

71904-1

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NO. 71904-1-I

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION I

HENRY GRISBY III,

Respondent,

v.

ROBERT HERZOG, et. al.,

Appellants

REPLY BRIEF OF RESPONDENT

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I. Introduction

Henry Grisby was facing a Drug Offender Sentencing Alternative violation proceeding in which the Department of Corrections not only was denying him appointed counsel but also was refusing to allow his pro bono counsel to represent him. Should he lose that hearing Mr. Grisby faced the possibility of going back to prison for more than three years. The Department was violating his state and federal due process rights by failing to conduct the case-by-case determination of the need for counsel required by this Court in State v. Ziegenfuss, 118 Wn. App. 110 (2003). Through pro bono counsel Mr. Grisby filed a petition for a writ of habeas corpus and in the alternative for a writ of mandamus and a writ of prohibition under RCW 7.16 et seq. and RCW 7.36 and Wash. Const. art. IV, § 6.

The Snohomish County Superior Court granted a writ of mandamus and writ of prohibition on Thursday, April 17, 2014. The Court ordered that the Department conduct a determination as contemplated by State v. Ziegenfuss, whether counsel should be appointed for Mr. Grisby for his hearing. The Court ordered DOC to “take into account Mr. Grisby’s mental health condition.” It was uncontested that

Mr. Grisby had been diagnosed with Post Traumatic Stress Disorder (PTSD), Major Depressive Disorder, and a significant history of chemical dependency.

The Court ordered that should the Department determine that counsel need not be appointed, the Department “shall permit Mr. Grisby’s pro bono retained counsel” to represent Mr. Grisby. And the Court ordered that the Department “shall not conduct a Drug Offender Sentencing Alternative violation hearing for Mr. Grisby without permitting counsel to represent him.”

Finally, the Court ordered that DOC “should conduct a case by case determination on the need for appointed counsel as contemplated by State v. Ziegenfuss in similarly situated cases when a request for a lawyer is made by the person subject to a community custody violation hearing.”

This Court in Ziegenfuss made clear that “the right to counsel in community custody violation hearings is determined on a case by case basis,” citing to Gagnon v. Scarpelli, 411 U.S. 778 (1973). In the interest of fundamental fairness, the touchstone of due process, Mr. Grisby was entitled to a case-by-case determination of his need for appointed counsel. The assistant attorney general categorically refused to permit representation even by pro bono counsel after a written request. The Gagnon Court stated that the “decision as to the need for counsel must be

made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system.”

The Court added:

Presumptively, it may be said that counsel should be provided in cases where after being informed of his right to request counsel, the probationer or parolee makes such a request based on a timely or colorable claim that he has not committed the alleged violation of the conditions upon which he is at liberty.

Because the court’s order was on a Thursday and the DOC hearing was set for the following Monday, pro bono counsel proceeded to represent Mr. Grisby before the DOC conducted a case-by-case determination. On April 21, 2014, with counsel representing him, Mr. Grisby was found guilty of one violation, not guilty of another, and the hearing officer ordered him released to a 30-day chemical dependency treatment program as recommended by counsel.¹ The outcome of Mr.

¹ A Commissioner of this Court on October 29, 2014, granted in part the State’s Unopposed Motion to Expand the Record on Appeal, including a transcript of the February 20, 2014, DOSA revocation hearing. As the transcript was not included in the Clerk’s Papers, no CP citations are available. The Commissioner denied the part of the motion seeking to include in the record a copy of the Hearing and Decision Summary Report by the hearing officer in Mr. Grisby’s April 21, 2014 hearing at which he was represented by counsel. The Respondent has filed a motion to modify the ruling seeking to add the hearing officer’s report. The hearing officer’s report included in the appendix to the Appellant’s motion documents the representation by counsel and the outcome of the hearing. Because the Respondent’s brief is due November 3, 2014, before a ruling is likely on the Motion to Modify, and because there is no right to file a response brief to the Appellant’s Reply Brief (RAP 10.1), counsel is referring to the hearing officer’s report herein, understanding that the Court may excise those references should the Motion to Modify be denied.

Grisby's case underscores the importance of having counsel to represent accused persons who face imprisonment. This Court should affirm the superior court's order.

II. Issues

1. An accused person facing revocation of a Drug Offender Sentencing Alternative and return to prison is entitled to a case-by-case determination of the right to appointed counsel.
2. A person facing a DOSA revocation hearing is entitled to retained or pro bono counsel even if the Department in a proper exercise of its discretion denies appointed counsel.
3. The superior court properly issued a writ of mandamus and a writ of prohibition to require the Department of Corrections to exercise discretion on the appointment of counsel and to prohibit the Department from conducting a revocation hearing without allowing pro bono counsel to represent Mr. Grisby.
4. The superior court properly ordered the Department to consider case-by-case appointments for similarly situated persons.

III. Statement of the Case

Mr. Grisby was found guilty of violating the Uniform Controlled Substances Act: Deliver Cocaine on March 15, 2010. CP 212–13 (¶ 4).² On June 4, 2010, Mr. Grisby was sentenced to a Prison-Based Special Drug Offender Sentencing Alternative (DOSA) for 45 months in prison and then 45 months in community custody. CP 213 (¶ 5). He was released from prison January 18, 2013. CP 213 (¶ 5).

CCO Jeff Overholser alleged, in a report dated December 19, 2013, that Mr. Grisby violated the terms of his DOSA on December 17, 2013. CP 213 (¶ 6). Mr. Overholser placed Mr. Grisby into custody on the date of the alleged violation. CP 213 (¶ 6). According to Mr. Overholser's report, Mr. Grisby had 1115 days of confinement to serve if his prison DOSA sentences were revoked. CP 213 (¶ 6).

Hearing Officer Clement held a hearing January 8, 2014, to determine whether to revoke Mr. Grisby's DOSA. CP 213 (¶ 7). Mr. Clement found that Mr. Grisby had violated the terms of his DOSA and ordered him returned to prison. CP 213 (¶ 7).

Mr. Grisby appealed the DOSA revocation and was granted another hearing on February 20, 2014, with Hearing Officer Paul

² Mr. Grisby's underlying conviction that led to his DOSA sentence recently was reversed. State v. Shearer, 2014 WL 4792048 (2014).

Ockerman. CP 213 (¶ 9). In the written notice for this hearing, DOC advised Mr. Grisby in part as follows:

- ◆ To present your case to the Hearing Officer. If there is a language or communication barrier, the Hearing Officer will ensure that someone is appointed Interpret or otherwise assist you. However, no other person may represent you in presenting your case. There is no statutory right to an attorney or counsel and without prior approval from the Hearings Program Administrator, no attorney will be permitted to represent you.

