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71904-1

NO. 71904-1-I

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

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HENRY GRISBY III,

Respondent,

v.

ROBERT HERZOG, et al.,

Appellants.

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**OPENING BRIEF OF APPELLANTS**

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## I. INTRODUCTION

Henry Grisby was serving a community custody term when he allegedly violated the conditions of his sentence. The Department of Corrections (DOC) planned to conduct a hearing on the alleged violation. Just prior to the hearing, Grisby petitioned for mandamus and prohibition relief in the Snohomish County Superior Court. Grisby asked the superior court to order DOC either to appoint counsel, or to allow his pro bono retained counsel to represent him at the hearing. The court granted the requested relief, issuing writs of mandamus and prohibition.

The writs provided two remedies: one for Grisby, and one for future offenders. First, the superior court ordered DOC to determine whether Grisby was entitled to appointed counsel for his scheduled community custody violation hearing. If DOC determined Grisby was not entitled to appointed counsel, the court ordered DOC to allow Grisby's pro bono retained counsel to represent him at the hearing. The court expressly directed DOC not to conduct a violation hearing for Grisby without representation by counsel. Second, the court ordered that in all future "similarly situated" cases where an offender requests counsel, DOC must conduct a case-by-case analysis to determine whether the offender should be appointed counsel for the violation hearing. The superior court made several errors in granting this relief.

First, the superior court disregarded this Court's binding precedent that there is no right to counsel in a community custody violation hearing. Since there is no right to counsel, DOC had no clear mandatory duty that could be compelled by mandamus, and DOC did not act outside its jurisdiction, as is required for a writ of prohibition. Then, by ordering that DOC must allow *retained* counsel to represent Grisby even if the DOC found no need for *appointed* counsel, the court exceeded the proper remedy allowed for either writ. Finally, the superior court exceeded its authority by ordering that, in future cases unrelated to Grisby, DOC must determine whether offenders in "similarly situated" cases are entitled to appointed counsel for a violation hearing.

Moreover, even though mandamus and prohibition are not available remedies to offenders in Grisby's situation, such offenders have an appropriate avenue to resolve the question of the right to an attorney: a personal restraint petition.

Additionally, the DOC's existing administrative hearing procedure is ultimately better for both the DOC *and* offenders, compared to what the superior court ordered in this case. In 2013, the DOC conducted over 13,000 community custody violation hearings. In such hearings, the decision-maker was not an attorney, and the DOC was not represented by counsel. This system is the result of a legislative shift

intended to provide a more efficient and informal process compared to the trial-like process that it replaced. The removal of trial-like procedures and attorneys from hearings reduced the time that alleged violators sat in jail awaiting their hearings. Due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.

Finally, the circumstances that led up to the decision in *In Re McNeal*, 99 Wn. App. 617, 994 P.2d 890 (2000) still exist today. Community custody still primarily furthers the punitive purposes of deterrence and protection. And therefore the decision to impose jail time still is based primarily on factual determinations about whether the offender willfully violated the conditions, not whether he is rehabilitated. As a result, attorneys still are not needed to argue on the extent of and future potential for the offender's rehabilitation.

## II. ASSIGNMENTS OF ERROR

1. The superior court erred in granting writs of mandamus and prohibition ordering DOC to determine whether Grisby was entitled to appointed counsel, and to allow pro bono retained counsel to represent Grisby at the violation hearing, when DOC has no clear mandatory duty to appoint or allow counsel in such a hearing. CP 4-5 (§§ I, II, III).

2. The superior court exceeded the proper remedy for mandamus and prohibition relief by exercising DOC's discretion and ordering that DOC must allow counsel to represent Grisby in a hearing. CP 5 (§ III).

3. The court erred by ordering the DOC to determine in future cases whether an offender is entitled to appointed counsel. CP 5 (§ V.).

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The writ of mandamus is available only to compel an agency to perform a clear, mandatory duty, and the writ of prohibition is available only to prevent an agency from acting outside its jurisdiction. Did the superior court err in granting mandamus and prohibition relief where this Court has held an offender has no right to counsel in a community custody violation hearing?

2. The writs of mandamus and prohibition cannot direct how an agency exercises its discretion. Assuming that the superior court could direct DOC to consider whether Grisby should have counsel for the hearing, did the court then err by ordering that DOC must allow counsel to represent Grisby?

3. Where the writ of mandamus lies only to compel an existing duty, did the superior court err in granting relief directed to future,

not yet existing cases involving offenders who are not a party to this present case?

4. Did Grisby lack standing to assert the legal rights of, and obtain relief for, other offenders in future community custody violation hearings?

#### IV. STATEMENT OF THE CASE

##### A. **Grisby Was Subject To A Violation Hearing After Allegedly Violating A Condition Of Community Custody**

Grisby was sentenced to a prison-based Drug Offender Sentencing Alternative (DOSA) sentence in 2009. CP 21. Under the sentencing alternative, Grisby served half of his sentence in prison, and then he must serve the second half on community custody. RCW 9.94A.662(1)(a) and (b). Grisby is supervised by DOC while on community custody, and he must comply with conditions of supervision imposed by the court and DOC. RCW 9.94A.703; RCW 9.94A.704(1). Grisby began serving the community custody term of his sentence in January 2013. CP 21 and 32.

When an offender allegedly violates a condition of community custody, DOC conducts an administrative hearing to determine whether the violation occurred and, if so, to impose the appropriate sanction.

RCW 9.94A.737(4).<sup>1</sup> The DOC conducted over 13,000 community custody violation hearings in 2013. CP 206.

