NO. 102875-0

WASHINGTON SUPREME COURT

ON APPEAL FROM COURT OF APPEALS, DIVISION THREE

CASE NUMBER 389308

RONALD BUZZARD JR.,

Appellant,

V.

ISRB, ESRC, DOC, et al.,

Respondent(s),

PETITION FOR REVIEW

PURSUANT TO RAP 13.4 (b)(1), (2), (3), (4)

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I. IDENTITY OF PETITIONER

Ronald Buzzard Jr., Appellant, herein Pro Se moves this Court for a Petition for Review based on the denial of his direct appeal "as a matter of right", RAP 2.2(a)(3), by Division Three, Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

Buzzard's direct appeal "as a matter of right" was denied on 2/13/2024. Buzzard's Motion for Reconsideration was denied, and Buzzard filed for an Extension of Time til 4/1/2024, this is timely filed.

Buzzard appeals the claim that the ESRC, End of Sentence Review Committee, ran by Theo Lewis, and DOC, Department of Corrections, and/or the ISRB Indeterminate Sentencing Review Board violated their mandatory duty that was created by the mandatory language of "shall" participate in all methodologies [or actuarial testing] in RCW 9.95.420 (1)(a), (c), when respondents illegally and unconstitutionally changed Buzzard's sex offender registration level from low risk Level One to high risk Level Three. This resulted in numerous prejudice including being denied parole in November 2021, an SVP-FPE-Forensic Psychological Evaluation after being found releaseable in October 2023, and his parole being rescinded and another 4 years added to his community custody revocation in February 2024, as a result of his level being changed without his participation. This is an "issue of first impression" that affects a thousand others, This,

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involves an issue of substantial public interest, RAP 13.4(b)(4), requiring review of this Petition for Review.

Buzzard seeks his level be reversed back to level One, and immediate release.

III. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals erred in ruling Buzzard failed to prove respondent(s) had a mandatory duty. Since controlling case law, and legislative authority mandates in statute that any "shall" is "mandatory language" which automatically creates a "mandatory duty", and reversal is required.

2. This is an "issue of first impression" requiring judicial review,

3. This is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4), and 12.4(a)(4)

IV. STATEMENT OF THE CASE

Buzzard initially filed this case in Franklin County Superior Court as a Writ of Mandamus, which after several show cause hearings was denied. He appealed the denial to Court of Appeals, Division Three, as a matter of right under RAP 2.2(a)(3). Division Three denied his direct appeal on February 13, 2024, ruling "Buzzard has failed to show a mandatory duty to act on the part of either DOC or the ISRB." Buzzard timely filed a Motion for Reconsideration which Division Three denied. Buzzard filed an Extension of Time, timely, in which to file this Petition for Review since he didn't get their decision on time. Buzzard timely files this Petition for Review. RAP 13.4(b)(4), (1), (2).

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ARGUMENTS WHY REVIEW SHOULD BE GRANTED

1. DIVISION THREE OBVIOUSLY AND PROBABLY ERRED, ABUSED IT'S DISCRETION, AND THEIR DECISION IS IN CONFLICT WITH THE OTHER DIVISIONS OF THE COURT OF APPEALS, AND SUPREME COURT CASES. THIS CASE ISSUE IS A SIGNIFICANT QUESTION OF LAW, AND INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT, RAP 13.4(b)(1-4), SINCE THE ESRC, END OF SENTENCE REVIEW COMMITTEE, ILLEGALLY CHANGED OVER 1,000 INMATES SEX OFFENDER REGISTRATION LEVELS FROM LEVEL ONE TO THREE WITHOUT THEIR "SHALL" PARTICIPATE IN AS REQUIRED IN RCW 9.95.420, THIS MANDATORY LANGUAGE OF "SHALL" CREATES A MANDATORY DUTY. THUS, THE COURT OF APPEALS DECISION STATING "BUZZARD FAILED TO PROVE A MANDATORY DUTY" IS WRONG, AND MUST BE REVERSED, BUZZARD'S LEVEL BE REDUCED BACK TO LEVEL ONE, HE BE ORDERED IMMEDIATELY RELEASED, AND HE BE PAID COSTS, ATTORNEYS FEES, AND DAMAGES FOR THE EXTRA NEARLY 3 YEARS INCARCERATION SINCE HIS "LEVEL THREE" WAS THE REASON FOR HIS 2021 RELEASE DENIAL IT'S WHAT CAUSED THE FPE-FORENSIC PSYCH EVAL, AND HIS FEBRUARY 2024 BOARD DENIAL, WHICH ADDED 48 MONTHS TO HIS TIME.