CP 213 (¶ 10). At this hearing, Officer Ockerman found Mr. Grisby not guilty of one allegation and guilty of another and determined that Mr. Grisby's DOSA would be revoked and sanctioned him to a term of confinement to serve the rest of his sentence. CP 213-14 (¶11). Mr. Ockerman noted that he "found +50 %" that he believed the allegation that Mr. Grisby had possessed a container in an "attempt to interfere/alter UA on 12-17-13." CP 214 (¶11).

Following the February 20, 2014, hearing, Mr. Grisby filed an appeal and the Appeals Panel affirmed the Hearing Officer's findings. CP 214 (¶ 12).

In a letter to Hearings Program Administrator Ton Johnson, pro bono counsel presented a number of grounds for granting Mr. Grisby a new hearing, challenging the Appeals Panel's findings. CP 192 et. seq. In a letter dated April 4, 2014, Mr. Johnson reversed the guilty finding and

remanded Mr. Grisby's case for a new hearing, predicated on "the right to call witnesses." CP 198.

Counsel responded on April 8, 2014, asking Mr. Johnson to provide information on the process by which counsel could request to represent Mr. Grisby at his new hearing. CP 200. The following day, Ronda D. Larson from the Washington Attorney General's Office of Washington wrote to say that DOC would not accommodate the request. CP 202-203. She added:

Although you will not be allowed to represent Mr. Grisby at the DOSA revocation hearing, one of you may attend the hearing as an observer, if approved in writing in advance by both the Hearings and Violations Administrator and the facility where the hearing is to be held.

CP 203. [The full text of the letter is in the Appendix.]

Ms. Larson did not request, nor did she discuss, any information about Mr. Grisby's individual circumstances, the factual complexity of his case, or his mental health status. *See* CP 202-03. There was no case-by-case determination of Mr. Grisby's need for counsel. *See* CP 202-03. Ms. Larson added that the observer would not be able to speak or communicate in any way to Mr. Grisby during the hearing, and should the observer communicate after a warning, the observer would be escorted out of the hearing. CP 203.

According to Dr. Andrew Corso, lead psychologist at Monroe Correctional Center, in a telephone call April 10, 2014, with Daniel Harkins, one of the Seattle University School of Law Ronald A. Peterson Law Clinic students, Mr. Grisby has been diagnosed with Post Traumatic Stress Disorder (PTSD), Major Depressive Disorder, and a significant history of chemical dependency. CP 215 (¶ 19). This diagnosis was uncontested by the state.

Mr. Grisby successfully sought a writ of mandamus and a writ of prohibition and the Superior Court ordered the Department of Corrections to conduct a case-by-case determination of Mr. Grisby's need for appointed counsel and to prohibit DOC from conducting Mr. Grisby's hearing without permitting retained pro bono counsel to represent him at the hearing. CP 4–5. Mr. Grisby sought these writs under both statutory and constitutional authority.³

Counsel represented Mr. Grisby at his hearing and following a finding of guilt on one charge and not guilty on the other, the hearing officer ordered Mr. Grisby released to go to a 30-day treatment program.

IV. Standard of Review

³ Article IV Section 6 of the Washington Constitution provides in part regarding superior courts: "Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties." RCW 7.16 et seq. provides for writs of mandamus and prohibition and RCW 7.36 provides for writs of habeas corpus.

The State oversimplifies the standard of review when it says that the review of writs of prohibition is *de novo*. Ap. Op. Br. at 13. As outlined below, there are two different standards of review for the two parts of a court's decision on issuing a writ.

This Court has held that "Writs of prohibition are reviewed for abuse of discretion, and reviewing courts consider 'the character and function of the writ of prohibition together with all the facts and circumstances shown by the record.'" [Citation omitted] In re King County Hearing Exam'r, 135 Wn. App. 312, 318 (2006).

The attorney general cites two cases to claim that the standard of review of a writ of prohibition is *de novo*. In the first, Smith v. Skagit County, 75 Wn. 2d 715 (1969), the Court addressed its need to review *de novo* a factual record in a county commission's zoning decision "where the record both at trial and on appeal consists entirely of written and graphic material-documents, reports, maps, charts, official data and the like-..."Smith v. Skagit Cnty., 75 Wn. 2d 715, 718, (1969) holding modified by State v. Post, 118 Wn. 2d 596 (1992).

The Smith opinion was a plurality opinion as four justices dissented and two concurred in the result. The Court of Appeals later explained: "But the focus of the court's review was the reasonableness of

the commissioners' decision, based on the 'documents, reports, maps, charts, official data and the like' that the parties submitted." Rideout v. Rideout, 110 Wash. App. 370, 374, 40 P.3d 1192, 1194 (2002) aff'd sub nom.as corrected (Oct. 27, 2003) In re Marriage of Rideout, 150 Wash. 2d 337, 77 P.3d 1174 (2003).

The second case cited by the state, Torrance v. King County, 136 Wn. 2d 783, 787 (1998), was concerned with the constitutional writ of *certiorari*, not statutory or constitutional writs of mandamus and prohibition.

On the issue of review of a whether a mandatory duty exists to support a writ of mandamus, the state cites Cost Mgmt. Servs., Inc. v. City of Lakewood, 178 Wn. 2d 635, 641(2013). The Court wrote in that case:

We have never directly stated the standard of review in this court of a lower court's determination regarding exhaustion of administrative remedies. We have, however, stated that "[t]he exhaustion issue is a question of law for the trial court to decide." ...We review questions of law de novo. ...Therefore, we review de novo whether exhaustion of administrative remedies was required in this case.

[Citations omitted.]

The Court explained that there are two different standards for review of a writ of mandamus:

Writs of mandamus are subject to two separate standards of review, depending on the question reviewed. First, a writ of mandamus "may be issued by any court ... to compel the performance of an act which the law

especially enjoins as a duty....” RCW 7.16.160. Moreover, “[t]he determination of whether a statute specifies a duty that the person must perform is a question of law.” *River Park Square, LLC v. Miggins*, 143 Wash.2d 68, 76, 17 P.3d 1178 (2001). Thus, since we review questions of law de novo, we review de novo the question whether a statute specifies a duty such that mandamus may issue. But “[w]hether there is a plain, speedy, and adequate remedy in the ordinary course of the law is a question left to the discretion of the court in which the proceeding is instituted.” *Id.* (citing *State ex rel. Hodde v. Superior Court*, 40 Wash.2d 502, 517, 244 P.2d 668 (1952)). We reverse discretionary decisions of the trial court only if “the superior court’s discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* (citing *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)). Therefore, to sum up, **if the question raised is whether a statute prescribes a duty that will support issuance of a writ of mandamus, our review is de novo. But if the question raised is whether there existed an adequate remedy at law that precludes issuance of mandamus, we review the trial court’s decision for abuse of discretion.**

Cost Mgmt. Servs., Inc. v. City of Lakewood, 178 Wash. 2d 635, 648-49 (2013) [footnote omitted][emphasis added].

