

“violate” him for conduct committed while incarcerated. PRP at 3-5. DOC argued the petition should be denied because, Mr. Dalluge remained subject to the conditions of community custody even when confined. DOC did not challenge or question the fact that Mr. Dalluge was restrained, instead contending his restraint was lawful. On the last page of its response, DOC did contend this matter was moot as Mr. Dalluge could not show prejudice, Response at 13, but nowhere in its response did DOC contend Mr. Dalluge was no longer under restraint.² In fact, DOC’s response contained a section entitled “Basis of Custody” in which sets forth the basis of Mr. Dalluge’s past and present restraint, yet omits any claim that he was not contemporaneously under restraint. Response at 1-3. The chief judge dismissed the petition.

Mr. Dalluge sought discretionary review in this Court. DOC’s response again failed to raise any claim that Mr. Dalluge was not under restraint. A commissioner of this Court denied the motion.

² In its motion to dismiss, DOC claims it previously argued Mr. Dalluge was not restrained. Motion at 3(citing Response at 8-13). As stated, on the last page of its response, DOC did contend this matter was moot as Mr. Dalluge could not show prejudice. Response at 13. But DOC never contended Mr. Dalluge was no longer under restraint, and its present contention that it did at best stems from an extraordinarily liberal reading of its prior briefing.

After this Court granted Mr. Dalluge's motion to modify, appointed counsel, and set the matter for argument, DOC for the first time contends Mr. Dalluge is not under restraint. DOC claims that in the absence of restraint Mr. Dalluge is not entitled to relief and his petition should be dismissed as moot. This Court should deny DOC's motion to dismiss because (1) Mr. Dalluge is under restraint as a result of DOC's unlawful actions, and (2) even if the matter were moot, the case present a public issue which is likely to recur and calls for an authoritative decision by this Court.

II. ARGUMENT

A. MR. DALLUGE IS UNDER RESTRAINT AND THUS THIS MATTER IS NOT MOOT

As set forth in Mr. Dalluge's supplemental brief, he is unlawfully restrained as a result of DOC's actions in this case. See Supplemental Brief of Petitioner at 12-13. As a result of the violation finding, DOC imposed a sanction of 60 days and altered Mr. Dalluge's reporting requirements upon his release, requiring he report to his community corrections officer within one business day of release and report weekly for one month. Exhibit 8 to Response. In addition, per DOC policy, Mr. Dalluge's present violations will increase the severity of any future sanction, see, DOC Policy

320.155 and attachment Department of Corrections Community Corrections Division Behavior Sanction Response Guide, and will factor in Mr. Dalluge's Risk Assessment during his present incarceration and ultimate release. See, DOC Policy 320.400.³

DOC's motion to dismiss carefully omits any reference to the fact of the violation itself and any discussion of the consequences that flow from it, choosing instead to fancifully claim Mr. Dalluge has only challenged the 60-day sanction imposed. But it is abundantly clear from Mr. Dalluge's PRP that he is not merely challenging the sanction imposed but rather the fact of the violation itself. Three of the five arguments Mr. Dalluge raised in his PRP challenge DOC's ability to "violate" him while he was confined and/or while his term of community custody was tolling. PRP at 3-5. The remaining two arguments contend DOC deprived him of equal protection and failed to properly allege the violation. Id. Nowhere in the five issue statements does he mention the 60-day sanction imposed. In fact, there is no mention of the sanction at all until the thirty-fifth, and last, page of the PRP. Mr. Dalluge's PRP

³ The cited DOC policies are included as an Appendix to Petitioner's Supplemental Brief.

challenges the fact of the violation, and he remains under restraint because of DOC's finding.

In Monohan v. Burdman, the Court concluded a person challenging the cancellation of an early release date is "restrained" even if by the time the petition is filed the person has been paroled, as he is subject to conditions on his release and faces reincarceration, and "thus, he is not a free man in the commonly accepted sense." 84 Wn.2d 922, 925, 530 P.2d 334 (1975). Further, Monohan looked to the potential future consequences of the release decision to conclude that because it might affect future decisions of the parole officer or a sentencing judge it constituted "restraint." Id. Such potential consequences are sufficient "to retrieve his petition from the 'limbo of mootness'" Id. DOC's policy establishes the present and future consequences of the finding of violation in this case. Mr. Dalluge is under the restraint of DOC's unlawful decision, and this matter is not moot.

B. EVEN IF THIS CASE IS MOOT IT PRESENTS PUBLIC ISSUES WHICH ARE LIKELY TO ARISE AGAIN AND WHICH CALL FOR A DEFINITIVE RULING BY THIS COURT.

DOC claims that if Mr. Dalluge is no longer restrained the Court can take no further action his case. Motion to Dismiss at 5. Yet even in a PRP this Court may reach a moot issue if it involves matters of substantial and continuing public interest, is likely to recur, and for which it is desirable to have an authoritative decision. In re the Personal Petition of Mines, 146 Wn.2d 279, 282-83, 45 P.3d 535 (2002); In re the Personal Restraint Petition of Myers, 105 Wn.2d 257, 261, 714 P.2d 303 (1986). Such is the case here.

In Mines, an inmate filed a PRP challenging the procedure employed at a parole hearing. 146 Wn.2d at, 282-83. As in the present case, the State made an eleventh-hour motion to dismiss contending the claim was moot because the petitioner had been paroled. Id. at 283-84. The Court refused to address the mootness claim, or necessarily the question of restraint, concluding the issue presented was one of substantial public interest warranting an authoritative decision regardless of its potential mootness.

Mines noted that questions of statutory construction are public as opposed to private issues, and tend to be more likely to

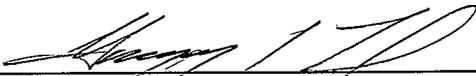
arise again. Id. at 285. Mr. Dalluge's case presents such a question of statutory construction, and thus a public issue which is likely to recur. The likelihood of reoccurrence is increased by DOC's steadfast insistence, in the face of contrary statutory directives, that a person remains subject to community custody condition even when they are not in the community. This potential misreading of the statute coupled with the thousands of offenders subject to DOC supervision make an authoritative ruling on the effect of confinement on supervision conditions and the meaning of "tolling" not only desirable but necessary. Indeed, in granting Mr. Dalluge's motion to modify and granting discretion review, this Court implicitly recognized the case presents significant questions of law and substantial issues of public interest that should be determined. See RAP 13.4(b).

Thus, even if the Court deems this case moot, it should reach the merits of the claim.

III. **CONCLUSION**

For the reasons above, this Court should deny DOC's motion to dismiss.

Respectfully submitted this 13th day of September, 2007



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF)
)
)
AMEL DALLUGE,) NO. 79841-9
)
)
Petitioner.)

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 13TH DAY OF SEPTEMBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITIONER'S RESPONSE TO MOTION TO DISMISS** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DONNA H. MULLEN (X) U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF SEPTEMBER, 2007.

X  _____

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