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A. The Use Of "Shall" In RCW 9.95.420(1)(a), (c) Is Mandatory Language

Statutory interpretation "begins with the text." Merit Management Group, LP V. FTI Consulting, Inc., 583 U.S. 366, 378, 138 S.Ct. 883, 200 L.Ed.2d 183, 194 (2018). The first sign that the statute imposed an obligation is its mandatory language: "shall." Me. Cmty. Health Options V. U.S., 140 S.Ct. 1308, 1320, 206 L.Ed.2d 764 (2020). "Unlike the word 'may', which implies discretion, the word 'shall' connotes a requirement." Kingdomware Technologies Inc. V. U.S., 579 U.S. 162, 163, 136 S.Ct. 1969, 195 L.Ed.2d 334, 339 (2016); see also Lexecon Inc. V. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998)(observing that "shall" typically "creates an obligation impervious to... discretion). "When", as is the case here, Congress "distinguishes between 'may' and 'shall', it is generally clear that 'shall' imposes a mandatory duty." Kingdomware, Id.; see U.S. ex rel. Siegel V. Thoman, 156 U.S. 353, 359-60, 15 S.Ct. 378, 39 L.Ed. 450 (1895). We see no reason to depart from the usual inference here.

For the reasons already given, the text of RCW 9.95.420(1)(a), (c) clearly imposes a mandatory duty. Thus, Division Three's opinion that "Buzzard failed to prove a mandatory duty" is incorrect, and must be reversed and grant his relief requested herein.

As a general rule, the use of the word "shall" in a statute is mandatory and operates to create a duty. State ex rel. Nugent V. Lewis, 93 Wn.2d 80, 83, 605 P.2d 1265 (1980). "Shall" in a statute creates mandatory requirement absent contrary Legislative intent. State V. Krall, 125 Wn.2d 146, 148-49, 881 P.2d 1040 (1994). "Shall" is a mandatory obligation. State V. Dodd,

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120 Wn.2d 1, 14, 838 P.2d 86 (1992).

Buzzard's due process rights created by a state created liberty interest was violated since the .420(1)(a), (c) statutorily circumscribed in mandatory language that the ESRC had a mandatory duty to allow Buzzard "to participate in" when they changed his sex offender registration level without him being able to participate, dispute incorrect facts in his file material. The reason Buzzard requests his level be lowered back to one, and immediate release is because it would violate double jeopardy to give the ESRC a "second bite at the apple", if this case was just reversed to allow Buzzard "to participate in", Thee Lewis, and the ESRC changing his level.

Since the ESRC failed to follow the statute, RCW 9.95.420 (1)(a), (c), and its companion WAC 381-90-090(3) they abused their discretion, violated Buzzard's state created liberty interest under the 14th Amendment. And now the Court is under a mandatory duty to act since Buzzard's met the qualifying criterion.

The judge's of this Court must exercise their discretion, since it is statutorily circumscribed, which creates a mandatory duty by statute and controlling case law, and GRANT all of Buzzard's requested relief.

The statute thus uses mandatory language and clearly specifies the outcome to be reached... Chaney V. Stewart, 156 F.3d 921, 928 (9th Cir. 1998). The statute therefore meets the requirements we have discribed for the creation of a liberty interest, See Bowin V. Calderon, 59 F.3d 815, 842 (9th Cir 1995). The majority opinion does not dispute that if the statute is "mandatory" it creates a

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liberty interest, Id. at 929

The Department's denial of the request will have contravened the mandatory language of [the statute, RCW 9.95.420(1)(a), (c)] and will have provided another basis for relief under The APA's judicial review statute. RCW 34.05.570(4)(c)(ii). Ries V. L&I, 145 Wn.2d 483, FN 15, 39 P.3d 561 (2002).

"Shall" is unequivocally mandatory language. Sane Transit V. Sound Transit, 151 Wn.2d 60, 92, 85 P.3d 346, 362 (2004)(citing Erection Co. V. Dept. of L&I, 121 Wn.2d 513, 518, 852 P.2d 288 (1993); see also Miller V. French, 530 US. 327, 337, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000)). Fundamental to statutory construction is the doctrine that "shall" is construed as mandatory language. State V. Goins, 151 Wn.2d 728, 749, 92 P.3d 181, 191 (2004)(citing Ries, 145 Wn.2d, at 501 n.11).

Notably, this Court overruled an earlier Court of Appeals case, State V. Hartwell, 38 Wn. App. 135, 684 P.2d 778 (1984), because that case failed to "recognize the general rule that 'shall' is presumptively mandatory." Kvall, 125 Wn.2d, at 149. After review of the legislative history, we held the word "shall" in the statute was mandatory. State V. Mollichi, 132 Wn.2d 80, 86, 936 P.2d 408 (1997).

"Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself." Mollichi, at 87 (citing Human Rights Comm'n ex rel. Spangenberg V. Cheney Sch. Dist. No. 30, 97 Wn.2d 118, 121, 641 P.2d 163 (1982)). See also Marquis V. City of Spokane, 130 Wn.2d 97, 107, 922 P.2d 43 (1996)("under our rules of statutory construction, a statute

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clear on its face is not subject to judicial interpretation). We have no license to rewrite explicit and unequivocal statutes. Id. at 87.

Thus, under the mandatory language of RCW 9.95.420(1)(a), (c):

"... the department shall conduct, and the offender shall participate in, an examination of the offender, incorporating methodologies that are recognized by experts..."

RCW 9.95.420(1)(a), (c).

Buzzard argues that since the ESRC is part of DOC, that is why he has the ESRC, DOC, and/or the ISRB all as respondents in this case. And the ESRC, Theo Lewis, is the one who changed his level "WITHOUT" Buzzard's participation. Respondents argued that "Buzzard participated in the .420 hearing, and got to view his Sinka packet. Thus, this constituted "participate in"."

Buzzard argues: 1. this is wrong; 2. there's no due process to appeal the over 1,000 people who Theo Lewis has changed their level since 2020; 3. to be afforded due process there must be participation in determining the level if above a level one, and to be able to contest any wrong facts relied on. This makes this an issue of substantial public interest.

The axiomatic, plain as the nose on one's face, is the Appellate Court's affirmation being dead wrong. They claim "Buzzard has failed to show a mandatory duty to act." Buzzard's claim was the ESRC did not follow state law and the word "shall", simple as that. "Shall" creates a Legislative duty that cannot be ignored. He showed explicit error.

When, however, a state creates a liberty interest, the Due Process

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requires fair procedures for its vindication – and federal courts will review the application of those constitutionally required procedures. Swarthout Vs. Cooke, 562 U.S. 216, 219-20, 131 S.Ct. 859, 178 L.Ed. 2d 732 (2011). US. Const. Amend. 5, 14. Since this is an issue of substantial public interest this Court should accept review since this is an issue affecting at least 1,000 other inmates. RAP 12.4(a)(4), RAP 13.4(b)(4), RAP 13.5A(a)(1), (b). In re Pers. Restraint of Coats, 173 Wn.2d 123, 267 P.3d 324 (2011).

Thus, this Court should accept review, reverse the Court of Appeals erroneous decision, Order Buzzard's sex offender registration level be reversed to Low Risk Level One, Order Buzzard immediately released, and allow Buzzard to be paid for wrongful incarceration back to November 2021, and award Buzzard costs for postage, copies, and attorneysfees, all the way back to the initial Writ of Mandamus over 2 years ago. RAP 18.1.

And in August 2023, the ISRB found me parolable with the Level 3 sex offender Notification Level. The ESRC found this erroneous Level 3 in November 2021 without Buzzard's "participation in" as .420(1)(a), (c)'s mandatory language requires. The only Notice as required they gave me was a sheet in my Sinka Packet they wouldn't give me a copy of to present as an Exhibit They never gave me an informal right to appeal to the ESRC for the Level Change since this process does not exist; which is required by law under WAC 381-90-050(2)(g), violating my due process. The ISRB decision taking back my parole release date of 11/13/2023, was based solely on my index offense and community custody violation file material

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which is the exact same information relied on in the FPE. This is an abuse of discretion for the ISRB to suspend, and revoke his release based on the illegal level change which spurred the FPE, and his suspension and revocation of his approved 11/13/2023 release date. U.S. Const. Amend. 5, 14; Wash. Const. Art. I §§ 3, 22.

This Court reversed and held that the ISRB abused its discretion because:

> [r]ather than focusing on the statutory presumption of release, her awareness of her crimes, her changed behavior, her assessed low risk to reoffend, and appropriate release conditions, the ISRB relied on Brashear's underlying crimes, the impact of these crimes, and the small portion of her sentence served in denying her petition.

In re Pers. Restraint of Evans, No. 85900-5-I (Div. I, 2024)(citing In re Pers. Restraint of Brashear, 6 Wn. App. 2d 279, 288, 430 P.3d 710 (2018)).