V. Argument

A. The Department Had a Clear Duty to Conduct a Case-by-Case Determination of the Need for Counsel

The state fails to apprehend the teaching of Gagnon v. Scarpelli, supra, that the right to counsel does exist in some parole revocation cases and that it should be determined on a case-by-case basis.

The Court of Appeals in Ziegenfuss, supra, 118 Wn. App. 110, 116, made clear that “the right to counsel in community custody violation

hearings is determined on a case by case basis,” citing to Gagnon v. Scarpelli, *supra*. In the interest of fundamental fairness, the touchstone of due process, Mr. Grisby had a right to a case-by-case determination of his need for appointed counsel. The assistant attorney general categorically denied that Mr. Grisby had the right to even pro bono counsel. CP 202–203. The Gagnon Court stated that the “decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system.” Gagnon, 411 U.S. 778, 790.

The Court added at 790:

Presumptively, it may be said that counsel should be provided in cases where after being informed of his right to request counsel, the probationer or parolee, makes such a request based on a timely or colorable claim that he has not committed the alleged violation of the conditions upon which he is at liberty.

Mr. Grisby denied that he committed one of the alleged violations and in fact the hearing officer in the April 21 hearing found him not guilty.⁴ Officer Ockerman had advised him that he could request in writing to be represented by counsel, Supplemental Transcript February 20, 2014 Hearing at 12 [Hereinafter Supp. Tr.], but when through counsel he did so, this request was denied. CP 202-203.

⁴ This refers to the Hearing Officer’s Report referenced in footnote 1 above and in the Appellant’s Motion to Expand the Record.

In the February 20, 2014, hearing Mr. Ockerman discussed the Gagnon v. Scarpelli case with Mr. Grisby:

Attorneys wishing to provide representation or offenders desiring representation should submit their request in writing to the hearing and vio—uh, hearing and violations administrator. The request must justify exceptional circumstances or complex issues that the—would prevent the off—you—from being able to defend yourself.

Supp. Tr. at 12. Mr. Ockerman asked if Mr. Grisby was aware of the possibility of making such a request, and Mr. Grisby said he was not. Id.⁵

In addition, the notice of hearing provided to Mr. Grisby said: “without prior approval from the Hearings Program Administrator, no attorney will be permitted to represent you.” CP 64. The following is an exact copy of an excerpt of the notice:

- ◆ To present your case to the Hearing Officer. If there is a language or communication barrier, the Hearing Officer will ensure that someone is appointed interpret or otherwise assist you. However, no other person may represent you in presenting your case. There is no statutory right to an attorney or counsel and without prior approval from the Hearings Program Administrator, no attorney will be permitted to represent you.

CP 64.

Both the hearing officer and the written notice contemplated the application of a case-by-case analysis by the Hearings Program

Administrator, but the assistant attorney general interfered with that process in this case.

Mr. Grisby was presumptively entitled to counsel. In addition to the presumption discussed above, the Supreme Court emphasized:

In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.

Gagnon v. Scarpelli, 411 U.S. 778, 790-91.

The Court wrote:

Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.

Id. at 786-87.

The assistant attorney general asserted that the “contest is among equals” in a community custody revocation hearing. CP 202. The idea that a prisoner is on equal footing with a Community Corrections Officer who has training and experience in such hearings is without foundation. It is worth noting that to apply for an entry-level position to become a Community Corrections Officer (CCO) one must possess “A four-year degree from an accredited college or university whose accreditation is recognized by the U.S. Department of Education and the Council for

Higher Education Accreditation (CHEA).” See job announcement at <http://www.doc.wa.gov/jobs/#>.

The February 20, 2014 transcript makes clear that Mr. Grisby had trouble speaking effectively. At one point the hearing officer told him: “...it looks like you’re gettin’ angry, um, and I just want you to take a deep breath and I d—you know, I don’t want to get in this bantering between a witness and—and yourself.” Supp. Tr. at 46.

Mr. Grisby not only is unskilled, but also he has multiple mental health issues that hinder his ability effectively to present his defense. CP 221. According to Dr. Andrew Corso, lead psychologist at Monroe Correctional Center, in a telephone call with one of the Ronald A. Peterson Law Clinic students, Mr. Grisby has been diagnosed with Post Traumatic Stress Disorder (PTSD), Major Depressive Disorder, and a significant history of chemical dependency. CP 215. Mr. Grisby’s symptoms of PTSD include nightmares, flashbacks, and anxiety. CP 221. As explained by Dr. Corso, anxiety from PTSD can be triggered in stressful situations such as an adversarial proceeding. CP 221. People with PTSD can also suffer from hyper vigilance, a condition in which they become highly attuned to their surrounding environment, which undermines their ability to think abstractly or track the subtleties and complexities of a legal proceeding. CP 221. In addition to PTSD, Mr.

Grisby suffers from Major Depressive Disorder, which according to Dr. Corso can interfere with attention, focus, and concentration. CP 221. The combination of these mental health issues definitely hinders Mr. Grisby's ability to advocate on his behalf effectively. CP 221.

The state relies heavily on In re McNeal, 99 Wn. App. 617 (2000), a 2-1 decision requiring that the state provide basic procedural protections in community custody revocation hearings. App. Op. Br. at 17. The McNeal court found that the basic procedural protections accorded to a parolee by the U.S. Supreme Court in Morrissey v. Brewer, 408 U.S. 471 (1972), should apply to community custody revocation proceedings. McNeal at 630. The Court reasoned that there was a similar liberty interest for persons in both kinds of proceedings. Id., at 632.

The McNeal court also held "that the State is not required to permit counsel to participate in community custody revocation hearings." Id. at 619. In reaching that conclusion, the McNeal majority did not follow Gagnon, supra, relied on by this Court in Ziegenfuss. It emphasized that "The focus of the Scarpelli opinion is on the rehabilitative goal of probation and parole." Id., at 634. Finding that the purpose of community custody was punitive, the majority wrote, "Absent the rehabilitative goal of probation and parole, the rationale of Scarpelli does not apply." Id. at 635. The majority found that "The success or failure of the rehabilitative

process is not even a factor.” Id. Judge Webster dissented, saying that Gagnon should apply. Id., at 636.

But DOSA does have a rehabilitative purpose and this Court unanimously in Ziegenfuss three years after McNeal rejected the very same argument made by the State herein, “that under *McNeal*, due process does not require representation by counsel in community custody violation hearings.” Ziegenfuss, 118 Wn. App. 110, 116. The Court made clear that “The right to counsel, however, is determined on a case by case basis.” Id.

