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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON NO. 37993-7-II
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COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION TWO

EVERETTE BURD,
Appellant

v.

HAROLD CLARKE,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary Tabor, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that it cannot remedy the fact that the Department of Corrections (DOC) violated its clear legal duty to evaluate whether appellant Burd qualified for the “Dangerous Mentally Ill Offender” (DMIO) program pursuant to RCW 72.09.370.

2. The trial court erred in concluding that the appellant’s original action against a state officer was untimely.

3. The trial court erred in failing to recognize that this action is justiciable because the court can provide effective relief and the case is therefore not moot.

4. The trial court erred in denying the appellant’s writ of mandamus.

5. The trial court erred in failing to order the DOC to fulfill its statutory legal duty under RCW 72.09.370 and resume its assessment of whether appellant Burd meets the DMIO criteria as requested in the writ.

Issues Pertaining To Assignments Of Error

1. RCW 72.09.370 imposes a clear statutory duty on DOC to assess whether an offender is a “Dangerous Mentally Ill Offender.” Can DOC ignore this mandatory obligation when it believes an offender may be filed upon as a “sexually violent predator” under chapter RCW 71.09?

3. If the statute has no “SVP exception,” was it error for DOC to interrupt its DMIO assessment of appellant Burd because – and only because – he was a potential candidate for SVP filing?

4. Did the DOC decision not to develop an appropriate release plan for a psychotic and mentally retarded sex offender needlessly expose the public to risk the Legislature intended to reduce?

5. DOC acknowledges that it violated the Legislature’s command, but argues that there is nothing to be done now that appellant Burd is no longer in their custody. Should this Court reject the DOC position that there never was and there never will be a right time for Mr. Burd to file this lawsuit?

7. If the Court has the power to provide effective relief, is DOC wrong in arguing that this case is moot?

8. Should the writ of mandamus, ordering DOC to resume its DMIO assessment of appellant Burd in accordance with their clear legal duty under RCW 72.09.370, issue?

B. STATEMENT OF THE CASE

1. Procedural History

On January 25, 2007, appellant Burd filed an Original Action Against State Officers (Harold Clarke, as head of the Department of Corrections) pursuant to RAP 16.2 in the Washington State Supreme Court. (See Cause No. 79741-2). On July 18, 2007 the Supreme Court Commissioner referred the case to a Supreme Court department for a determination of whether the petition should be retained, transferred, or dismissed. The Commissioner also requested that the parties attempt to approve an agreed statement of facts. The parties were unable to agree on a statement of facts and each submitted their own.

On September 6, 2007, the Supreme Court, Department II, ordered that the petition be transferred to the Thurston County Superior Court for determination on the merits. The Supreme Court Certificate of Finality is dated September 14, 2007. Appendix A.

In accordance with the Supreme Court order, the merits of the appellant's original action against a state officer were litigated in Thurston County Superior Court under cause number 07-2-02131-8. The appellant asked that the trial court order the Department of Corrections to complete a screening assessment of Mr. Burd to determine whether he qualified as a "Dangerous Mentally Ill Offender" pursuant to RCW 72.09.370.

On April 25, 2008, the Thurston County judge heard the appellant's summary judgment motion and the respondent DOC's cross-motion. The trial court denied appellant Burd's summary judgment motion and granted the respondent DOC cross-motion for summary judgment. Appendix B. This is an appeal from that June 9, 2008 order.

2. Statement Of The Facts

Mr. Everette Burd, the appellant herein, is a mentally retarded man who has required individual care all his life. When he was just six years old, Mr. Burd was removed from kindergarten and sent to a special preschool communications class. (Assessment Report, 6/17/87) CP 281. A year later, he was officially diagnosed with "mild mental retardation." Id. In 1987, Mr. Burd's full scale IQ score was measured as 57 and he remained relegated to a special education academic program. Id.