The decision to impose jail time at these hearings is based primarily on factual determinations about (1) whether the offender willfully violated the conditions; (2) whether he has had multiple prior violation processes, indicating poor “adjustment” to supervision and a pattern of violating sentence conditions; and (3) whether that poor adjustment is a risk to community safety. If DOC finds that the offender has willfully violated a condition of community custody, DOC may impose a range of sanctions up to returning the offender to prison “to serve the remaining balance of the original sentence.” RCW 9.94A.662(3).

Prior to the hearing, DOC provides the offender with written notice of the violation and his or her rights in relation to the hearing, a summary of the facts supporting the allegations, and all supporting documentary evidence that will be introduced at the hearing. RCW 9.94A.737(6)(a); Washington Administrative Code (WAC) 137-104-040(3). As to the

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<sup>1</sup> RCW 9.94A.737(6) directs DOC to adopt rules for the violation hearings. The rules are set out in chapter 137-104 Washington Administrative Code (WAC) (non-DOSA hearings), chapter 137-24 WAC (DOSA hearings), DOC Policy 460.130 (Violations, Hearings, and Appeals), and DOC Policy 670.655 (DOSA). The two policies are available at <http://www.doc.wa.gov/policies/>.

offender's rights, the notice advises the offender of the procedural rights at the hearing, the right to appeal the hearing officer's decision to DOC's Appeals Panel, and the right to file a personal restraint petition. RCW 9.94A.737. If the offender is confined, the hearing must be held within five business days after the offender receives written notice of the violation. RCW 9.94A.737(6)(b). But if the hearing officer becomes aware that the offender may be mentally incompetent to stand for the hearing, the hearing officer may continue the hearing so that the offender can be evaluated.<sup>2</sup>

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<sup>2</sup> See DOC Policy 460.130, at 14 (available at <http://www.doc.wa.gov/policies/>). If an evaluation shows the offender needs mental health services, DOC can arrange for treatment. See <http://www.doc.wa.gov/family/offenderlife/docs/OffenderHealthPlan.pdf>, at 27. This is so whether the offender is still serving his or her prison sentence or is in jail awaiting a violation hearing. *Id.*, at 9 (“The [Offender Health Plan] will apply to health care delivered to offenders for whom DOC is responsible but who are housed in jails . . .”). Where serious mental health problems exist, however, the DOC likely will already know about it before the offender even begins community custody and will put the offender in a special needs unit (SPU) to be supervised by specialist CCOs. This is because during an offender's prison term, if he or she has special needs relating to mental health, the Offender Re-Entry Community Safety (ORCS) Committee will evaluate the offender prior to release and may determine that the offender should be placed in the ORCS program. The ORCS program has wrap-around services to assist special-needs offenders in transitioning into the community, including mental health treatment and counseling. A description of the ORCS program can be found at DOC Policy 630.590, Offender Re-Entry Community Safety Program Review, available at <http://www.doc.wa.gov/policies/>.

The offender has the right to be present at the hearing, to testify or remain silent, to call witnesses and present evidence, and to question witnesses who testify. RCW 9.94A.737(6)(c). If the offender has a language or communications barrier, the hearing officer may appoint someone to assist the offender. RCW 9.94A.737(6)(c); WAC 137-24-040(7); WAC 137-104-060(7). Under the rules established pursuant to DOC's statutory authority, there is no right to counsel at the hearing. WAC 137-24-040(7); WAC 137-104-060(7) ("However, no other person may provide representation in presenting the case. There is no right to an attorney or counsel.")<sup>3</sup> Likewise, the statute that governs the general right to counsel does not list community custody violation hearings as among those proceedings subject to the right. RCW 10.73.150; *also, compare* RCW 9.95.220 (governing probation revocations and not mentioning any right to counsel) *with* CrR 7.6(b) (requiring counsel at probation revocation hearings). Additionally, neither the DOC officer presenting the allegations at the violation hearing, nor the hearing officer, is an attorney. No party is represented by counsel.

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<sup>3</sup> This Court has observed that DOC's hearing process is more protective of offenders' rights than the previous judicial procedure because DOC's hearings require a determination of probable cause within three working days of the offender's arrest. *State v. Ziegenfuss*, 118 Wn. App. 110, 115-16, 74 P.3d 1205 (2003) (citing former RCW 9.94A.195 (1984), recodified as RCW 9.94A.631).

After the hearing, DOC provides the offender with a written summary detailing the evidence relied upon, the findings, and the reasons for the particular sanction imposed by DOC. RCW 9.94A.737(6)(c)(vi); WAC 137-104-060(11). The offender then has two levels of appeal available. First, the offender may appeal the hearing officer's decision within seven days to the DOC Appeals Panel. RCW 9.94A.737(6)(d). The offender is free to retain counsel to undertake this appeal. But the members of that panel are not attorneys, and there is no oral argument. Rather, the panel conducts an administrative review. Second, if the DOC Appeals Panel upholds the hearing officer's decision, an offender (or his or her retained counsel) may write to the DOC Hearings and Violations Administrator and ask him or her to vacate or modify the sanction.<sup>4</sup> The offender also may file a personal restraint petition, through counsel or pro se, challenging the DOC's final decision.

The Legislature created this administrative hearing system, without attorneys and judges, to bring efficiency to the violation process. Prior to the enactment of the Offender Accountability Act, violation hearings were before a judge, with both parties represented by counsel,<sup>5</sup> and this resulted

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<sup>4</sup> DOC Policy 460.130, at 13.

<sup>5</sup> See Washington State Institute for Public Policy, "*What Works*" in *Community Supervision, Interim Report*, December 2011, at 3 (available at [http://www.wsipp.wa.gov/ReportFile/1094/Wsipp\\_What-](http://www.wsipp.wa.gov/ReportFile/1094/Wsipp_What-)

in lengthy delays and concomitant lengthy pre-hearing jail time for offenders. The Legislature created the violation hearing process to avoid such delay and pre-hearing confinement.