The state misapprehends the case law and the purpose of the DOSA statute. The purpose of RCW 9.94A.660, known as DOSA, is to provide meaningful treatment and rehabilitation incentives for those convicted of drug crimes, State v. Hender, 180 Wn. App. 895 (2014). The Washington Supreme Court explained the rehabilitative purpose as well:

The DOSA program is an attempt to provide treatment for some offenders judged likely to benefit from it. It authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions.

State v. Grayson, 154 Wn. 2d 333, 337 (2005).

As a state study observed, “Prior to 2005 legislation, DOSA was a 'prison-based' treatment alternative. The 2005 changes created a 'community-based' DOSA for offenders with non-prison sentences.”

WASHINGTON’S DRUG OFFENDER SENTENCING

ALTERNATIVE: AN UPDATE ON RECIDIVISM FINDINGS, Washington State Institute for Public Policy, December 2006.⁶ In addition, “The legislative intent of DOSA is to increase the use of effective treatment for substance abusing offenders, thereby reducing recidivism.” Id.

The state argues that providing counsel or allowing counsel to participate in DOC hearings would prolong hearings and lengthen the time required to reach a decision, App. Op. Br. at 33. In fact, the length of the recording of the February 20 hearing without counsel was two hours 49 minutes 59 seconds. And without counsel, Mr. Grisby’s proceeding began January 8, 2014, and the final hearing, after two appeals to correct errors in the hearings conducted without counsel, was set for April 21, 2014. Had Mr. Grisby been effectively represented in his January hearing, he might well have avoided more than three months in custody and the Department could have avoided having two appeals and two more hearings. Any cost of providing counsel would have been less than the cost of two appeals and two hearings and incarcerating Mr. Grisby for more than three months.⁷

⁶ Available at (<http://www.wsipp.wa.gov/Reports/06-12-1901>).

⁷ DOC’s cost per offender per day in FY 2013 was \$89.33. Worksheet available at <http://www.doc.wa.gov/aboutdoc/docs/msCostOfIncarceration-FY2010-2013.pdf>

The importance of having counsel to achieve a fair result was recognized in a recent report by the Boston Bar Association on the need for counsel in civil proceedings.⁸ The report concluded not only that providing counsel helped reach fair results but also that investment in civil legal aid returned more dollars than the cost because of other savings. The report included the results of a survey of judges:

Uniformly across state courts and regions, a vast majority of respondents noted that lack of representation consumed court staff time in assisting pro se litigants, slowed down procedures, and resulted in the unclear presentation of evidence by those litigants without counsel. Most disturbingly, 6 out of 10 judges who responded felt that lack of representation negatively impacted the courts' ability to ensure equal justice to unrepresented litigants. Those low-income litigants, who do not have the benefit of a lawyer, are hindered in presenting their cases. Meaningful access to justice, a basic right for all, is denied to them as a result.⁹

While the Boston Bar study addressed matters such as eviction, foreclosure, and family law such as cases of child abuse and domestic violence, its conclusions resonate in consideration of hearings involving liberty.

⁸ INVESTING IN JUSTICE--A Roadmap to Cost-Effective Funding of Civil Legal Aid in Massachusetts. A Report of the Boston Bar Association Statewide Task Force to Expand Civil Legal Aid in Massachusetts, October 2014, available at <http://www.bostonbar.org/docs/default-document-library/statewide-task-force-to-expand-civil-legal-aid-in-ma---investing-in-justice.pdf>.

⁹ *Id.* at 11.

An American Bar Association study found similar results to the Boston one, with 62 per cent of judges saying that not having an attorney hurts parties.¹⁰ With observations relevant to the considerations herein, the report found:

Ninety-four percent (94%) of those responding stated that the failure to present necessary evidence was the most common problem. Eighty-nine percent (89%) said that parties were impacted by procedural errors. Ineffective witness examination (85%) and failure to properly object to evidence (81%) were both cited by more than four fifths of the judges as issues. Seventy-seven percent (77%) of the judges cited ineffective arguments. Several judges noted that even when a party won at hearing, they were not able to proffer an enforceable order or judgment to the court.¹¹

These problems are evident in the transcript of Mr. Grisby's hearing.

The Superior Court herein appropriately ordered the Department to do a case-by-case determination of the need for appointed counsel and to require that in any event pro bono counsel could represent Mr. Grisby.

B. Even if the DOC Had Determined in a Proper Exercise of Discretion that Mr. Grisby Did Not Need Appointed Counsel, DOC Should Have Permitted Him to Have Retained Pro Bono Counsel

¹⁰ Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts (Preliminary) (2010) Available at <http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.authcheckdam.pdf>

¹¹ Id., at 3-4.

Even if DOC had determined that despite his mental health concerns Mr. Grisby did not need appointed counsel, his retained counsel should have been allowed to represent him.

The state mistakenly conflates these issues in its complaint that the superior court directed the result to follow from DOC's exercise of discretion. App. Op. Br at 20. The exercise of discretion relates to appointment of counsel, not the participation of retained pro bono counsel.

The state cites McNeal as authority for denying counsel altogether: "...there is no right to counsel in a community custody violation hearing." App. Op. Br. at 28. It is true that the McNeal majority wrote: "We also hold that the State is not required to permit counsel to participate in community custody revocation hearings." In re McNeal, 99 Wn. App. 617, 619. But in its discussion of the right to counsel, the majority discussed its view that the rehabilitative goal of Gagnon v. Scarpelli was not present in McNeal's case. The McNeal majority added:

And the burden on the State of providing counsel, including delay in and formalization of the hearings, the added expense and the administrative burden, override the marginal value counsel would provide at these in-custody hearings.

In re McNeal, 99 Wn. App. 617, 635.

As outlined above, the DOSA statute has a rehabilitative goal in a way that it did not when McNeal was decided. Case law since McNeal

also has emphasized the rehabilitative purpose. And Mr. Grisby's case demonstrates that having counsel does not necessarily delay proceedings.

The U.S. Supreme Court has emphasized the importance of having counsel of one's choice:

Inherent in the right to counsel is the right to retain one's counsel of choice. The Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.

U.S. v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006).

That was in a criminal case, but the reasoning is compelling here. (This Court has followed Gonzalez-Lopez in State v. Hampton, 332 P.3d 1020, 1023 (Wn.App. 2014).)

1. Washington Permits Counsel at other Administrative Hearings

The State argues that counsel in administrative hearings cause delay and "formalization of the hearings". App. Op. Br. at 22. Yet in hearings involving money, not liberty, Washington's Department of Social and Health Services permits attorneys to represent people in child support hearings, and even encourages people to find an attorney by providing information on seeking legal advice. The manual "Child Support Hearing Rights"¹² includes the following:

¹² Available at <http://www.dshs.wa.gov/pdf/publications/22-001.pdf>, last checked

Do I need an attorney?