The petitioner's parents had a difficult time raising Mr. Burd, resorting to corporal punishment to discipline their mentally retarded son. According to a neighbor, Mr. Burd's mother was "nuts," did "a lot of screaming, and was noticeably "meaner" to the petitioner than to his siblings. (10/26/06 Deposition of Patricia Starkey, at p. 7) CP 273-277. Child Protective Services had two referrals regarding abuse of Mr. Burd as a child when beatings left him with welts. (DOC Psychological Report, 7/10/97) CP 279-282. The parents' management of Mr. Burd was

ineffective. As a juvenile, he was adjudicated to having committed criminal trespass, burglary, and indecent liberties in the juvenile court system. (DOC Psychosocial History Summary, 7/20/04). CP 285-289.

In April of 1997, at the age of twenty-one, Mr. Burd was admitted into DOC custody, following a conviction for attempted rape in the first degree. (DOC Legal Face Sheet, 4/28/05). CP 291-308. Mr. Burd was sentenced to serve 90 months in prison and 36 months on community custody. *Id.* Early on, DOC “Chrono notes” stated, “Due to [Mr. Burd’s] small stature and personality traits, he has great potential to be victimized in prison.” (DOC Offender Chrono Report for dates 3/9/95 – 9/8/05, at 3/13/97). CP 318. Upon admission, the Department of Corrections retested Mr. Burd’s intellectual functioning. Their examination confirmed an IQ of 60. (DOC Offender Profile Report, 4/4/97). CP 338-339. Initial reports noted that Mr. Burd slept on a small square of his bunk without sheets or pillows. (7/10/97 Psychosocial Report at p. 3). CP 279-282. As early as 1997, Mr. Burd was reportedly screaming about hearing voices and suicide. (Mental Health Treatment Plan, 7/5/97). CP 341.

For the first six years of his incarceration, Mr. Burd was, for the most part, placed into the general prison population. He responded very poorly to life in prison. Between 1997 and 2003, Mr. Burd committed one hundred and six (106) major rule infractions. (Psychosocial History

Summary, 7/20/04 at p. 1). CP 285-289. Each incident brought nearly the same punishment: loss of privileges, solitary confinement, or administrative segregation. (DOC Legal Face Sheet). CP 291-308. During this period, Mr. Burd's mental health deteriorated. On the administrative segregation unit, Mr. Burd "would crawl underneath his sleeping area, the metal bunk, and cover up with sheets and blankets and hide, and he would at times scream all night long." (10/20/06 Deposition of Chad Blair, p. 11:18-24). CP 343-350.

On November 6, 2003, Mr. Burd was finally placed in an appropriate mental health unit. (DOC Offender Chronos at 11/16/03). CP 326. He was transferred to the "Special Offender Unit" (SOU) of the Monroe Correctional Complex. Id. The SOU is a unit specifically designed for inmates who have mental health issues. On intake, DOC psychologists diagnosed Mr. Burd with "psychosis NOS, mood disorder and mental retardation." (Initial Psychiatric Evaluation, 11/10/03). CP 352-355. He was also medicated with the drug (olanzapine) Zyprexa, an anti-psychotic medication. Id.

According to the Department of Corrections, the SOU is run more like a mental health facility than a prison. At the SOU, medical, mental health and custody staff work together to provide around-the-clock services. The SOU offers initial diagnostic evaluations, individual and

group treatment, medication management, and psycho-education. See <http://www.doc.wa.gov/facilities/mccdescription.htm> (Last accessed December 4, 2006.)

The SOU staff developed and implemented an individualized treatment plan for Mr. Burd. His response to the special attention was remarkable. His behavior finally changed for the better. For the rest of his prison sentence – almost three years – Mr. Burd did not receive a single other infraction.