In December 2013, Grisby allegedly violated his conditions of community custody by using a device to alter a urine test required under his sentence. CP 47-49, at entries dated 12/17/2013; CP 55. DOC provided Grisby with notice of the alleged violation on January 7, 2014. CP 64-65. DOC also provided Grisby with the documentation it would use at the upcoming violation hearing. CP 60-83.

At the hearing on January 8, 2013, the hearing officer found Grisby guilty. CP 86 and 88. Grisby appealed to the DOC's Appeals Panel. CP 90-138. The appeal was 48 pages long, including exhibits. *Id.* The Appeals Panel granted Grisby's appeal, ruling that the hearing officer's ex parte communication with a witness violated Grisby's right to cross-examine the witness. *Id.* The Appeals Panel remanded the matter for a second violation hearing. *Id.*

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("Prior to implementation of the OAA, the superior court was responsible for oversight of the sanctioning process when offenders violated conditions of supervision. Under the OAA, DOC has jurisdiction over imposing conditions, responding to violations, and sanctioning offenders.").

Grisby submitted a written argument for the second violation hearing. CP 143-157. After the second hearing, the hearing officer found Grisby guilty. CP 163, 165, 167-175. Grisby appealed, contending that he was unable to call a witness at the hearing, and that he was entitled to counsel at the hearing. CP 177-180, 183. The Appeals Panel denied Grisby's appeal. CP 183. DOC informed Grisby that he could appeal to the Hearings and Violations Administrator. CP 186. Grisby and his counsel both filed letters of appeal to the Hearings and Violations Administrator seeking a third hearing. CP 188-190 and 192-196. The Hearings and Violations Administrator granted the appeal, and remanded for a third hearing, finding Grisby was denied the right to call a witness at the second hearing. CP 198. Grisby's attorney informed DOC that they planned to represent Grisby at the third hearing, scheduled for April 21, 2014. CP 200; RP at 5. DOC responded, stating that there was no right for an attorney to represent an offender at a violation hearing. CP 202-203.

**B. Grisby Filed A Petition In Superior Court To Compel DOC To Allow Counsel To Represent Him At The Violation Hearing**

On April 14, 2014, Grisby filed a Petition for Writs of Habeas Corpus, Mandamus, and Prohibition in the Snohomish County Superior Court. CP 210-228. Grisby sought an order compelling DOC to allow

counsel to represent him at the third violation hearing. CP 210-228. DOC filed a response. CP 6-206. The response included copies of the electronic audio recordings of Grisby's first and second violation hearings. CP 1-3. The electronic recordings showed Grisby was capable of representing himself during the violation hearings. CP 1-3; RP 15.

The superior court held a hearing on Grisby's petition on April 17, 2014. RP 1. The court noted that it received the recordings of the prior hearings, but it stated that it would not listen to those recordings in evaluating whether Grisby should be allowed counsel at the third violation hearing. RP 14-16. After argument by counsel, the superior court granted Grisby's petition for writs of prohibition and mandamus. CP 4-5. The court ordered DOC to determine under *State v. Ziegenfuss*, 118 Wn. App. 110, 74 P.3d 1205 (2003), whether DOC should appoint counsel to represent Grisby in the third violation hearing. CP 4-5. The court then ordered that, if DOC determines in the exercise of its discretion that Grisby was not entitled to appointed counsel, DOC must permit pro bono retained counsel to represent Grisby at the hearing. CP 5. The court ordered that DOC could not conduct a violation hearing without permitting counsel to represent Grisby. CP 5. Finally, the court ordered that the DOC should conduct a case-by-case determination on the need for

appointed counsel in any future “similarly situated” case when an offender requests counsel for a violation hearing. CP 5.

DOC now appeals the superior court’s order.

## V. STANDARD OF REVIEW

In reviewing the grant of a writ of mandamus, the Court reviews *de novo* the issue of whether a mandatory duty exists to support the writ. *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 649, 310 P.3d 804, 812 (2013). This Court also reviews *de novo* the grant of a writ of prohibition. *Smith v. Skagit County*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969); *see also Torrance v. King County*, 136 Wn.2d 783, 787, 966 P.2d 891 (1998) (court reviews *de novo* the grant or denial of a constitutional writ), *overruled on other grounds by Wenatchee Sportsmen Assoc. v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000).

## VI. ARGUMENT

### A. **The Court Erred In Granting A Writ Of Mandamus Because Grisby Did Not Prove DOC Had An Existing Duty To Appoint Counsel Or To Allow Retained Counsel To Represent Grisby**

The superior court ordered DOC to determine whether Grisby should be appointed counsel, and if DOC did not appoint counsel, to allow pro bono retained counsel to represent Grisby. The superior court erred in granting mandamus relief because DOC had no clear, existing duty to perform these acts.

### 1. The Standard For Issuing A Writ Of Mandamus

“Mandamus is an extraordinary writ, the issuance of which is not mandatory, even in response to allegations of constitutional violations.” *Staples v. Benton County*, 151 Wn.2d 460, 464, 89 P.3d 706 (2004) (citing *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994)). When directed to an equal branch of government, “the judiciary should be especially careful not to infringe on the historical and constitutional rights of that branch.” *Walker*, 124 Wn.2d at 407. The jurisdiction “to issue writs of mandamus to state officers, does not authorize [the Court] to assume general control or direction of official acts.” *Id.* (quoting *State ex rel. Taylor v. Lawler*, 2 Wn.2d 488, 490, 98 P.2d 658 (1940)). The Court “will not usurp the authority of the coordinate branches of government.” *Walker*, 124 Wn.2d at 410.