Many people represent themselves at the hearing. You may represent yourself, or have an attorney, friend, relative, or other person of your choice represent you. Ask friends or relatives to recommend an attorney, or contact one of the following:

- Northwest Justice Project's CLEAR Hotline
888-201-1014
www.nwjustice.org
- Legal Voice
866-259-7720
206-621-7691
www.legalvoice.org
- www.washingtonlawhelp.org

Some law schools, volunteer attorney services associations, and other nonprofit legal organizations may also be able to provide help. Additionally, your county's bar association or referral services (usually listed at the end of the "attorney" section in the telephone book advertising section) may be able to direct you to an attorney in your community.

DSHS has approximately 22,000 hearings per year.¹³

2. Another State's Analysis Provides Helpful Guidance

In a case involving conflicts of interest and disqualification of a lawyer in a civil case, the Oklahoma Supreme Court wrote:

The right to counsel may also be based on statutory authority. However, even when there is no constitutional or statutory right to be *furnished* counsel, a party litigant in a civil proceeding still has a fundamental right to *employ* and be

October 23, 2014.

¹³ In the Office of Administrative Hearings Strategic Plan Fiscal Years 2009-2015, the projected caseload for DSHS appeal hearings was 22,680. Page 5, available at http://www.oah.wa.gov/OAH_Strategic_Plan_2009-2015.pdf, last checked October 23, 2014.

heard by counsel of his or her own choosing. The right to select counsel without state interference is implied from the nature of the attorney-client relationship in our adversarial system of justice, where an attorney acts as the personal agent of the client and not the state. It is also grounded in the due process right of an individual to make decisions affecting litigation placing his or her property at risk.

Arkansas Valley State Bank v. Phillips, 171 P.3d 899, 904 (Okla. 2007)(footnotes omitted).

In an earlier decision involving an administrative proceeding to revoke a dentist's license to practice, the Oklahoma Supreme Court found that even when an administrative body had no duty to provide counsel, "the respondent is entitled to have counsel of his own choosing, but he must bear the burden himself..." Bancroft v. Bd. of Governors of Registered Dentists of Okl., 1949 OK 216, 202 Okla. 108, 109, 210 P.2d 666 (1949).

While not binding in Washington, these decisions provide helpful insight in assessing the due process implications of the state's position herein.

C. The Washington Due Process Clause Provides Additional Support for the Right to Counsel Herein

As this Court recognized in Ziegenfuss, supra, there is a due process right to a case-by-case determination of the need for counsel in a DOC revocation proceeding. The case this Court relied on, Gagnon v.

Scarpelli, 411 U.S. 778, 786, made clear that under the Fourteenth Amendment “the effectiveness of the rights guaranteed by Morrissey may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess.”

Should this Court question the applicability of Fourteenth Amendment Due Process protections to Mr. Grisby, despite the decisions in Gagnon and Ziegenfuss, the Respondent urges this Court to recognize a greater protection under the Washington Constitution.

The Washington Supreme Court has affirmed that “context matters when we are determining whether to independently analyze the state due process clause.” Bellevue Sch. Dist. v. E.S., 171 Wn. 2d 695, 71 (2011). In that case, the Court accepted that in some circumstances the state due process clause could provide greater protection than the Fourteenth Amendment, but said that in the “context” of an initial truancy proceeding that did not involve immediate loss of liberty, it did not. Id., at 714, emphasis added.

Article I of the Washington Constitution provides: “No person shall be deprived of life, liberty, or property, without due process of law.”

Wa. Const. art. I, § 3.

The Supreme Court has six non-exclusive factors to consider in determining whether the state constitution provides greater protection than the federal:

“(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.” *Gunwall*, 106 Wash.2d at 58, 720 P.2d 808.

E.S., 171 Wn. 2d 695, 710.

The Respondent urges this Court to review factors 4-6.¹⁴

As the Court said in E.S., “... ‘the United States Constitution is a *grant* of limited power to the federal government, while the state constitution imposes *limitations* on the otherwise plenary power of the state’.... Thus, the fifth *Gunwall* factor supports an independent analysis of the state constitution.” E.S., 171 Wn. 2d 695, 713, (citations omitted).

Regarding the fourth factor, pre-existing state law, Ziegenfuss, supra, supports the conclusion that Washington has recognized a due process case-by-case right to counsel for people facing DOC revocation proceedings.

The DOSA statute itself, focusing on rehabilitation, also is of particular state concern. As the Court has noted,

¹⁴ The Supreme Court in King v. King, 162 Wn. 2d 378, 392 (2007) found that the first three factors do not support a greater protection in a due process claim for appointed counsel in a dissolution case. Because the language in the two constitutions is the same the Respondent focuses on the other factors.

DOSA sentences reduce drug and drug felony recidivism, and thus benefit rehabilitated individuals and society as a whole, through reduced crime and lower costs. These are important benefits, implicating a state interest in ensuring that DOSA revocations are founded upon verified facts and accurate knowledge.

In re Personal Restraint Petition of McKay, 127 Wn.App. 165, 170 (2005) (footnote omitted).

In order for the DOC Hearing Officer to make a fair, reasoned, and effective decision for the individual and the community, the Hearing Officer must have clear, cogent, and comprehensive information to consider. The assistance of counsel makes more likely a resolution that will lead to successful rehabilitation.

The Washington Supreme Court's decision in State v. A.N.J., 168 Wn. 2d 91, 110 (2010) is relevant both to the pre-existing state law factor and to the particular state interest factor. In that case the Court emphasized that it would consider the Washington Defender Association's *Standards for Public Defense Services* and the Washington State Bar Association's standards in determining the effective assistance of counsel. The Court advanced its particular interest in the right to counsel by implementing rules adopting standards for public defense and requiring appointed counsel to certify compliance with those standards. See, e.g., Cr. R. 3.1 Stds.

The sixth factor, whether the matter is of particular state or local concern, also supports an independent analysis. Washington's legislature has passed a law specifically addressing the right to counsel:

The legislature finds that effective legal representation must be provided for indigent persons and persons who are indigent and able to contribute, consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches.

RCWA 10.101.005 .

While the statute is silent on the issue of DOC revocation proceedings, it is a recognition that the right to counsel is of particular state concern.

In addition, the Department's own advice of rights form is an indication that the case-by-case right to counsel is of particular state concern. CP 64. It advises the accused person that he/she can request counsel.

