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April 24, 2017

Patrick Preston Brown
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Mandy Lynn Rose **(sent by e-mail only)**
Attorney General of Washington
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Re: Supreme Court No. 93742-7 - Personal Restraint Petition of Patrick Preston Brown

Counsel and Mr. Brown:

Enclosed is a copy of the RULING DISMISSING PERSONAL RESTRAINT PETITION signed by the Supreme Court Deputy Commissioner on this date in the above entitled cause.

Sincerely,

Susan L. Carlson
Supreme Court Clerk

SLC:mt

Enclosure as stated

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of: PATRICK PRESTON BROWN, Petitioner.	NO. 93742-7 RULING DISMISSING PERSONAL RESTRAINT PETITION

Patrick Brown pleaded guilty in King County Superior Court to first degree robbery, for which he received a 129-month prison sentence to be followed by a term of community custody for the longer of 18-to-36 months or "the entire period of earned early release awarded under RCW 9.94A.728." After Mr. Brown served 86 months in prison and earned 43 months of early release credit, the Department of Corrections released Mr. Brown in May 2013 to serve community custody. But Mr. Brown frequently violated his terms of community custody. After his ninth or tenth violation, the department sanctioned Mr. Brown by revoking his community custody and returning him to total confinement to serve the period of earned early release previously applied to his sentence. Mr. Brown subsequently filed a series of personal restraint petitions in Division One of the Court of Appeals, challenging the revocation decision or the department's calculation of early release credits in relation to that decision, all of which were dismissed for various reasons. Mr. Brown then filed another personal restraint petition in the Court of Appeals, his sixth, challenging the revocation decision on multiple newly asserted grounds. After obtaining responsive

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briefing from the department, the acting chief judge transferred Mr. Brown's successive petition to this court. *See* RCW 10.73.140; RCW 2.06.030; *In re Pers. Restraint of Martinez,* 171 Wn.2d 354, 362, 256 P.3d 277 (2011) (if the Court of Appeals determines that its review of a successive petition for similar relief is barred by RCW 10.73.140, but that RAP 16.4(d) may allow consideration of relief in a successive petition for "good cause," the proper practice is to transfer the petition to this court); *In re Pers. Restraint of Perkins*, 143 Wn.2d 261, 266-67, 19 P.3d 1027 (2001) (a successive petition filed in the Court of Appeals raising new grounds that might entitle the petitioner to relief should be transferred to this court). Now before me for determination is whether to dismiss the petition or refer it to the court for consideration on the merits. *See* RAP 16.5(d); RAP 16.11(b).

Because Mr. Brown did not have a prior opportunity for judicial review of the department's revocation decision and calculation of early release credits, he must show that his current restraint is unlawful under RAP 16.4(c). *See In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994) (indeterminate sentencing review decisions); *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 299, 88 P.3d 390 (2004) (sentencing amendment); *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 212-13, 227 P.3d 285 (2010) (prison disciplinary decisions). Bald assertions and conclusory allegations unsupported by admissible evidence are insufficient to justify a reference hearing or other relief available by personal restraint petition. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). If Mr. Brown fails to present an arguable basis for collateral relief in law or fact given the constraints of the personal restraint petition procedure, his petition must be dismissed as frivolous under RAP 16.11(b). *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015).

Mr. Brown first asserts that the department lacked statutory authority to sanction him with more than 30 days of jail confinement. He is mistaken. The

department has authority to impose 30-day jail sanctions for isolated violations of community custody provisions. RCW 9.94A.737(4). But where an offender has been transferred to community custody in lieu of early release, as was Mr. Brown, the department also has express authority to revoke the offender's community custody status and return the offender to prison to serve the remaining portion of his or her sentence when the offender has a history of repeated violations, as Mr. Brown does. RCW 9.94A.633(2)(a); WAC 137-30-080(3); DOC Policy 350.100(XI)(B). Mr. Brown's additional assertion that the department violated a contract to impose only 30-day sanctions is frivolous.