The writ is not to be directed at a general course of conduct, and mandamus will not lie to compel a discretionary act or to direct state officers to generally perform constitutional duties. *Walker*, 124 Wn.2d at 407 and 410. Mandamus is appropriate only “where there is a specific, existing duty which a state officer has violated and continues to violate...” *Id.* at 408. There must be a clear duty to act existing at the time the writ is sought. *Id.* at 409; *Gerberding v. Munro*, 134 Wn.2d 188, 195, 949 P.2d

1366 (1998); *In re Dyer*, 143 Wn.2d 384, 398, 20 P.3d 907 (2001); *Burd v. Clarke*, 152 Wn. App. 970, 972, 219 P.3d 950 (2009).

“Doubtful plaintiff rights do not justify a writ of mandamus.” *Eugster v. City of Spokane*, 118 Wn. App. 383, 404, 76 P.3d 741 (2003) (citing *United States ex rel. Arant v. Lane*, 249 U.S. 367, 371, 39 S. Ct. 293, 63 L. Ed. 650 (1919); *In re Life & Fire Ins. Co. v. Heirs of Wilson*, 33 U.S.(8 Pet.) 291, 302-03, 8 L. Ed. 949 (1834)). Whether an agency has a specific duty that must be performed is a question of law. *River Park Square, L.L.C. v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001).

Mandamus can only compel DOC to perform a duty it was already clearly required to do by law. This Court has held that DOC is under no mandatory duty to allow counsel in community custody violation hearings. *In re McNeal*, 99 Wn. App. 617, 994 P.2d 890 (2000). Since DOC had no clear duty to provide counsel, the court erred in granting the writ.

## **2. DOC Had No Clear Statutory Or Constitutional Duty To Provide Counsel At The Violation Hearing**

This Court has previously determined that offenders on community custody are not entitled to counsel at a violation hearing. *McNeal*, 99 Wn. App. at 635. The Court’s decision in *McNeal* still governs in this case. In *McNeal*, the offender was on community custody in lieu of early release. *McNeal*, 99 Wn. App. at 619. After *McNeal*

violated his conditions of community custody, DOC returned him to prison to serve 300 days of confinement. *Id.*; *see also* former RCW 9.94A.205 (1998).<sup>6</sup> The Court held that McNeal had no right to counsel at his violation hearing. *McNeal*, 99 Wn. App. at 635.

In reaching this conclusion, the Court analyzed both *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed.2d 656 (1973). In *Morrissey*, the United States Supreme Court established the minimum due process requirements for a parole revocation hearing and recognized that the state has an “overwhelming” interest in returning a parolee to prison without the burdens of a trial-like hearing. *Morrissey*, 408 U.S. at 483. In *Gagnon*, the Court held that in a revocation hearing for a probationer or a parolee, the “need for counsel must be made on a case-by-case basis . . . .” *Gagnon*, 411 U.S. at 790. The Court explained that “the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation . . . .” *Id.*, 411 U.S. at 784.

*McNeal* contrasted this with community custody, where the primary goal *is* to compel performance. *McNeal*, 99 Wn. App. at 635. *McNeal* explained that in the case of parole, “[b]ecause the focus of the

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<sup>6</sup> Currently codified at RCW 9.94A.633(2)(a).

hearing is often on the extent of and future potential for rehabilitation, counsel may be necessary to advocate for the parolee.” *Id.* In contrast, in the case of community custody, “[t]he decision to revoke community custody is based primarily on factual determinations about whether the individual violated the conditions of community custody. The success or failure of the rehabilitative process is not even a factor.” *Id.* In light of this, and also in light of the “delay in and formalization of the hearings” that counsel would bring that would “override the marginal value” of having counsel in the hearings, the *McNeal* Court held that the State is not required to provide counsel in community custody violation hearings. *Id.* Rather, “the *Morrissey* requirements are sufficient to protect against a wrongful revocation of community custody . . . .” *Id.* The Court correctly reasoned that the rationale of *Gagnon* does not apply where community custody’s primary goal is not rehabilitation. *McNeal*, 99 Wn. App. at 635.

No controlling precedent has changed the holding in *McNeal*. Under the existing statutes and case law, DOC has no clear mandatory duty either to appoint counsel for Grisby or to allow retained counsel to represent Grisby in the violation hearing. Since DOC has no existing, clear mandatory duty, Grisby was not entitled to mandamus relief.

### 3. This Court's Decision In *Ziegenfuss* Did Not Establish The Clear Duty Found By The Superior Court

The superior court apparently relied on *State v. Ziegenfuss*, 118 Wn. App. 110, 115-16, 74 P.3d 1205 (2003), to find DOC had a duty to consider whether Grisby was entitled to appointed counsel, and to allow pro bono retained counsel to represent Grisby at the hearing. But the language in *Ziegenfuss* did not impose upon DOC a clear mandatory duty. The language in *Ziegenfuss* concerning the appointment of counsel for a violation hearing was dicta. *Id.* The Court declined to resolve the issue, finding the claim was not ripe for review. *Id.* Since the claim was not ripe, the Court did not resolve the issue, and it did not overrule *McNeal*. Since *McNeal* is still the controlling law on this issue, DOC has no clear mandatory duty either to consider appointing counsel for Grisby, or to allow pro bono retained counsel to represent Grisby in the hearing.

Even if the Court finds that the language in *Ziegenfuss* is not dicta, the language nevertheless incorrectly distinguishes *McNeal*. The *Ziegenfuss* Court stated: "We note that *Ziegenfuss*' case differs factually from *McNeal* in that *McNeal* was decided when community custody referred only to DOC supervision in lieu of earned early release." *Ziegenfuss*, 118 Wn. App. at 116, n.24.