The Washington Supreme Court has emphasized that the constitutional right to counsel is presumed to apply to those cases in which the litigant's physical liberty is threatened. In re Grove, 127 Wn. 2d 221, 237 (1995). As this Court has held,

An inmate has a significant liberty interest in the expectation of community custody as opposed to incarceration, including the ability to be with family and friends, be employed or attend school, and to live a relatively normal life.

In re McKay, 127 Wn.App. 165, 170 (footnote omitted).

The Grove decision, which carefully analyzed under what circumstances an indigent person could proceed in an appeal at public expense, is further evidence of Washington's particular interest in due process for indigent persons.

In summary, Washington has a pre-existing history of particular state interest both in the rehabilitation purpose of DOSA and in the right to counsel. The state constitution places limits on the power of the government. All of these factors support providing a case-by-case right to counsel in DOC DOSA revocation proceedings.

D. Writs of Mandamus and Prohibition are Appropriate because DOC is failing to Follow Case Law on Appointment of Counsel

The superior court properly issued the writs because the DOC had a clear duty to conduct case-by-case determinations of the right to counsel and Mr. Grisby had no other plain, speedy, and adequate remedy.

RCW 7.16.290 provides:

The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

In this case, the court properly prohibited DOC from conducting Mr. Grisby's hearing without permitting retained pro bono counsel to represent him at the hearing.

This Court has held that “Writs of prohibition are reviewed for abuse of discretion, and reviewing courts consider ‘the character and function of the writ of prohibition together with all the facts and circumstances shown by the record.’” [citation omitted] In re King Cnty. Hearing Exam’r, 135 Wn. App. 312, 318 (2006). The Supreme Court has explained: “A trial court abuses its discretion if a decision is manifestly unreasonable or based on untenable grounds or untenable reasons.” [citation omitted] Skagit Cnty. Pub. Hosp. Dist. No. 304 v. Skagit Cnty. Pub. Hosp. Dist. No. 1, 177 Wn. 2d 718, 730 (2013). In Skagit Cnty., the Supreme Court found that the trial court (the same judge as in this case) did not abuse its discretion. It said that the petitioner “may have been able to seek other relief, but under the facts of this case, it was not manifestly unreasonable to find that there was no plain, speedy, and adequate remedy available in the ordinary course of legal procedure.” Id., 177 Wn. 2d at 730-31. The trial court here did not abuse its discretion in finding that there was no plain, speedy, and adequate remedy to avoid the DOC hearing being held without counsel in four days’ time. Had Mr. Grisby lost the hearing, he could have been returned to prison instead of being released. A personal restraint petition, which the state suggests would be an acceptable alternative, App. Op. Br. at 23, could not have been heard quickly enough to avoid him being sent to prison.

As outlined above, the trial court's determination of whether there was an adequate remedy available is reviewed for abuse of discretion.

The state distorts the implication for this case of City of Seattle v. Williams, 101 Wn.2d 445, 455-56 (1984) which it cites for the argument that an RALJ appeal is an adequate alternative to a writ. App. Op. Br. at 23. The case does not address Mr. Grisby's situation. The Court wrote:

Since the RALJ provides a "speedy and adequate remedy at law" in most instances, we conclude that statutory writs should be granted sparingly when used as a method of review of interlocutory decisions of courts of limited jurisdiction. ...

Similarly, the state inappropriately cites Washington State Council of County and City Employees, Council 2, AFSCME, AFL-CIO, Local 87 v. Hahn, 151 Wn.2d 163, 167 (2004). App. Op. Br. at 23. In that case the Supreme Court decided that the Public Employees' Collective Bargaining Act (PECBA) applied to judges and that under it unions had a cause of action for unfair labor practices involving judges. This holding does not conflict with the trial court's decision herein that there was no adequate and speedy remedy of law for Mr. Grisby.

The state further misapprehends the import of the personal restraint petition process used in In re McNeal, supra, which it claims is the appropriate way to challenge a DOC revocation proceeding. App. Op. Br. at 24. In McNeal, this Court wrote: "He has served the time imposed as a

result of the revocation, and the case is moot as applied to him because no relief can be provided.” McNeal at 619. Mr. McNeal was ordered to serve 300 days as a result of his revocation hearing, which occurred December 24, 1996. Id. The Court of Appeals issued its decision on his PRP March 6, 2000. Mr. Grisby by seeking a writ was seeking to avoid the denial of his right to counsel and the unlawful revocation of his DOSA. The Superior Court was within its discretion to find that there was no speedy and adequate remedy at law to prevent that denial and revocation.

The writ of mandamus will issue to compel the performance of an act that the law especially enjoins as a duty resulting from an office, trust or station. RCW 7.16.160 provides:

It may be issued by any court, except a district or municipal court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person.

In this case, the Department of Corrections was precluding Mr. Grisby from exercising his right to counsel and was failing to exercise its discretion in appointing counsel for him.

The superior courts have original jurisdiction over writs of mandamus and prohibition. Wash. Const. art. IV, § 6. Like prohibition,

mandamus will issue where there is not a plain, speedy and adequate remedy at law. RCW 7.16.170. As the Court of Appeals has explained:

“We note at the outset that mandamus is an extraordinary writ.” *Walker v. Munro*, 124 Wash.2d 402, 407, 879 P.2d 920 (1994). A court may issue a writ of mandamus, “to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station.” RCW 7.16.160. “The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit on the application of the party beneficially interested.” RCW 7.16.170. If disputed material fact issues exist, the trial court has discretion to hold a trial before it determines the appropriateness of mandamus. RCW 7.16.210.

The above legal framework requires the applicant to satisfy three elements before a writ will issue: (1) the party subject to the writ is under a clear duty to act, RCW 7.16.160; (2) the applicant has no “plain, speedy and adequate remedy in the ordinary course of law,” RCW 7.16.170; and (3) the applicant is “beneficially interested.” RCW 7.16.170.

Eugster v. City of Spokane, 118 Wn. App. 383, 402 (2003).

In this case, the DOC was under a clear duty to consider a right to counsel for Mr. Grisby on a case-by-case basis, *Ziegenfuss*, 118 Wn. App. at 116, and Mr. Grisby had no plain, speedy, and adequate remedy. In addition to failing to make a case-by-case determination of the need for appointed counsel, the DOC attorney advised counsel that counsel could not represent Mr. Grisby at his hearing. *See* CP 202–03. Mr. Grisby clearly was beneficially interested in the outcome of this proceeding.

A writ of prohibition is the counterpart to a writ of mandamus.

RCW 7.16.290.