Mr. Brown relatedly asserts that the department was collaterally estopped from revoking his community custody in light of a federal civil rights suit filed by pro se inmate Matthew Silva in relation to a separate prison disciplinary proceeding. Collateral estoppel requires a prior determination of an issue on its merits, and the party asserting the doctrine must prove: (1) the issue decided in the prior adjudication is identical with the one presented in the second action, (2) the prior adjudication must have ended in a final judgment on the merits, (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication, and (4) application of the doctrine does not work an injustice. *Thompson v. State, Dep't of Licensing*, 138 Wn.2d 783, 790, 982 P.2d 601 (1999). The issues in Mr. Silva's suit were not identical to the issues adjudicated in Mr. Brown's revocation proceeding. This, too, is a frivolous argument.

Mr. Brown next contends that he was denied due process because he did not have adequate notice that he risked being returned to prison to serve the rest of his sentence. An offender subject to community custody revocation proceedings is entitled to certain due process protections, including (1) written notice of the alleged violations, (2) disclosure of evidence, (3) an opportunity to appear in person and present witnesses and documentary evidence, (4) the right to confront and

cross-examine witnesses, (5) a neutral and detached decision maker, and (6) a written statement describing the reasons for the revocation and the evidence relied upon. *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). The records provided by the department demonstrate that Mr. Brown was provided these due process protections in relation to his most recent violation, and that he was already aware that repeated violations could result in revocation of community custody and return to prison. Mr. Brown cannot plausibly claim to have lacked notice before the violation that resulted in revocation.

Mr. Brown further complains that the revocation hearing was closed to the public in violation of his First Amendment rights. Mr. Brown cites no authority holding that an offender is constitutionally entitled to an open revocation proceeding analogous to a criminal defendant's trial. *See, e.g., State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012). The department's regulations nonetheless state that "[c]ommunity custody violation hearings shall be open to the public unless the hearing officer, for a specifically stated reason, closes the hearing in whole or in part." WAC 137-104-050(12). Mr. Brown's hearing was held within the county jail. It is generally understood that approved visitors may enter a correctional facility subject to security procedures and restrictions. The notice of hearing, which Mr. Brown signed, does not contain an express exclusion of visitors or other persons, though it states that the hearing officer had authority to remove persons. More specifically, the hearings officer in Mr. Brown's proceeding did not specifically close the hearing to approved visitors, and Mr. Brown failed to object that the proceeding was not more open in any event. Furthermore, he did not request the presence of any friends or relatives. Under these circumstances, Mr. Brown fails to show that he is entitled to relief.

Mr. Brown additionally asserts that the department violated his due process rights by imposing a "blanket denial" on being represented by an attorney at the revocation hearing. WAC 134-104-060(7) states that "[t]here is no right to an attorney

or counsel" at a community custody violation hearing. But Division One of the Court of Appeals has held that the department must determine on a case-by-case basis whether an offender subject to community custody revocation proceedings is entitled to appointed counsel. *Grisby v. Herzog*, 190 Wn. App. 786, 805, 362 P.3d 763 (2015). The department did not have the benefit of *Grisby* at the time of Mr. Brown's revocation hearing. But in any event, the notice of hearing, which Mr. Brown signed, indicated that although he had no statutory right to an attorney, the department could allow an attorney to represent him, which is not inconsistent with *Grisby*. But in contrast to the offender in *Grisby*, Mr. Brown did not request an attorney to represent him at the hearing. *See id.* at 790-91. Mr. Brown asserts by declaration that the jail staff who delivered the notice told him he did not have a right to counsel and that there was no procedure for requesting one, but Mr. Brown does not show that he could justifiably rely on a county employee's representation of state correctional policy. He could have brought the matter up with the hearings officer but failed to do so. Under these circumstances, Mr. Brown does not show that he was unlawfully restrained in this regard.