In fact, in 1998, community placement<sup>7</sup> was one of the standard sentence terms added to the prison term at sentencing, and it was composed of a period of community custody in lieu of early release, as well as a period of post-release supervision. DOSA sentences, with one year of added community custody, were not uncommon at that time, having been created as a sentencing alternative in 1995.<sup>8</sup> And sex offenders were required at the time to receive a three-year term of community custody in addition to their prison term, just like today.<sup>9</sup> See, e.g., *McNeal*, 99 Wn. App. at 621 (“‘Community custody’ means that portion of an inmate’s sentence of confinement in lieu of earned early release time *or imposed pursuant to* RCW 9.94A.120 (6), (8), or (10)”) (quoting former RCW 9.94A.030(4) (1998)) (emphasis added). Thus, the supervision statutes at issue in *McNeal* did not differ from current statutes in the way that *Ziegenfuss* thought they did. The distinction mentioned in *Ziegenfuss* does not exist. Just as with current statutes, the statutes in 1998 allowed the sentencing court to impose community custody *in addition to* the prison term.

Because the statutes at issue in *McNeal* are not distinct from current statutes in the way that the *Ziegenfuss* Court believed, *McNeal* is

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<sup>7</sup> See RCW 9.94B.050.

<sup>8</sup> See Laws 1995, ch. 108, sections 1, 3.

<sup>9</sup> See former RCW 9.94A.120(10)(a) (1998); RCW 9.94A.701(1)(a) (providing three years of community custody for certain sex offenses).

still the controlling law, and the DOC has no clear mandatory duty either to consider appointing counsel for Grisby, or to allow pro bono retained counsel to represent Grisby in the hearing.

**4. The Court's Order That DOC Must Allow Counsel To Represent Grisby Exceeds The Proper Remedy In Mandamus**

In addition to ordering DOC to consider whether Grisby was entitled to appointed counsel, the superior court went further and ordered DOC to allow pro bono retained counsel to represent Grisby. By doing this, the superior court not only ordered DOC to exercise its discretion, but also directed the result to follow from this exercise of discretion. This order exceeded the proper remedy in mandamus.

While mandamus may direct an agency to exercise a mandatory discretionary duty, mandamus cannot direct the manner in which the agency exercises that discretion. *Peterson v. Dep't of Ecology*, 92 Wn.2d 306, 314, 596 P.2d 285 (1979). "Mandamus will not lie to compel the performance of acts or duties which call for the exercise of discretion." *Vangor v. Munro*, 115 Wn.2d 536, 543, 798 P.2d 1151 (1990); *see also Walker v. Munro*, 124 Wn.2d at 410. For mandamus to lie, a clear abuse of discretion must be found amounting to a failure to exercise discretion. *Vangor*, 115 Wn.2d at 543. The Supreme Court has explained the limits of a mandamus action with respect to an agency's exercise of discretion:

Mandamus lies to compel discretionary acts of public officials when they have totally failed to exercise their discretion to act, and therefore it can be said they have acted in an arbitrary and capricious manner. Once officials have exercised their discretion, mandamus does not lie to force them to act in a particular manner.

*National Electrical Contractors Assoc. v. Riveland*, 138 Wn.2d 9, 32, 978 P.2d 481 (1999) (quoting *Aripa v. Dept. of Soc. & Health Servs.*, 91 Wn.2d 135, 140, 588 P.2d 185 (1978), *overruled on other grounds by State v. WWJ Corp.*, 138 Wn.2d 595, 601, 980 P.2d 1257 (1999)).

Assuming, *arguendo*, that DOC had a clear duty to consider whether Grisby should be appointed counsel, the writ of mandamus should have been limited to compelling DOC to perform that duty. The court should have ordered DOC to conduct the case-by-case analysis as to Grisby. But the court went further, and actually directed how DOC was to exercise its discretion. The court ordered that if DOC did not appoint counsel, then DOC must allow pro bono retained counsel to represent Grisby. Since this order did much more than simply direct DOC to perform a clear mandatory duty, the court erred.

DOC had no clear mandatory duty to allow retained counsel at the hearing. There is no statute or existing case law that mandates DOC allow an offender to have retained counsel at a violation hearing. Although a court may agree to allow a retained attorney to represent a party in a

judicial proceeding, there is no requirement that DOC allow such representation in an administrative hearing. Absent such a duty, the court may not issue a writ of mandamus to order the executive branch to allow representation by retained counsel.

Furthermore, *McNeal* addressed not just whether appointed counsel should be allowed in a violation hearing. It also addressed whether retained counsel should be allowed. And it ruled in the negative. “The *Morrissey* court explicitly stated that it did not reach the question whether a parolee is entitled to the assistance of *retained* or appointed counsel.” *McNeal*, 99 Wn. App. at 629 (emphasis added). “We also hold that the State is not required to *permit* counsel to participate in community custody revocation hearings.” *Id.* at 619 (emphasis added).

This conclusion makes sense, because “[t]he introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding,” *Gagnon*, 411 U.S. at 787, whether or not counsel is appointed or retained. In either case, adding attorneys to an administrative process causes a “delay in and formalization of the hearings.” *See McNeal*, 99 Wn. App. at 635. “[D]ue process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.” *Gagnon*, 411 U.S. at 788.

There is not clear existing right to have retained counsel at the community custody violation hearing. Consequently, the superior court erred in issuing a writ of mandamus that compelled DOC to allow pro bono retained counsel to represent Grisby.