The superior court has authority to issue writs of prohibition to arrest “the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.” RCW 7.16.290. The statutory writ may be invoked to prohibit judicial, legislative, executive, or administrative acts if the official or body to whom it is directed is acting in excess of its power. *Winsor v. Bridges*, 24 Wash. 540, 543, 64 P. 780 (1901). Prohibition is a drastic remedy and may only be issued where (1) a state actor is about to act in excess of its jurisdiction and (2) the petitioner does not have a plain, speedy and adequate legal remedy. *County of Spokane v. Local 1553, American Federation of State, County & Mun. Employees, AFL-CIO*, 76 Wash.App. 765, 768, 888 P.2d 735 (1995).

Brower v. Charles, 82 Wash. App. 53, 57, 914 P.2d 1202, 1204 (1996).

The DOC planned to deny Mr. Grisby the assistance of counsel at his hearing April 21, 2014. The DOC refused to exercise its discretion to do a case-by-case determination of the need for appointed counsel and also refused to permit pro bono counsel to represent him. This refusal was acting in excess of its power. There was no other speedy and adequate remedy than a writ to prevent this denial of due process.

E. The U.S. Justice Department Provides Legal Assistance to Persons with Mental Disability in Immigration Proceedings

The need to provide counsel for persons with mental disability has been recognized by the U.S. Executive Office for Immigration Review. In 2013 the EOIR announced its policy to “make available a qualified

representative to unrepresented detainees who are deemed mentally incompetent to represent themselves in immigration proceedings.”¹⁵

The announcement of this policy followed the decision in Franco-Gonzalez v. Holder, CV 10-02211 DMG DTBX, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013), which held that the EOIR must provide legal representation to immigrant detainees with mental disabilities who are facing deportation and who are unable adequately to represent themselves in immigration hearings. The Court wrote: “Plaintiffs’ ability to exercise these rights is hindered by their mental incompetency, and the provision of competent representation able to navigate the proceedings is the only means by which they may invoke those rights.”

“Qualified Representative” includes (1) an attorney, (2) a law student or law graduate directly supervised by a retained attorney, or (3) an accredited representative, all as defined in 8 C.F.R. § 1292.1. Franco-Gonzalez v. Holder, supra.

F. Denying Mr. Grisby Counsel Would Violate Washington’s Law Against Discrimination

Washington’s “law against discrimination”, RCW 49.60.010 et.seq., establishes “The right to be free from discrimination because of ... the presence of any sensory, mental, or physical disability.” RCW

¹⁵ Available at <http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html>.

49.60.030. The legislature declared: “such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. “ RCW 49.60.010.

Because Mr. Grisby had a documented mental disorder, CP 215 (§ 19), denying Mr. Grisby counsel was a discrimination that threatened the integrity of the DOC proceeding.

G. Because There Had Been Two Recorded Hearings with Testimony from Professional Witnesses, Mr. Grisby Needed Assistance to Cross-Examine Them

Mr. Grisby needed counsel to be able to cross-examine multiple professional witnesses at the DOC hearing and expose inconsistencies in their testimony. Some of the witnesses had testified on the record at two previous hearings. *See* CP 85; 159. His case included “the offering or dissecting of complex documentary evidence” which would cause him difficulty in presenting his case.

Mr. Grisby had his first hearing regarding his alleged violation on January 8th, 2014. CP 85. Two Community Corrections Officers (CCOs), CCO Sheppard and CCO Overholser, testified under oath. *Id.* Also in evidence at the hearing was a discovery packet that included the CCOs’ chronological reports and signed written statements of what happened during the alleged violation on December 17th, 2013. CP 47-50. After successfully appealing this hearing, CP 140-41, Mr. Grisby was granted a

second hearing on January 20th, 2014, during which three CCOs testified under oath: CCO Overholser, CCO Fields, and CCO McDonnell. CP 159; 161. The testimony from both hearings was recorded, CP 64, creating evidence that needed to be dissected in preparation for the third hearing. These recordings, in addition to the sworn written statements, created a complex fact pattern that is beyond what a layperson could be expected to digest and organize. To conduct impeachment in the violation hearing, counsel could quickly call up on a laptop computer references to these recorded hearings to offer to the hearing officer. Mr. Grisby was unable to do that on his own as he did not have access to the necessary equipment and audio recordings while incarcerated.

It is worth noting that Hearing Examiner Ockerman noted that he “found +50 %” that he believed the allegation against Mr. Grisby. CP 162. This suggests that he was barely finding guilt by the required preponderance of the evidence. Skillful presentation of Mr. Grisby’s case could persuade a hearing examiner that the evidence did not meet that standard.

Counsel was necessary to assist Mr. Grisby at his hearing, not only because of the factual complexities of his case, but also because “it has often been observed that the effectiveness of cross-examination and impeachment depends more upon the skill and techniques of the cross-

examiner than upon a knowledge of the rules of evidence.” Rule 607, Who May Impeach, *construed in* 5A Wash. Prac. § 607.6 (2013). When there is conflicting testimony by multiple professional witnesses in two hearings, it is even more important that effective cross-examination form the foundation of a solid defense. *See Id.*

Given counsel’s access to audio recordings of prior hearings and the equipment with which to transcribe key passages, impeachment material could be prepared and inconsistencies in testimony identified.

In addition, the cross-examiner has to be prepared to handle hostile witnesses, and therefore “the norms of simplicity and brevity also apply with greater force on cross-examination.” Edward J. Imwinkelried, *Evidentiary Foundations* 7 (2012). When encountering hostile witnesses, the cross-examiner will frame questions clearly and box the witness in--approaches that are lost on an untrained defendant. Skilled cross-examination can elicit crucial facts from witnesses and raise doubt about their credibility. *Id.* Whereas an unskilled person might be tempted to use questioning as an opportunity for his personal testimony, trained counsel can more effectively confront adverse witnesses and point specifically to inconsistencies and raise doubts.

In fact, with counsel’s assistance at the hearing April 21, 2014, Mr. Grisby was found not guilty on one charge, with the hearing officer citing

“inconsistent testimony from the CCO”. Supplemental Record Hearing and Decision Summary Report. Counsel also was able to present a dispositional alternative, 30-day chemical dependency treatment, which the hearing officer accepted. Hearing Officer’s Report.

H. The State’s Argument About Similarly Situated Persons Fails

The state argues that the trial court could not order the DOC to conduct case by case determinations of the need for counsel for similarly situated persons and that Mr. Grisby had no standing to request such relief. App. Op. Br. at 25-26. The state’s argument fails because standing is not an issue here.¹⁶

As Karl Tegland has explained, a precedential decision in this appeal normally would be followed in similar cases in the future.

Long a concept of Anglo-American law, stare decisis provides stability for its jurisprudence and uniform treatment of litigants. Sometimes known as the rule of precedent, the doctrine contemplates that the law as demonstrated in a given case is applicable to another case involving identical or substantially similar facts.

14A Wash. Prac., Civil Procedure § 35:54 (2d ed.)[Footnote omitted].