Buzzard's already served over 22 years, including nearly 5 years of that on community custody, now almost 4 years, in July 2024, on this community custody violation, which in February 2024 he was flopped for another 4 years, so 8 years on a violation Buzzard has finished his Entrepreneur Certificate from Edmonds College, and is 2 classes away from his Business Associates Degree, which he starts these last 2 classes on 4/2/2024, and gets his Degree on 6/10/2024 with a current 3.74 GPA, Buzzard's finished SOTAP, Thinking for a Change, Alternatives to Violence, and numerous other programs. He's rehabilitated for release.

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B. The Mandatory Language In RCW 9.95.420(1)(a),(c) Created A Mandatory Duty For The ESRC To Allow Buzzard To Participate In, An Examination Of The Offender, Incorporating Methodologies, Requiring Reversal Of The Court of Appeals' Opinion/Decision

The mandatory duty of RCW 9.95.420(1)(a), (c) was designed to prevent the kind of injury suffered by Buzzard. Pierce V. County of Orange, 526 F.3d 1190, 1208 (9th Cir. 2008)(citing Turner V. Safely, 482 US. 78, 88-90, 107 S. Ct. 2254, 96 L.Ed.2d 64 (1987)).

Noting that "[w]hen a statute distinguishes between 'may' and 'shall', it is clear that 'shall' imposes a mandatory duty. In re Parental Rights of K.J.B., 187 Wn.2d 592, 603, 387 P.3d 1072 (2017)(citing Kingdomware, Id., 136 S.Ct. at 1977). In general, the word "shall" in a statute imposes a mandatory duty. Rios V. L&I, 103 Wn.App. 126, 139, 5 P.3d 19 (2000); See e.g., Wash. State Coalition of the Homeless V. DSHS, 133 Wn.2d 894, 907-08, 949 P.2d 1291 (1997).

The statute must create a mandatory duty to take specific action to correct a violation. Forest V. State, 62 Wn.App. 363, 369, 814 P.2d 1181 (1991). "[T]he word 'shall' in a statute is presumptively imperative and operates to create a duty." State V. Martin, 137 Wn.2d 149, 154, 969 P.2d 450 (1999)(citing State V. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

Buzzard argues this Court should disagree with respondents and Division Three, should reverse and rule that he's proven a mandatory duty for the ESRC, DOC, and/or the ISRB to allow Buzzard to participate in the file review materials when they changed his sex offender registration level from low risk level one to high risk

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level three as RCW 9.95.420(1)(a), (c) mandates with mandatory language: "shall".

The Supreme Court disagreed with DSHS, holding that the statute created a mandatory duty. DSHS, 133 Wn.2d, at 908. "While the Department is afforded discretion under the statute in developing the plan required, it must comply with the clear language of the statute when it exercises that discretion." Coalition, 133 Wn.2d, at 912.

It is a violation of procedural due process, and state law based claims for failure to discharge a mandatory duty. St. Jon V. Tatro, No. 15-CV-2552-EPC-JLB (S.D.CA. 2016).

Buzzard has herein alleged a violation of "any duty which is non-discretionary." City of Fairborn V. U.S. EPA, No. 3:22-CV-102 (S.D. OH. 2023), At *22-23. Since RCW 9.95.420(1)(a), (c) requires the ESRC, DOC, and/or the ISRB to take a specific action, "to participate in", to allow Buzzard to be involved in the methodologies, testing, etc. respondents used to change his sex offender registration level from one to three, then a Writ of Mandamus can compel the action, Colvin V. Inslee, 195 Wn.2d 879, 893, 467 P.3d 953 (2020), thus, Division Three, and Franklin County erred in denying Buzzard's Mandamus, requiring reversal.

The Writ "contemplates the necessity of indicating the precise thing to be done." Walker V. Munro, 124 Wn.2d 402, 407, 879 P.2d 920 (1994). A mandatory duty is subject to mandamus if its ministerial, and nondiscretionary, in nature. SEIU Healthcare 775 NW V. Gregoire, 168 Wn.2d 593, 599, 229 P.3d 774 (2010). A duty is both mandatory and ministerial when "the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment. Id. Reversal's required here.

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2. "Issue Of First Impression" Requires Judicial Resolution

Buzzard argues this Court must accept review and do a de novo review since this is an "issue of first impression," and is an issue of substantial public interest.

An "issue of first impression" requires judicial resolution. Christiansburg Garment Co. V. EEOC, 434 U.S. 412, 423-24 (1978). Whether the controversy is sufficiently based upon a real threat of injury to the plaintiff. Garner V. Cuyahoga Cnty. Juv. Ct., 554 F.3d 624, 636 (6th Cir. 2009).