**5. The Court Erred In Granting A Writ Of Mandamus Because Grisby Already Had An Adequate Remedy: A PRP**

Grisby filed his petition for an extraordinary writ to compel the DOC to allow counsel to represent him at a violation hearing. But extraordinary relief was not warranted in his case because he had an adequate remedy at law: a personal restraint petition.

The court “will not grant a writ of mandamus if there is a plain, speedy, and adequate remedy at law.” *Washington State Council of County & City Employees, et al. v. Hahn*, 151 Wn.2d 163, 167, 86 P.3d 774 (2004). The existence of an adequate remedy merely requires that there be a process by which the plaintiff may seek redress for the allegedly unlawful action. *Id.* at 170 (union had adequate remedy under Public Employees Collective Bargaining Act); *City of Seattle v. Williams*, 101 Wn.2d 445, 455-56, 680 P.2d 1051 (1984) (existence of RALJ appeal provided adequate remedy). “A remedy may be adequate even if attended with delay, expense, annoyance, or some hardship.” *City of Olympia v. Thurston Cty. Bd. of Comm’rs.*, 131 Wn. App. 85, 96, 125 P.3d 997

(2005). For a remedy to be inadequate, “[t]here must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress afforded without issuance of the writ.” *Id.* at 96.

Grisby had an adequate remedy available to him in the form of a personal restraint petition under RAP 16.3 - 16.15, which provides a defendant the right to collaterally attack the DOC’s administration of a sentence. *See* RAP 16.3 - 16.15. Post-conviction review is now a well established part of this state’s criminal process. *Toliver v. Olsen*, 109 Wn.2d 607, 610, 746 P.2d 809 (1987). The post-conviction relief rules were adopted in order to provide a “single unitary post-conviction remedy” called a personal restraint petition. *Id.*, 109 Wn.2d at 610-11 (internal quotations omitted).

Personal restraint petitions are a customary vehicle for challenging DOC violation hearings. In *McNeal*, the offender properly challenged the DOC’s actions at his violation hearing by bringing a personal restraint petition after the hearing, and seeking a ruling that required the DOC to do the hearing over. *See McNeal*, 99 Wn. App. at 620.

Grisby may argue that a personal restraint petition was not speedy. But he could have filed a motion for accelerated review with his personal restraint petition, and this Court could have granted it. For this reason, the

court erred in granting the extraordinary relief of mandamus and prohibition to Grisby.

**B. The Trial Court Erred When It Granted Prospective Mandamus Relief To Future Similarly Situated Offenders**

**1. Even If Mandamus Were Proper As To Grisby, The Court Could Not Use The Writ To Direct DOC's Conduct In Future Cases**

Assuming, *arguendo*, that the superior court's order was correct as to Grisby, the court also granted mandamus relief as to all future "similarly situated" cases where an offender requests counsel for a violation hearing. The court granted mandamus relief not only to compel the performance of an allegedly existing duty, but also to compel performance of an alleged duty that will occur in the future. Since the court's remedy far exceeds the proper scope of mandamus relief, the court erred.

The Court will not issue a writ unless the duty exists at the time the writ is sought. *Walker*, 124 Wn.2d at 409. As this Court explained, "it must appear that there has been an actual default in the performance of a clear legal duty then due at the hands of the party against whom relief is sought. Until the time fixed for the performance of the duty has passed, there can be no default of duty." *Walker*, 124 Wn.2d at 409 (quoting *State ex rel. Hamilton v. Cohn*, 1 Wn.2d 54, 58-59, 95 P.2d 38 (1939)).

Relief at future hearings is not within the scope of the mandamus power. Therefore, the court erred in granting the writ to provide such future relief.

**2. Grisby Lacks Standing To Litigate Other Inmates' Cases**

Not only is mandamus relief not allowed for future hearings, but Grisby also lacked standing to seek appointment of counsel for any “similarly situated” offenders in such future violation hearings, where such future hearings do not affect Grisby’s legal rights. “Principles of standing are intended to prevent one party from asserting another's legal right.” *West v. Thurston County*, 144 Wn. App. 573, 578, 183 P.3d 346 (2008). “Standing is jurisdictional.” *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011). In order to establish standing sufficient to enforce private rights or challenge private rights, the challenging party must demonstrate that it has some real interest and that the interest is present and substantial, as opposed to an expectancy or future contingent interest. *Kim v. Moffett*, 156 Wn. App. 689, 698, 234 P.3d 279 (2010) (quoting *State ex. rel Hays v. Wilson*, 17 Wn.2d 670, 672, 137 P.2d 105 (1943)).

Even if Grisby were correct that the DOC has a duty to appoint counsel in future violation hearings, Grisby does not show how that

alleged future duty resulted in any injury cognizable in Grisby's own case. He has not shown that he has a substantial and present interest in those future cases. Thus, he lacks standing to litigate the alleged rights of the offenders in those future cases, and the court erred in granting the writ of mandamus with regard to those other offenders.

**C. The Superior Court Erred In Granting A Writ Of Prohibition Because Grisby Did Not Prove DOC Acted Outside Or In Excess Of Its Jurisdiction**

Grisby did not show DOC acted in excess of its jurisdiction. DOC has statutory authority to conduct hearings for violations of community custody, and the statute authorizing the hearings does not require DOC to provide counsel, or to allow retained counsel to represent the offender. Thus, the remedy of prohibition was not available to him.