This Court should reaffirm its statement in Ziegenfuss that a case-by-case determination of the need for counsel is required. When it does,

¹⁶ Appellate courts “generally do not consider issues raised for the first time on appeal”. State v. Kirwin, 137 Wn.App. 387, 392 (2007).

affirming the judge's ruling in this case, that decision will be precedent directing the DOC in future similar cases.

The state misapprehends the teaching of Walker v. Munro, 124 Wn. 2d 402 (1994). App. Op. Br. at 25. The Court in that case denied a writ of mandamus that the petitioners sought to “order a state officer to adhere to the constitution.” Id., at 408. The Court explained that this was too general a mandate. It then added:

This does not mean that a writ cannot issue in regards to a continuing violation of a duty. Where there is a specific, existing duty which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance.

Walker v. Munro, 124 Wn.2d 402, 408.

In this case, the state department has violated a specific, existing duty, to do a case-by-case determination of the need for counsel in DOSA revocation hearings, and it has made clear that it always has violated that duty. See Declaration of Rebecca Torrence, CP 206. Unless this Court affirms the Superior Court DOC will continue to violate that duty. This is what the Walker Court described as “a recurring situation where the same specific duty repeatedly arises.” 124 Wn. 2d 402, 409. Mandamus is an appropriate remedy to compel DOC to do its duty.

VI. Conclusion

For the reasons stated above, the state denied Mr. Grisby's due process right to counsel. This Court should affirm the writ of prohibition and writ of mandamus to prohibit the DOC from conducting a hearing without a case-by-case determination of the need for appointed counsel and to require the DOC to allow retained pro bono counsel to represent Mr. Grisby.

Respectfully submitted this 3rd day of November 2014.



Robert C. Boruchowitz, WSBA No. 4563, Attorney for Respondent

Assisting on the brief: Ashwin Kumar, Steven Lee, Third Year Law Students

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APPENDIX



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April 9, 2014

Steven Lee
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RE: Henry Grisby DOC #794931

Dear Mr. Lee, Mr. O'Brien, Mr. Harkins, and Mr. Boruchowitz,

I am responding on behalf of the Department of Corrections to your letter dated April 8, 2014. You request to represent Mr. Grisby at his Drug Offender Sentencing Alternative (DOSA) revocation hearing on April 17, at 1 p.m., at the Monroe Correctional Complex. Unfortunately, the DOC cannot accommodate your request. In a DOSA revocation hearing, there is no right to counsel. *In re McNeal*, 99 Wn. App. 617, 635, 994 P.2d 890 (2000).

DOSA revocation hearings are legally distinct from probation and parole revocation proceedings in Washington. The latter are prosecuted by the State by way of the county prosecutor. Therefore, it would create an uneven playing field to disallow offenders in probation and parole revocation proceedings to be represented by counsel. Hence, court rule requires offenders to be represented by counsel in such proceedings. *See* CrR 7.6(b) (requiring counsel at probation revocation hearings).

In contrast, DOSA revocation hearings under the Offender Accountability Act¹ (OAA) involve a non-attorney corrections officer bringing a violation allegation. The hearing is not in a court before a judge but instead in a conference room before a non-attorney hearing officer. Because neither the offender nor the corrections officer who alleges the violation is an attorney, the contest is among equals.

And the OAA created the administrative hearing system without attorneys and judges for the very purpose of simplifying violation hearings. Prior to the OAA, violations hearings occurred

¹ E2SSB 5421, Chapter 196, Laws of 1999.

ATTORNEY GENERAL OF WASHINGTON

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in court before a judge, with both parties represented by counsel. The result was lengthy delays and concomitant lengthy pre-hearing jail time for offenders. This delay was not to the offenders' benefit, and as a result, the legislature adopted the current system by enacting the OAA.

Although you will not be allowed to represent Mr. Grisby at the DOSA revocation hearing, one of you may attend the hearing as an observer, if approved in writing in advance by both the Hearings and Violations Administrator and the facility where the hearing is to be held. This advanced approval is necessary for you to obtain a safety and security clearance that will allow you to enter the facility. Additionally, after the hearing, you may request a copy of the audio record.

During the hearing, although one of you may be present as an observer, you will not be allowed to speak, signal, or otherwise communicate to Mr. Grisby. You also will not be allowed to have a discussion with Mr. Grisby about the hearing during any break in the proceeding. If communication occurs, there will be one warning only, and if the behavior persists, Mr. Grisby will be escorted out of the hearing to allow you time to gather your belongings and leave so the hearing can continue. If Mr. Grisby refuses to return to the hearing or if his behavior is such that any officer has concerns about the safety and security of staff, yourself, Mr. Grisby, or the institution, the hearing will continue on the record in Mr. Grisby's absence.

In your letter, you also requested that the DOC provide you with copies of any notices to Mr. Grisby concerning the hearing. Please obtain such copies from Mr. Grisby.

Feel free to contact me if you have any questions regarding the issue of the right to counsel at revocation hearings.

Respectfully,


RONDA D. LARSON
Assistant Attorney General

RDL:kb

cc: Ton Johnson, DOC Hearings and Violations Administrator
Maria Puccio, DOC Senior Contracts Attorney

No. 71904-1-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON, DIVISION I

Henry Grisby III,)	CERTIFICATE OF SERVICE
Respondent)	
)	
Vs.)	
Robert Herzog, et al.,)	
Appellants)	
)	
_____)	

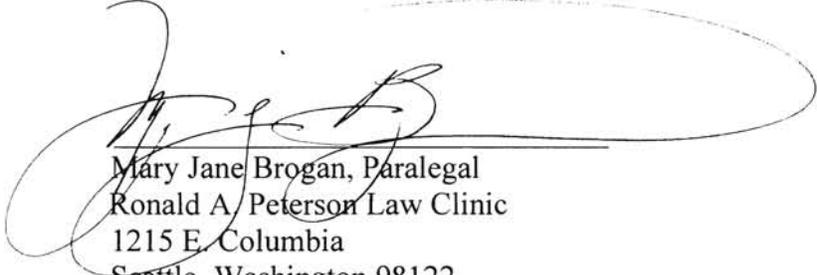
CERTIFICATE OF SERVICE

I, Mary Jane Brogan, certify under penalty of perjury under the laws of the State of Washington that on Monday, November 3, 2014, I caused to be served on the person listed below by U.S. Mail the Respondent's Motion to Modify the Commissioner's Ruling.

Mailed to:

Ronda D. Larson, Assistant Attorney General
Corrections Division
PO Box 40116
Olympia WA 98504-0116

Dated this 3rd day of November 2014.



Mary Jane Brogan, Paralegal
Ronald A. Peterson Law Clinic
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Seattle, Washington 98122
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