Mr. Burd was to be released from prison custody in July of 2006. DOC counselor J. Tone, “risk management specialist” Dana Osborn, and “community corrections officers” Theo Lewis and Gary Rink were all involved in preparing for Mr. Burd’s release. (Offender Chronos, 9/8/05-7/20/06, at 12/15/05). CP 356-367. The staff asked that Mr. Burd be screened for the “Dangerous Mentally Ill Offender” (DMIO) program. Id. On December 15, 2005, the “risk management specialist” Dana Osborn noted that the “team is waiting for the DMIO committee decision on 12/19/05 before starting release planning... if made a DMIO [Seattle Mental Health] will need 90 day pre-release planning.” Id.

The “Dangerous Mentally Ill Offender” (DMIO) program was established in 1999 by legislative act. RCW 72.09.370. The Washington State Legislature entrusted the DOC with the responsibility of identifying

and assisting those offenders who qualify as “dangerous” and “mentally ill” under the statute. This law commands that the secretary of the Department of Corrections “shall identify offenders in confinement or partial confinement who: (a) Are reasonably believed to be dangerous to themselves or others; and (b) have a mental disorder.” RCW 72.09.370. Once the DOC identifies an offender as a DMIO, a multidisciplinary team “shall develop a plan, as determined necessary by the team, for delivery of treatment and support services to the offender upon release.” RCW 72.09.370.

An individual who is identified as a “Dangerous Mentally Ill Offender” will receive substantial financial assistance upon their return to the community. This allocation of resources is designed to ease a mentally ill offender’s re-integration into society. The monies directly serve to provide the released offender with stable housing and treatment. All offenders designated as DMIOs receive up to \$10,000 in annual support for five years, even after their community custody term expires. (Mentally Ill Offender Community Transition Program, Report to Legislature, December 2001, at p. 7). CP 368-398 and “Declaration of Thomas E. Saltrup.” CP 425-427.

The DMIO program has been successful in its public protection goal. A recent study by the Washington State Institute for Public Policy

(WSIPP) found that the DMIO program measurably lowers the recidivism rates of its participants. “Washington’s Dangerous Mentally Ill Offender Law: Was Community Safety Increased?” Lovell, D., Gagliardi, G., Phipps, P. Washington State Institute for Public Policy. March 2005. On the whole, DMIO participants re-offended at statistically significantly lower rates than a comparison group. Id. Also, the DMIO participants were connected more quickly to community mental health treatment and received more intensive services. Id.

DOC “Offender Chrono Notes” indicate that the DOC terminated review of Mr. Burd’s DMIO eligibility because the King County Prosecuting Attorney’s office was considering referring Mr. Burd for a possible filing under the “Sexually Violent Predator” Act. RCW 71.09. (DOC Offender Chrono Reports, at 1/25/06). CP 356-367. From that point forward, the DOC Chronos are silent regarding any further planning for Mr. Burd’s release or how DMIO resources could assist in Mr. Burd’s community housing and treatment.

However, neither the statute nor DOC policy in place at the time allowed DOC to avoid its responsibility of identifying a DMIO and planning for his release, even when there is a likely SVP referral.

DMIOs may be referred for Civil Commitment per RCW 71.05 or RCW 71.09. The DMIO transition planning will still occur as a contingency plan in case civil commitment process is not

completed.

(Original DOC Policy 350.520(IX)(A)). CP 400-405.

In their response to appellant Burd's motion for summary judgment, DOC submitted a declaration by Dr. Thomas E. Saltrup, the DOC Director of Behavioral Health Services for DOC and the former DMIO Program Manager. (Declaration of Thomas E. Saltrup) CP 425-427. Dr. Saltrup acknowledges that the DMIO program was established because "legislation required that the Department (DOC) identify individuals committed to DOC who are mentally ill and present a high risk to either themselves or public safety." CP 425. Dr. Saltrup goes on to make it clear that the DOC refusal to consider offenders referred for RCW 71.09 evaluations was a DOC policy choice and not what the statute required. "A policy decision was made that offenders who had been referred for RCW 71.09 evaluations would not be reviewed by the [DMIO] Committee." CP 426-427. Because this "policy decision" actually contradicted the original DOC Policy 350.520 (CP 400-405) DOC revised the policy in response to Mr. Burd's lawsuit on July 3, 2007. (DOC Policy 630.590) CP 429-438,

On July 20, 2006, the King County Prosecuting Attorney's Office filed an SVP petition against Mr. Burd. He was then taken from DOC

custody and placed into the DSHS “Special Commitment Center” on McNeil Island.