Mr. Brown further complains that the department did not promulgate rules for community custody revocation. RCW 9.94A.633 contains no provision requiring the department to promulgate regulations specifically governing community custody revocation proceedings. But one of the department's regulations states that an offender on community custody who has committed his or her third violation and has not yet served his or her total sentence may be returned to prison to serve the rest of the sentence. WAC 137-30-080. That rule is largely consistent with RCW 9.94A.633(2)(a), which does not have a third violation requirement. The department also has a policy providing for revocation of community custody in a manner consistent with WAC 137-30-080 and RCW 9.94A.633(2)(a). DOC Policy 350.100.X.C. In this instance, the department gave Mr. Brown the benefit of waiting

until he had committed numerous violations before it revoked his community custody in a manner compliant with RCW 9.94A.633(2)(a), WAC 137-30-080, and DOC Policy 350.100.X.C.

Mr. Brown contends that the statutes governing community custody revocation are unconstitutionally vague and violate equal protection principles. Vagueness challenges to enactments that do not involve First Amendment rights, as here, are to be evaluated in light of the particular facts of each case. *City of Spokane v. Douglass*, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). In this circumstance, statutes are tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges them, not by examining hypothetical situations at the periphery of the statutes' scope. *Id.* at 182-83. Mr. Brown thus must challenge the applicable statutes as unconstitutionally vague as applied to him. *Id.* Statutes must provide fair notice of what they prohibit, and adequate standards to protect against arbitrary, erratic, and discriminatory enforcement. *Id.* at 180-81; *see also State v. Watson*, 160 Wn.2d 1, 6-7, 154 P.3d 909 (2007). To this end, the language of the statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. *Id.* Persons of common intelligence must not be made to guess at the statute's meaning. *Id.* at 7. But some measure of vagueness is inherent in the use of language, so courts do not require impossible standards of specificity or absolute agreement. *Id.* Vagueness in the constitutional sense is not mere uncertainty, and a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his or her actions would be classified as prohibited conduct. *Id.* Instead, a statute meets constitutional requirements if persons of ordinary intelligence can understand what the statute proscribes, notwithstanding some possible areas of disagreement. *Id.*

Mr. Brown's vagueness challenge fails for the simple reason that RCW 9.94A.633(2)(a) plainly states that an offender transferred to community custody in lieu of early release credit who violates terms of community custody may be sanctioned with return to prison to finish the unexpired portion of the sentence. A person of ordinary intelligence would readily understand the meaning of the statute. And Mr. Brown's situation fell entirely within the ambit of that statute: he admitted the community violation, and the sanction of returning him to prison was explicitly authorized under RCW 9.94A.633(2)(a). Mr. Brown argues that RCW 9.94A.633(2)(a) is vague in light of references to RCW 9.94A.633 in RCW 9.94A.706(1), which states that an offender's unlawful possession of firearms, ammunition, or explosives may be considered in relation to a proceeding under RCW 9.94A.633. He also claims vagueness in reference to RCW 9.94A.716(1), which concerns an offender arrested on a warrant and placed in total confinement pending a hearing under RCW 9.94A.633. These statutory reference points do not alter the central meaning of RCW 9.94A.633(2)(a): an offender in violation of terms of community custody may be returned to prison. There is no vagueness problem.

As for the equal protection argument, equal protection principles require that persons similarly situated with respect to the legitimate purposes of the law receive like treatment. *State v. Harner*, 153 Wn.2d 228, 235, 103 P.3d 738 (2004). But because Mr. Brown provides no reasoned argument as to this complex constitutional issue, it will not be considered further. *See State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) ("naked castings" into constitutional seas insufficient to merit judicial consideration).

Finally, Mr. Brown contends that he was not given credit for time spent in the county jail. The department has persuasively shown that Mr. Brown was given the proper amount of jail time credit. He does not show otherwise.

In sum, Mr. Brown fails to present an arguable basis for relief in law or fact given the constraints of the personal restraint petition procedure. *Khan*, 184 Wn.2d at 686-87. His petition is therefore frivolous under RAP 16.11(b).

The personal restraint petition is dismissed.[1]

DEPUTY COMMISSIONER

April 24th, 2017

[1] Mr. Brown's "MOTION TO STRIKE UNTIMELY OPPOSITION" and his request for appointed counsel are denied.