

71904-1

71904-1

NO. 71904-1-I

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

HENRY GRISBY III,

Respondent,

v.

ROBERT HERZOG, et al.,

Appellants.

REPLY OF APPELLANTS

ROBERT W. FERGUSON
Attorney General

RONDA D. LARSON, WSBA #31833
Assistant Attorney General
Corrections Division
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445

~~STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
CLERK OF COURT
JAN 11 2010 9:40~~

TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT1

 A. The Writ Of Mandamus Was Inappropriate Because
 There Was No Clear Mandatory Duty To Allow Counsel
 In This Case1

 B. The DOSA Statute Has Not Changed Its Purpose Since
 McNeal Was Decided2

 C. Whether Other State Or Federal Agencies Allow Counsel
 In Administrative Hearings Is Not Relevant To This Case4

 D. Washington’s Due Process Clause Does Not Offer
 Greater Protection Than The Federal Due Process Clause6

 E. Denying Grisby Counsel Would Not Violate
 Washington’s Law Against Discrimination.....9

III. CONCLUSION11

TABLE OF AUTHORITIES

Cases

<i>Bellevue Sch. Dist. v. E.S.</i> , 171 Wn.2d 695, 257 P.3d 570 (2011).....	7, 8
<i>Cf. State v. Vasquez</i> , 148 Wn.2d 303, 59 P.3d 648 (2002).....	6
<i>Fell v. Spokane Transit Authority</i> , 128 Wn.2d 618, 911 P.2d 1319 (1996).....	9
<i>In re Albritton</i> , 143 Wn. App. 584, 180 P.3d 790 (2008).....	3
<i>In re McNeal</i> , 99 Wn. App. 617, 994 P.2d 890 (2000).....	1, 2, 4, 8
<i>In re Pers. Restraint of Dyer</i> , 143 Wn.2d 384, 20 P.3d 907 (2001).....	6
<i>King v. King</i> , 162 Wn.2d 378, 174 P.3d 659 (2007).....	7
<i>State v. Conners</i> , 90 Wn. App. 48, 950 P.2d 519 (1998).....	3
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	7, 8, 9
<i>State v. Manussier</i> , 129 Wn.2d 652, 921 P.2d 473 (1996).....	6
<i>State v. McCormick</i> , 166 Wn.2d 689, 213 P.3d 32 (2009).....	6
<i>State v. Morgan</i> , 163 Wn. App. 341, 261 P.3d 167 (2011).....	6

<i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992).....	6
<i>State v. Ross</i> , 129 Wn.2d 279, 916 P.2d 405 (1996).....	4
<i>State v. Ziegenfuss</i> , 118 Wn. App. 110, 74 P.3d 1205 (2003).....	2, 8
<i>Walker v. Munro</i> , 124 Wn.2d 402, 879 P.2d 920 (1994).....	2

Statutes

Laws of 1995, ch. 108.....	3
Laws of 1999, ch. 196.....	5
RCW 10.73.150	8
RCW 49.60.030	10
RCW 49.60.400	10
RCW 9.94A..505(2)(a)(vi).....	3
RCW 9.94A.505(1).....	3
RCW 9.94A.660(3).....	3
RCW 9.94A.662(1).....	3
RCW 9.94A.737(6)(c)	7, 11
RCW 9.95.100	3
RCW 9.95.220	8
RCW Ch. 49.60.....	9

Rules

CrR 7.6(b) 8

Regulations

WAC 137-104-060(7) 8, 11

WAC 137-24-040(7) 8, 11

WAC Title 162 10

I. INTRODUCTION

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, Washington Department of Corrections (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. *In re McNeal*, 99 Wn. App. 617, 994 P.2d 890 (2000). 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.

II. ARGUMENT

A. **The Writ Of Mandamus Was Inappropriate Because There Was No Clear Mandatory Duty To Allow Counsel In This Case**

For a court to issue a writ of mandamus, there must exist a clear mandatory duty. *Walker v. Munro*, 124 Wn.2d 402, 409, 879 P.2d 920

(1994). Grisby claims there was a clear mandatory duty for DOC to undertake a case by case analysis of whether counsel should be appointed because this Court in *State v. Ziegenfuss*, 118 Wn. App. 110, 74 P.3d 1205 (2003), made that duty clear. Respondent's Brief (Resp't's Br.), at 11-12. But *Ziegenfuss* did nothing more than comment on the issue in passing. The Court declined to resolve the issue, finding the claim was not ripe for review. *Id.* 118 Wn. App. at 115-16. Since the claim was not ripe, the Court did not resolve the issue, and it did not overrule. *In re McNeal*, 99 Wn. App. at 617. 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.

The threshold issue in this case is whether a clear mandatory duty existed to support the issuance of the writs. Because no such clear duty existed, the Court should reverse the superior court.