At Mr. Burd’s upcoming SVP trial, the State will argue that he must be civilly committed to a secure facility, in part because his current plans for life in the community are insufficient to manage the danger he poses as a mentally ill offender. Issues of where Mr. Burd will be housed and how his mental illness will be managed in the community will be central to the argument over whether he meets the statutory definition of a “sexually violent predator” under RCW 71.09. The availability of DMIO services to Mr. Burd would likely mitigate how jurors and witnesses (including the State’s forensic expert) perceive the recidivism risk that Mr. Burd poses upon his release from custody.

C. SUMMARY OF ARGUMENT

The DOC refusal to consider whether Mr. Burd qualifies for the Dangerous Mentally Ill Offender (DMIO) services violates the clear command of RCW 72.09.370. The plain language of the statute compels the DOC to identify offenders who are eligible for DMIO services and prepare for their return to the community. In the simplest of words, RCW 72.09.370 orders that the DOC “**shall identify**” DMIO-eligible offenders and “**shall develop**” release plans for them. RCW 72.09.370. (Emphasis added.) The appellant seeks to enforce this legal duty.

DOC interrupted their DMIO assessment of Mr. Burd because he had been referred for possible SVP commitment. But, because there is no SVP exception to the DMIO statute, the DOC “policy decision” to carve out such an exception was and continues to be unlawful. The DOC policy – and actions taken with regard to Mr. Burd – contravenes Legislative intent and needlessly exposes the public to unnecessary risk.

Because this Court can provide effective relief, this action is timely and justiciable. A writ of mandamus ordering DOC to resume and complete the RCW 72.09.370 DMIO assessment of Mr. Burd must issue.

D. ARGUMENT

1. RCW 72.09.370 Commands That DOC Identify Offenders Who Are Eligible For DMIO Services And Prepare For Their Release Into The Community.

RCW 72.09.370 orders that the DOC “**shall identify**” DMIO-eligible offenders and “**shall develop**” release plans for them. RCW 72.09.370. (Emphasis added.) The release plans are to include “the delivery of treatment and support services to the offender upon release.” RCW 72.09.370(2). “Presumptively, the use of the word ‘shall’ in a statute is imperative and operates to create a duty rather than to confer discretion.” Clark Cy. Sheriff v. Department of Social & Health Servs., 95 Wn.2d 445, 450, 626 P.2d 6 (1981), *citing* State Liquor Control Bd. v. State Personnel Bd., 88 Wn.2d 368, 561 P.2d 195 (1977).

RCW 72.09.370(3) also requires DOC to determine whether an evaluation for possible commitment under RCW 71.05 is needed. RCW 72.09.370 does not speak to any possible commitment under RCW 71.09, the “Sexually Violent Predator” Act.

In this case, DOC failed to fulfill the requirements of the statute. DOC initially identified Mr. Burd as potentially eligible for DMIO services. However, once DOC learned that the King County Prosecutor’s Office announced its intent to file an SVP petition, it stopped the process and failed to complete the initial assessment to determine Mr. Burd’s

eligibility and conduct appropriate release planning. In other words, DOC chose to follow its “policy decision” (See Declaration of Thomas E. Saltrup, CP 425-427) and not the law.

2. The DMIO Statute Does Not Allow DOC to Interrupt a DMIO Assessment For Offenders Referred for Possible SVP Commitment.

RCW 72.09.370 does not allow DOC to abandon DMIO planning even where the State intends to file an SVP petition. The statute commands DOC to identify eligible offenders and assemble a team of professionals to prepare for the offender’s release. *See* RCW 72.09.370(2) (DOC “shall develop a plan ...”). There is simply no “SVP exception” to the legislative command in the statute and it is not the DOC’s place to write one in.