A writ of prohibition is an extraordinary remedy that "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." RCW 7.16.290. In Washington, it is "long established law that a writ of prohibition is an extraordinary remedy available only where the tribunal is clearly and inarguably acting in a matter where there is an inherent, entire lack of jurisdiction." *Barnes v. Thomas*, 96 Wn.2d 316, 318, 635 P.2d 135 (1981); *Brower v. Charles*, 82 Wn. App. 53, 57, 914 P.2d 1202 (1996), *review denied*, 130 Wn.2d 1028 (1997);

*Consolidated Disposal v. Grant County*, 51 Wn. App. 652, 656, 754 P.2d 1059 (1988). The petitioner seeking the writ must demonstrate the right to a writ is clear and inarguable. *Floor Decorators, Inc. v. Department of Labor and Industries*, 44 Wn. App 503, 506, 722 P.2d 884 (1986).

Grisby did not show DOC acted in excess of its jurisdiction. DOC has statutory authority to conduct hearings for violations of community custody. RCW 9.94A.737(4); WAC 137-24-030; WAC 137-104-050. The statute authorizing the hearings does not require DOC to provide counsel, or to allow counsel to represent the offender. RCW 9.94A.737(6)(c); WAC 137-104-060(7); WAC 137-24-040(7). As discussed above, this Court has held there is no right to counsel in a community custody violation hearing. *McNeal*, 99 Wn. App. 617.

DOC had jurisdiction to conduct the violation hearing, without the need to either appoint counsel, or allow pro bono counsel to represent Grisby. Since DOC acted under its statutory authority, and in accordance with this Court's decision in *McNeal*, Grisby failed to clearly prove DOC acted in a manner that exceeded its authority and jurisdiction. Since Grisby failed to meet the standard for a writ of prohibition, the superior court erred in granting a writ of prohibition.

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**D. *McNeal* Is Still Good Law; DOC Hearings Focus On Factual Determinations, Not The Extent Of And Potential For Rehabilitation**

A mandamus action is not the proper forum in which to determine the issue of whether *McNeal* should be overturned. As argued above, the existing law does not impose a duty, and that is the end of the matter.

But even if the Court disagrees, *McNeal* is still good law. No changes have occurred that would undermine *McNeal*'s conclusion that the DOC need not allow counsel at community custody violation hearings. Community custody still "primarily furthers the punitive purposes of deterrence and protection," *State v. Ross*, 129 Wn.2d 279, 286, 916 P.2d 405 (1996), and counsel still are not needed to argue on "the extent of and future potential for rehabilitation." *See McNeal*, 99 Wn. App. at 635. "The decision to revoke community custody is still based primarily on factual determinations about whether the individual violated the conditions of community custody[.]" *id.*, whether the offender has had multiple prior violation processes that indicate poor adjustment to supervision and a pattern of violating sentence conditions, and whether that poor adjustment is a risk to community safety.

This focus on deterrence and protection, as opposed to the extent of and future potential for rehabilitation, arises from the fact that the Legislature has made community custody an enhancement to the prison

sentence, rather than simply a part of it, as in the case of probation or parole. Under RCW 9.94A.662, RCW 9.94A.701, and RCW 9.94A.702, community custody is added to the confinement term. It is not part of the confinement term. As such, it primarily furthers the punitive purposes of deterrence and protection. *See Ross*, 129 Wn.2d at 286 (citing *In re Davis*, 67 Wn. App. 1, 9 n.5, 834 P.2d 92 (1992) (describing community placement as “part of an inmate’s punishment” requiring explicit statutory authorization); *State v. Miles*, 66 Wn. App. 365, 368, 832 P.2d 500 (1992) (noting enhanced sentences for crimes committed while on community placement further purposes of protection and deterrence)). Rather than being a “reward for rehabilitation” like probation or parole, community custody is a sentence enhancement. *See Ross*, 129 Wn.2d at 286 (“Community placement occurs in addition to the period of confinement, while probation and parole occur in lieu of confinement.”) (citing *Parry v. Rosemeyer*, 64 F.3d 110, 116-17 (3d Cir. 1995), *superseded by statute*, 28 U.S.C. § 2254(d)).

Grisby’s February 20, 2014, revocation hearing is an example of the focus of community custody on deterrence and protection, as opposed to rehabilitation. The hearing officer was concerned mainly with Grisby’s compliance record and his risk to the community, not on the extent of or future chances for rehabilitation. The CCO indicated that the offender’s

“adjustment” to supervision was poor. CP 173. The CCO explained that “[a]s a non-compliant, unemployed, and chemically-addicted offender he poses great risk to the community. His blatant disregard for conditions of the court and of the Department compounds this risk.” (Emphasis added). CP 173. The CCO also noted that it was Grisby’s ninth violation process since he began supervision under that sentence in 2013. *Id.*

The hearing officer decided to revoke Grisby’s DOSA sentence based on Grisby’s risk classification level of high violent,<sup>10</sup> the fact that DOSA sentences “have an expectation that the offender remain clean and sober and follow the conditions set forth,” and Grisby’s poor “adjustment” to supervision, including his long record of non-compliance. CP 174-75 (“[I]n fact he had 8 prior interventions in less than a year.”). The hearing officer did not revoke Grisby’s DOSA based on a lack of rehabilitation or future potential for rehabilitation, but rather on his record of non-compliance and his risk to community safety.

Under Washington law, community custody is an addition to the confinement term, unlike probation or parole. Because it is an enhancement, it is primarily for purposes of community protection and offender punishment. The rationale of *McNeal* is still applicable, and the

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<sup>10</sup> Grisby’s risk level classification (RLC) is “HV” or high violent, which means he is at high risk to reoffend violently. CP 29 (upper left); *see* RCW 9.94A.501; *see also* <http://www.doc.wa.gov/aboutdoc/docs/CorrectionalTopicAreasAvailableData.pdf>, at 1.

case by case analysis of *Gagnon* is inapplicable to community custody violation hearings.