B. The DOSA Statute Has Not Changed Its Purpose Since *McNeal* Was Decided

Grisby claims that the Drug Offender Sentencing Alternative (DOSA) statute has a rehabilitative purpose in a way it did not when *McNeal* was decided. Resp't's Br., at 17, 21. In fact, the goal of providing treatment-oriented sentences was the same in 2000 as it is

today. Division Three of this Court stated in 1998 that the purpose of the DOSA statute is to “provide ‘treatment-oriented sentences’ for drug offenders.” *State v. Conners*, 90 Wn. App. 48, 53, 950 P.2d 519, 521 (1998) (quoting Laws of 1995, ch. 108). Likewise, in 2008, this Court stated, “The purpose of a DOSA sentence is to allow offenders to serve a portion of their sentence in a substance abuse program while on community custody.” *In re Albritton*, 143 Wn. App. 584, 593, 180 P.3d 790, 794 (2008).

Most importantly, community custody during a DOSA sentence still is not a reward for rehabilitation, as is the case with parole. The DOSA community custody *is* the punishment. See RCW 9.94A.505(1) (“When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.”), & .505(2)(a)(vi) (“relating to the drug offender sentencing alternative”); RCW 9.94A.660(3); RCW 9.94A.662(1) (“A sentence for a prison-based special drug offender sentencing alternative shall include: . . . (b) One-half the midpoint of the standard sentence range as a term of community custody”). In contrast, parole is a release from prison based on rehabilitation. RCW 9.95.100 (“The board shall not, however, until his or her maximum term expires, release a prisoner, unless in its opinion his or her rehabilitation has been complete and he or she is a fit subject for release.”). Furthermore, the

legislature created DOSA sentences in the first place because treating drug offenders has been shown to be an effective method of reducing recidivism. In reducing recidivism, a DOSA sentence “primarily furthers the punitive purposes of deterrence and protection.” *State v. Ross*, 129 Wn.2d 279, 286, 916 P.2d 405 (1996). Grisby fails to show that the nature of community custody (DOSA or otherwise) has changed since this Court decided *McNeal*. And no controlling precedent has changed the holding in *McNeal*.

Because the nature of community custody in this state remains primarily punishment and deterrence, the decision to impose jail time still is based primarily on factual determinations about whether the offender willfully violated the conditions, not whether he or she 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 reasoning of *McNeal* remains valid.

C. Whether Other State Or Federal Agencies Allow Counsel In Administrative Hearings Is Not Relevant To This Case

Grisby notes that the Department of Social and Health Services (DSHS) permits attorneys in child support hearings and that the agency has approximately 22,000 hearings per year. Resp’t’s Br., at 22-23. Actually, the 22,000 figure Grisby cites encompasses multiple types of

hearings beyond child support, including public assistance, licensing, child abuse, and vulnerable adult abuse appeals.¹ Grisby does not explain whether attorneys are allowed in those other types of cases as well. But even if they are, nothing prohibits the Department of Social and Health Services (DSHS) from allowing attorneys if it so chooses. And nothing prohibits the DOC from doing so as well, if it were to make a policy to allow counsel in violation hearings. But that did not authorize the superior court to order the DOC to appoint counsel for Grisby. The issue in this case is whether offenders are constitutionally entitled to counsel in a community custody violation hearing. An agency's discretionary policy to allow counsel is not relevant. The fact the DSHS has that policy, like the fact that superior court in Snohomish County has a policy that allows counsel in traffic violation hearings, does not create a constitutional right to an attorney in a DOC violation hearing.

Furthermore, the 22,000 hearings that DSHS has every year are not causing people to have to wait in jail for their day in court. Because confinement is not involved, the DSHS example is not applicable here.² Prior to the Offender Accountability Act,³ when violations of community custody conditions were dealt with by courts, defense attorneys and

¹ See http://www.oah.wa.gov/OAH_Strategic_Plan_2009-2015.pdf, at 9 (accessed December 4, 2014).

² See <http://www.oah.wa.gov/DSHS.shtml> (accessed December 3, 2014).

³ Laws of 1999, ch. 196 (E2SSB 5421).

prosecutors, the dockets of trial courts were so full that offenders spent undue amounts of time in jail awaiting their hearings.⁴ The legislature's decision to remove attorneys and courts from the process streamlined it such that an offender's liberty interest was protected, not infringed.

D. Washington's Due Process Clause Does Not Offer Greater Protection Than The Federal Due Process Clause

This Court has held that "Washington's due process clause is coextensive with that of the Fourteenth Amendment, providing no greater protection." *State v. Morgan*, 163 Wn. App. 341, 352, 261 P.3d 167, 173 (2011) (citing *State v. McCormick*, 166 Wn.2d 689, 699, 213 P.3d 32 (2009); *In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001); *State v. Manussier*, 129 Wn.2d 652, 679, 921 P.2d 473 (1996); *State v. Ortiz*, 119 Wn.2d 294, 303–05, 831 P.2d 1060 (1992)). This Court should decline Grisby's invitation to reach a different conclusion.

Likewise, the Court need not undertake an independent analysis of the state due process clause. In both *Bellevue Sch. Dist. v. E.S.*, 171

⁴ 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-Works-in-Community-Supervision-Interim-Report_Full-Report.pdf) ("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."); *Cf. State v. Vasquez*, 148 Wn.2d 303, 317, 59 P.3d 648 (2002) ("if an administrative hearing takes on characteristics of a completely litigated trial, it would defeat the legislative purpose of conducting swift and expeditious administrative hearings.").