In fact, the written DOC policy in place when Mr. Burd was in their custody explicitly required DMIO planning to continue “as a contingency plan in case civil commitment process is not completed.” CP 400-404. That written policy acknowledged that some offenders who are initially detained for civil commitment are released into the community without ever being found to meet the SVP commitment criteria. This can occur if the SVP trial court does not find probable cause to detain under RCW 71.09.040(4) or, if the SVP forensic psychologist learns facts that

cause him or her to recommend that an SVP petition be dismissed even before it ever goes to trial.¹

3. Mr. Burd Satisfies the DMIO Criteria and is Eligible for DMIO Resources.

RCW 72.09.370(1) requires DOC to identify eligible offenders who are “reasonably believed to be dangerous to themselves or others; and [] have a mental disorder.”

DOC policy 350.520 provided guidance for DOC to determine whether an offender’s eligibility for the “mental disorder” prong, including *any* of the following criteria:

1. The offender has an Axis I Major Mental Disorder and Seriously Mentally Ill;
2. The offender has had past mental health related/psychiatric hospitalizations;
3. The offender is currently residing in, or has previously resided in, a Mental Health Unit;
4. The offender has a history of community mental health

services, is currently on psychotropic medications, or has been in the past. DOC Policy 350.520(II)(A). CP 400-404 These elements for meeting the major mental disorder criteria were not changed with the enactment of the new DOC DMIO Policy 630.590. CP 425-438.

DOC concedes that Mr. Burd meets most of these criteria. He was diagnosed by DOC as suffering from a major mental illness, he resided in a

¹ Perhaps in response to Mr. Burd’s lawsuit, DOC revised the policy. CP 425-438. Their policy cannot trump the statute and the revision does not cure the illegality of their actions.

mental health unit for the last three years he resided in a DOC institution, and he has been on psychotropic medications for years. He is plainly mentally disordered as required by the statute and policy.

It is also unrefuted that Mr. Burd has been deemed “dangerous” by DOC. He was classified as a Level III sex offender and was deemed dangerous enough for an SVP petition to be filed. He has a history of major infractions, including assaulting prison officers, and has a history of serious violent offenses.

4. A Writ of Mandamus Is The Proper Remedy

This Court has authority to issue a writ of mandamus to compel state officers to take an action required by law. RAP 16.2(a); Whitney v. Buckner, 107 Wn.2d 861, 864-865, 734 P.2d 485 (1987). “Mandamus is an appropriate action to compel a state official to comply with law when the claim is clear and there is a duty to act.” In re the Personal Restraint Petition of Dyer, 143 Wn.2d 384, 398, 20 P.3d 907 (2001), citing Walker v. Munro, 124 Wn.2d 402, 408, 879 P.2d 920 (1994). This court must compel DOC to act in accordance with RCW 72.09.370.

Courts possess inherent power to protect individual citizens from arbitrary actions that occur when governing statutes and policies are not followed, even though a constitutional right is not violated by the arbitrary actions. Williams v. Seattle Sch. Dist. No. 1, 97 Wn.2d 215, 222, 643 P.2d 426 (1982). DOC’s “compliance with requirements of a statute

affecting [an inmate's] release is a protected liberty interest.” In re Dutcher, 114 Wn.App. 744, 758 (2002). Mr. Burd has a legitimate expectation of freedom from arbitrary and capricious actions by the DOC because he has a fundamental right to be treated consistent with the law, including RCW 72.09.370.

DOC violated Mr. Burd's rights by failing to complete the DMIO assessment prior to his release. DOC acted unlawfully by making a “policy decision” to interrupt the DMIO assessment process because of the pending RCW 71.09 SVP commitment referral. Had the DMIO assessment been completed, DOC would have developed a release plan for Mr. Burd that would rely on DMIO funding for transitional services.

