Petitioner's Opening Brief at 10-11. Terms of
confinement neither toll nor stop when an inmate is
released from one consecutive sentence to another.
RCW 9.94A.171(1); Paschke, 61 Wn.App. at 594-595;
St. Peter, 56 Wn.2d at 299-300.

IV. Conclusion.

For all of the reasons stated in the record,
Mr. Gronquist respectfully requests the Court to
accept review, enforce the terms of the 2008 Max Ex
Date calculation, and order his immediate release
from unlawful imprisonment.

Dated this 1st day of February, 2018.



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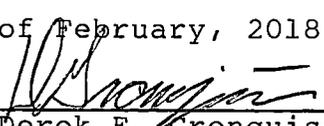
DECLARATION OF SERVICE

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 Monroe Correctional Complex, and made arrangements for postage, containing: Reply in Support of Motion for Discretionary Review. Said envelope(s) was addressed to:

Annie L. Yu
Assistant Attorney General
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P.O. Box 40116
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Susan L. Carlson, Clerk
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Temple of Justice
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Dated this 4th day of February, 2018.


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