Wn.2d 695, 257 P.3d 570, 580 (2011), and *King v. King*, 162 Wn.2d 378, 174 P.3d 659 (2007), the Washington Supreme Court rejected a request for an independent analysis of the state due process clause for purposes of the right to counsel. *See Bellevue*, 171 Wn.2d at 714; *King*, 162 Wn.2d at 392. This Court should also reject an independent analysis.

Furthermore, Grisby concedes that factors one through three of the six-factor test of *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), do not support an independent analysis of the state constitution in this case. Resp't's Br., at 26. Factors four through six likewise do not tip the balance in favor of independent analysis.

As for the fourth factor, pre-existing state law, the pre-existing state law in this case is both the statute and case law. The applicable statute does not provide a right to counsel at a community custody violation hearing. RCW 9.94A.737(6)(c) provides the following rights:

The offender shall have the right to: (i) Be present at the hearing; (ii) *have the assistance of a person qualified to assist the offender in the hearing*, appointed by the hearing officer *if the offender has a language or communications barrier*; (iii) testify or remain silent; (iv) call witnesses and present documentary evidence; (v) question witnesses who appear and testify; and (vi) receive a written summary of the reasons for the hearing officer's decision.

RCW 9.94A.737(6)(c). Also, under the regulations 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.”). 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).

As for case law, this Court in *Ziegenfuss* declined to resolve the issue of right to counsel, finding the claim was not ripe for review. *Ziegenfuss*, 118 Wn. App. at 115-16. The Court did not resolve the issue, and it did not overrule *McNeal*. Therefore, *McNeal* is still the controlling law on this issue. In light of *McNeal* and the above statutes, the fourth *Gunwall* factor does not support an independent analysis of the state constitution regarding right to counsel in community custody violation hearings.

The fifth *Gunwall* factor, regarding structural differences in the state and federal constitutions, has consistently been held to support an independent analysis. *Bellevue*, 171 Wn.2d at 713.

Finally, the sixth *Gunwall* factor, regarding matters of particular state or local concern, does not support an independent analysis because

the issues of criminal procedure, criminal justice, reducing recidivism, and responding to violations of offenders being supervised are all issues that do not entail a local interest; every state in the nation has an interest in those issues.

The *Gunwall* factors do not support an independent inquiry of right to counsel under article I, section 3 of the Washington Constitution, in the context of a community custody violation hearing.

E. Denying Grisby Counsel Would Not Violate Washington’s Law Against Discrimination

Grisby claims that because he has a mental disorder (depression, post-traumatic stress disorder, and chemical dependency), not allowing him to have counsel represent him at a community custody violation hearing violates the Washington Law Against Discrimination (WLAD), RCW Ch. 49.60. Resp’t’s Br., at 35-36. But the WLAD does not apply to community custody violation hearings. Even if it did, Grisby’s claim seeks to transform “an antidiscrimination statute into an entitlement statute” and offers “no principled limit to the reach of the statute.” *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 626, 911 P.2d 1319 (1996) (reversing trial court’s finding that transit authority’s new paratransit system constituted discrimination in public accommodations, where new

plan ended transit service to some people served under the prior plan who were now outside new plan's geographic service area).

The WLAD provides, "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." RCW 49.60.400. The WLAD expressly addresses the areas of employment and labor unions, public accommodations, housing, credit transactions, insurance transactions, commerce, and breastfeeding in public. *See* RCW 49.60.030; WAC Title 162. Thus, it does not expressly apply to community custody violation hearings. Grisby cites no case law holding that the WLAD implicitly applies, either.

Even if the WLAD did apply implicitly, it would not require the DOC to allow Grisby to have counsel represent him in a violation hearing. Existing procedures already prevent discrimination. As discussed in Appellants' opening brief, before or during a violation hearing, 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. *See* DOC Policy 460.130, at 14 (available at <http://www.doc.wa.gov/policies/>). 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. *See* DOC Policy 630.590, Offender Re-Entry Community Safety Program Review (available at <http://www.doc.wa.gov/policies/>).

Furthermore, the offender in a community custody violation hearing 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. RCW 9.94A.737(6)(c); WAC 137-24-040(7); WAC 137-104-060(7).

The Washington Law Against Discrimination does not support Grisby's claim that he is entitled to counsel in his violation hearing.

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

RESPECTFULLY SUBMITTED this 5th day of December, 2014.

ROBERT W. FERGUSON
Attorney General



RONDA D. LARSON, WSBA #31833
Assistant Attorney General
Corrections Division OID# 91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445

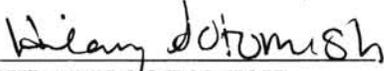
CERTIFICATE OF SERVICE

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

ROBERT C. BORUCHOWITZ
RONALD A. PETERSON LAW CLINIC
1215 E COLUMBIA
SEATTLE WA 98122-4340
boruchor@seattleu.edu

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

EXECUTED this 5th day of December, 2014, at Olympia, WA.


HILARY SOTOMISH
Legal Assistant