Washington State courts have already taken the DOC to task for adopting policies that contradict their statutory legal obligations. Specifically, an expected SVP civil commitment decision – the same as what Mr. Burd faced – has been held not to relieve DOC of its obligations to engage in statutorily required release planning. See e.g. Personal Restraint of Liptrap, 127 Wn.App. 463 (2005).

In Liptrap, three sex offenders incarcerated in DOC sought a writ of mandamus asking the Court to order DOC to approve their release plans without delay. DOC had adopted a policy of refusing to consider a plan for transferring an inmate into community custody until a forensic evaluation for SVP commitment was completed. The Court held that DOC had violated the statute regarding earned early release credits because the legislature had not authorized DOC to delay consideration of

release plans while awaiting a forensic evaluation. *Id.* at 474-76. DOC has an obligation to take action on an eligible plan to transfer to community custody independent of the decision to refer for civil commitment. *Id.* The Court granted the inmates' writ, ordering DOC to comply with the statute and act on proposed release plans in a timely manner. *Id.* at 476. Likewise, in this case, DOC was never authorized to interrupt the DMIO assessment while awaiting a prosecutorial decision about an SVP RCW 71.09 filing. This Court should grant Mr. Burd's request for a writ of mandamus and order DOC to complete the DMIO assessment as called for in RCW 72.09.370.

In addition, the DOC decision to withhold DMIO planning and resources from Mr. Burd affects his ability to defend himself at the SVP trial where his risk in the community will be at issue. At an SVP trial, the jury must consider, in part, whether the detainee is "likely to commit future acts of predatory sexual violence unless confined in a secure facility." RCW 71.09.020(7). To make this determination, the jury can consider any conditions imposed by the DOC pursuant to Mr. Burd's two years of community supervision. *See* WPI 365.14. The jury would also consider whatever resources might be available to Mr. Burd if he is released to that DOC supervision. *Id.* Resources such as housing assistance and/or mental health services made available for Mr. Burd upon his release could impact a juror's determination of Mr. Burd's risk. The DMIO funding – if Mr. Burd's assessment shows that he is eligible – could similarly persuade the state forensic psychologist that Mr. Burd is

less likely than not to reoffend. Because DOC did not comply with the DMIO statute and policy, Mr. Burd's ability to defend himself at trial is jeopardized.

Because DOC did not comply with the DMIO statute, no DMIO release plan was developed for Mr. Burd, even though he likely qualifies for such a program. In the context of the SVP process, this creates an incomplete and ill-informed picture of Mr. Burd's risk.

5. By Ignoring Its Clear Duty Under The Law DOC Is Exposing The Public To Greater Risk.

The DOC "policy decision" to terminate DMIO assessments and release planning for offenders referred for possible RCW 71.09 commitment jeopardizes community safety. If Mr. Burd prevails at the SVP trial, he would be immediately released with no transitional plans or resources because DOC has failed to fulfill its obligations under the statute and its own policy.

In Liptrap, the Court recognized that strict compliance with statutory obligations toward release planning for inmates is necessary, stating:

[A] practice of institutionalized delay, though it may appear "superficially sensible and administratively efficient," is actually "at odds with both public safety and the purpose of earned early release." Id. at 475, quoting Dutcher, 114 Wn.App. 755 (2002). In Liptrap, the Court acknowledged that early release credits are designed to promote

public safety by assisting offenders with the transition from prison to the community. Id. By delaying the release planning for offenders referred for evaluation, DOC reduced the amount of time the offender could be supervised if an SVP petition were not filed.

As in Liptrap and Dutcher, this Court must order DOC to perform its obligations under the statute and DOC policy. Otherwise, community safety will be jeopardized if Mr. Burd is released from the SVP petition without DMIO services.

The recent passage of “Engrossed Substitute Senate Bill 6157” of the 60th Legislature 2007 Regular Session gives further evidence of the Washington State Legislature’s commitment to reducing recidivism and protecting the community through coordinated offender reentry planning. The introduction to this bill reads: “The people of the State of Washington expect to live in safe communities in which the threat of crime is minimized.” “Engrossed Substitute Senate Bill 6157” of the 60th Legislature 2007 Regular Session, Sec. 1.