**E. A Cost-Benefit Analysis Confirms That DOC's Current Violation Hearing Procedures Satisfy Due Process**

The Legislature created the DOC administrative hearing system without attorneys and judges to bring efficiency to the violation process. It replaced a cumbersome court-based system that resulted in offenders having to wait in jail for long periods before the court had time to hear their violations. This outweighs the marginal value counsel would provide in violation hearings.

A cost-benefit analysis is proper in these types of cases. In *Mathews v. Eldridge*, the Supreme Court discussed the three factors a court must balance in determining what due process protections apply: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976)); see *Black v. Romano*, 471 U.S. 606, 618, 105 S. Ct. 2254, 85 L. Ed. 2d 636

(1985) (Marshall, J., concurring) (stating that all due process questions are to be analyzed under the three-factor *Mathews* standard) (collecting cases).

As to the private interest affected, offenders have an interest in making a good case to the hearing officer. The DOC's policy results in offenders being unable to have counsel at DOC violation hearings to argue on behalf of the offenders.

As to the risk of an erroneous deprivation of such interest, it is not great because DOC's current hearing procedures have multiple layers of protection. The offender is allowed to have a lay person assist him or her in making a good case to the hearing officer if the offender has a language or communication barrier. The hearing officer can continue the hearing if he or she thinks the offender may not be mentally competent. After the hearing, the offender has two levels of administrative appeals he or she can pursue with or without assistance of an attorney. And the offender additionally can file a personal restraint petition.

As to value of additional safeguards, i.e., adding counsel into violation hearings, counsel would add marginal value because of the procedural safeguards already in place, including the two levels of appeals and a lay person to assist during the hearing. And counsel also

would have the effect of lengthening the hearing process, which in turn could cause the offender to have to be in jail longer.

As to the burden on the DOC, abrogating *McNeal* would be unduly burdensome. Relying on *McNeal* for the past 14 years, DOC has constructed a hearing system that is faster and more efficient than prior hearing procedures. Adding attorneys into the mix would alter this equation substantially. As discussed in *McNeal*, the burden includes “delay in and formalization of the hearings, [and] the added expense and the administrative burden.” *Id.*, 99 Wn. App. at 635 (citing *Morrissey*, 408 U.S. at 481, 92 S. Ct. 2593; *Mathews*, 424 U.S. at 334-35).

This added expense would certainly occur in the context of DOSA violation hearings and violation hearings for offenders who are still within their early release period of community custody. This is because every DOSA violation hearing and every violation hearing for an offender still in his or her early release period is potentially a revocation hearing. *See* RCW 9.94A.662(3) (“If the department finds that conditions have been willfully violated, the offender may be reclassified . . . .”); RCW 9.94A.633(2)(a) (“If the offender was transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.728, the offender may be transferred to a more restrictive confinement status to serve up to the remaining portion of the sentence . .

. .”). Not until the hearing is over does a hearing officer know for certain what sanction he or she will impose. Thus, to require counsel in DOSA revocation hearings and early release revocation hearings is to require counsel at all DOSA violation hearings and all violation hearings for offenders who are still serving early release.

Given that the DOC conducts thousands of violation hearings each year, abrogating *McNeal* would be a far-reaching and expensive alteration of a system that is efficient and more protective of offenders’ due process rights than the cumbersome, delay-plagued system it replaced. One cannot argue that cost is of no consequence in these right-to-counsel cases. Rather, for justice to be done, it is imperative that courts find a balance among competing interests.

**F. Even If The DOC Had A Duty To Undertake A Case-By-Case Analysis, Counsel Would Not Have Been Appropriate Here**

Finally, in the larger picture, Grisby was articulate and well-qualified to represent himself. He made no showing that he could not have articulated his defense. The recordings of the two prior hearings demonstrated he was well-equipped for arguing his case at violation hearings. CP 2-3. He spoke persuasively and at length in his own defense at the two prior hearings. Also, his appeal from his first hearing and his multiple pages of written argument submitted in preparation for his

second hearing demonstrated he was capable of challenging the hearing process and making his arguments. *See* CP 90-138, 143-157. Even if the DOC had a duty to appoint counsel on a case-by-case basis, Grisby was not one who would have necessitated counsel.

## VII. CONCLUSION

Because of this Court's binding precedent there is no right to counsel in a community custody violation hearing. Because there is no clear right, DOC had no clear mandatory duty that could be compelled by mandamus, and DOC did not act outside its jurisdiction, as is required for a writ of prohibition. That is the threshold issue in this case and the Court need not reach the issue of whether *McNeal* is still good law. But if the Court does address whether *McNeal* is still good law, the circumstances that led up to the decision in *McNeal* still exist today. Community custody still primarily furthers the punitive purposes of deterrence and protection. And therefore the decision to impose jail time still is based primarily on factual determinations about whether the offender willfully violated the conditions, not whether he is rehabilitated. As a result, attorneys still are not needed to argue on the extent of and future potential for the offender's rehabilitation. The DOC respectfully

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requests that this Court reverse the superior court's grant of writs of prohibition and mandamus.

RESPECTFULLY SUBMITTED this 2nd day of September, 2014.

ROBERT W. FERGUSON  
Attorney General

A handwritten signature in black ink, reading "Ronda D. Larson". The signature is written in a cursive style with a long horizontal flourish extending to the right.

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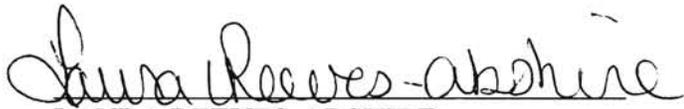
**CERTIFICATE OF SERVICE**

I certify that I served a copy of the foregoing Opening Brief of Appellants document on all parties or their counsel of record as follows:

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I certify under penalty of perjury that the foregoing is true and correct.

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