In this law, which became effective on July 22, 2007, the Legislature emphasized its commitment to cost-efficient, evidence-based means of reducing recidivism. Given that the DMIO program has been shown to be effective in reducing recidivism, the DOC unwillingness to

assess whether Mr. Burd qualifies for it, flies in the face of legislative intent to minimize the risk of offenders' reentry.

6. This Case Is Justiciable And The Writ Must Issue.

A writ of mandamus is the only recourse available to Mr. Burd to compel DOC to fulfill its obligations under the statute and its own policy. He cannot ask the trial court in the SVP case to force DOC to comply with the statute and policy because DOC is not a party to the SVP case.

DOC succeeded in persuading the trial court that Mr. Burd should not get relief because his case is somehow moot and no longer justiciable. However, if a court can provide effective relief, a case is not moot. State v. Turner, et al., 98 Wn.2d 731, 733; 658 P.2d 658 (1983); Pentagram Corp. v. Seattle, 28 Wn. App. 219, 223; 622 P.2d 892 (1981). In Turner, the State Supreme Court indicated that it could "supply effective relief by relieving [juveniles adjudicated as delinquents] of their liabilities and cleansing their records." Turner, at 733. While the Turner court could "no longer prevent appellants' incarceration, that incarceration probably has collateral consequences of sufficient moment to make its validity a matter of more than academic interest." *Id.* The lawsuit was not moot and the action warranted a remedy.

Likewise, the dispute between the DOC and Petitioner is far from academic and this Court has the power to order simple, practical, and

effective relief.² The DOC can carry out the DMIO assessment based on Mr. Burd's institutional records, and if needed, interview Mr. Burd in person at the DSHS Special Commitment Center which is also located on McNeil Island.

E. CONCLUSION

The DOC "policy decision" cannot trump the plain language of the statute. RCW 72.09.370 sets out a clear legal duty, which the DOC willfully ignored.

Respondent respectfully requests this Court reverse the trial court's summary judgment ruling and issue a writ of mandamus ordering DOC to resume and complete the DMIO assessment.

Respectfully Submitted, November 20, 2008



Mick Woynarowski, WSBA # 32801
Attorney for Appellant Everette Burd

² See also: Sequim v. Malkasian, 157 Wn.2d 251, 258-259; 138 P.3d 943 (2006); Grays Harbor Paper Co. v. Grays Harbor County, 74 Wn.2d 70, 73, 442 P.2d 967 (1968); Pentagram Corp. v. City of Seattle, 28 Wn. App. 219, 223, 622 P.2d 892 (1981); 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.3, at 261 (2d ed. 1984) ("The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief."); Church of Scientology of Cal. v. United States, 506 U.S. 9, 13, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992) (The availability remedy need not be fully satisfactory to avoid mootness).

Appendix A – Certificate of Finality From Supreme Court

FILED
SUPREME COURT
STATE OF WASHINGTON
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THE SUPREME COURT OF WASHINGTON

EVERETT BURD,

Petitioner,

v.

HAROLD CLARKE,

Respondent.

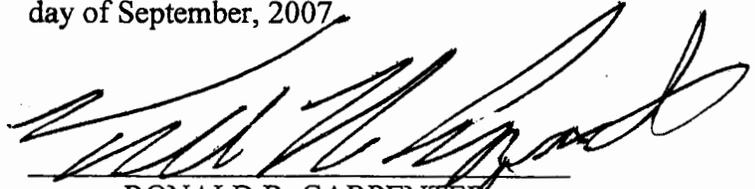
CERTIFICATE OF FINALITY

NO. 79741-2

This is to certify that the order of the Supreme Court of the State of Washington, filed on September 6, 2007, is final.



I have affixed the seal of the Supreme Court of the State of Washington and filed this Certificate of Finality this 14th day of September, 2007.



RONALD R. CARPENTER
Clerk of the Supreme Court
State of Washington

cc: Dennis P. Carroll
Mick Woynarowski
Amanda M. Migchelbrink
Reporter of Decisions

Plummer County Sup. Court
Doug Bail
(360) 786-5426



Appendix B – Trial Court Summary Judgment Order

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FILED
JUN 09 2008
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

RECEIVED
JUN 10 2008
The Defender Assoc - SOC

**STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT**

EVERETTE BURD,
Petitioner,
v.
HAROLD CLARKE,
Respondent.

NO. 07-2-02131-8
ORDER ON
PETITIONER'S MOTION
FOR SUMMARY
JUDGMENT AND
RESPONDENT'S CROSS-
MOTION FOR
SUMMARY JUDGMENT

Petitioner, having filed a Motion for Summary Judgment and Respondent, having filed a Cross Motion for Summary Judgment, and the Court being fully advised and having examined the records and files herein, does hereby find and ORDER:

1. Petitioner's Motion for Summary Judgment is DENIED;
2. Respondent's Cross Motion for Summary Judgment is GRANTED.
3. This ruling terminates this action. The Petitioner's Original Action Against a State Officer is DISMISSED;

//
//
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ORDER ON PETITIONER'S MOTION FOR
SUMMARY JUDGMENT AND
RESPONDENT'S CROSS-MOTION FOR
SUMMARY JUDGMENT
NO. 07-2-02131-8

ATTORNEY GENERAL OF WASHINGTON
Corrections Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

1 4. The Clerk is directed to send uncertified copies of this Order to
2 both counsel.

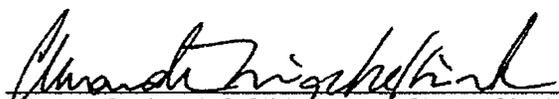
3 DATED this 9th day of June, 2008.

4
5 Gary R. Tabor

6 GARY R. TABOR
7 Superior Court Judge

8 Submitted by:

9 ROBERT M. MCKENNA
10 Attorney General

11 
12 AMANDA MIGCHELBRINK, WSBA #34223
13 Assistant Attorney General
14 Corrections Division
15 P.O. Box 40116
16 Olympia, WA 98504-0116
17 (360) 586-1445

18 Approved as to form, signature waived:

19 /s/ Mick Woynarowski
20 MICK WOYNAROWSKI, WSBA #32801
21 Counsel for Petitioner Burd
22 The Defender Association
23 810 Third Avenue, Suite 800
24 Seattle, WA 98102
25 (206) 447-3900 ext. 614

CERTIFICATE OF SERVICE

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I certify that I served a copy of the [PROPOSED] ORDER ON PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by _____

TO:
MICK WOYNAROWSKI
THE DEFENDER ASSOCIATION
810 THIRD AVENUE, SUITE 800
SEATTLE, WA 98104

EXECUTED this 30th day of May, 2008 at Olympia, Washington.



KAREN THOMPSON

FILED
COURT OF APPEALS
DIVISION II
08 NOV 24 AM 9:53
STATE OF WASHINGTON
BY Cm
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

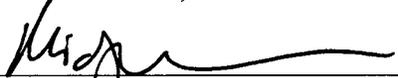
Everette Burd,)	No. 37993-7-II
Appellant,)	
v.)	PROOF OF SERVICE
Harold Clarke,)	
Respondent)	
_____)	

I certify that on November 20, 2008, a true and correct copy of Appellant's Opening Brief and Proof of Service was mailed by USPS to the Respondent's attorney:

Amanda Marie Migchelbrink
Office of the Attorney General
PO Box 40116
Olympia, WA 98504-0001

A courtesy copy was also sent by electronic mail.

DATED this 20th of November, 2008



Mick Woznarowski
Staff Attorney
The Defender Association
810 Third Avenue, 8th Floor
Seattle, WA 98104