Buzzard argues he's proven a real injury since due to the ESRC raising his sex offender registration level from level one to level three, which is: 1. the reason why he was flopped in November 2021 for 2 extra years, which proves injury; 2. the reason why after the ISRB found him "releasable" in August 2023, and approved his release address and then due to the level 3 King County Prosecutor filed a "self referral" for an FPE-Forensic Psychological Evaluation for an SVP application. Which is an injury ONLY filed due to the Level 3 designation. This caused Buzzard to have his parole release revoked, and in February 2024 the ISRB added 48 months to his minimum term. Thus, Buzzard proves injury since he's been given an extra 6-7 years, so far, based on the level 3 designation.

An issue of first impression which would overrule clear past precedent [requires review]. In re Drysdale, 248 B.R. 386, 390-91, FN2 (9th Cir 2000). Further, the bringing of cases of first impression in this state helps safeguard the constitutional rights of the plaintiffs, as well as those of others, serving fundamental

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goals of §§ 1983 and 1988, Washington State Republican Party, V. WA. State Public Disclosure Com'n, 141 Wn.2d 245, 291, 4 P.3d 808, 838 (2000). Cases of first impression are not frivolous if they present debatable issues of substantial public importance." Cary V. Allstate Ins. Co., 78 Wn. App. 434, 440-41, 897 P.2d 409 (1995), aff'd, 130 Wn.2d 335, 922 P.2d 1335 (1996).

Buzzard's case is a case of first impression that presents debatable issues of substantial public importance.

Moreover, the argument is of constitutional magnitude, debatable, and a matter of first impression for this state, and thus could not be "frivolous" as that term has been previously defined. State ex rel. Quick-Ruben V. Verharen, 136 Wn.2d 888, 909, 969 P.2d 64, 75 (1998). This appears to be an issue of first impression in Washington, as no case is cited or found that specifically discusses [this issue]. Valdez-Zontek V. Eastmont School Dist., 154 Wn. App. 147, 174, 225 P.3d 339, 354 (Div. 3, 2010).

Accordingly, defendant's argument presents an issue of first impression. Maes V. Standard Ins. Co., ___ Fed. Supp. 2d ___; No. C98-00353-ERB (N.D. CA. 1998). This is an issue of first impression for this Court. U.S. V. Orozco, 630 F. Supp. 1418, 1522 (S.D. Cal. 1986).

This is an "issue of first impression", never raised in this Court which requires judicial resolution.

3. This Is An Issue of Substantial Public Interest That Should Be Decided By This Court. RAP 13.4(b)(4); 12.4(a)(4)

A substantial public interest is a consideration that weighs in favor of this Court accepting review. State V. Bergstrom, 199 Wn.2d 23, 51, 502 P.3d

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837 (2022).

To obtain review in this Court, Buzzard must demonstrate that the Court of Appeals' decision conflicts with a decision of this Court or with a published Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b). In re Pers. Restraint of Williams, No. 99344-1 (2021). Buzzard contends that review is justified because he is raising a significant constitutional question and that his case involves an issue of substantial public interest. RAP 13.4(b)(3-4).

Having reviewed the Court of Appeals decision, the briefing of the parties, and the records presented, it is readily apparent that this court's review is justified.

This Court has discretion to decide an appeal if the question is of continuing and substantial public interest. Sorenson V. Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). To determine whether a case presents an issue of continuing and substantial public interest, we consider a nonexclusive list of criteria: "[(1)] the public or private nature of the question presented, [(2)] the desirability of an authoritative determination for the future guidance of public officers, and [(3)] the likelihood of future recurrence of the question." State V. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012)(quoting In re Pers. Restraint of Mattson, 166 Wn.2d 730, 736, 214 P.3d 141 (2009)). As a fourth factor, courts may also consider the level of adversity between the parties and the quality of the advocacy of the issues. Hart V. DSHS, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988).

Buzzard's question/issue presented requires this Court provide guidance

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to public officers, the ESRC, DOC, and/or ISRB, and the likelihood of future recurrence of the question since this has already caused Buzzard three actual injuries so far. And Buzzard has no counsel or advocacy to help him. Thus, satisfying the fourth factor.

V. CONCLUSION

Buzzard has proven this is an "issue of first impression", and has proven prejudice, actual injury, and the obvious and probable error of the Court of Appeals. And he's entitled to his relief requested Level reduced back to level One, immediate release, pay damages and costs back to November 2021, and Order the ESRC to develop an appeal process on level changes.

Dated this 1 day of April, 2024.

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Appellant, Pro Se

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

RONALD BUZZARD, Jr., Appellant, v. INDETERMINATE SENTENCE REVIEW BOARD, et al., Respondent.	)	No. 38930-8-III UNPUBLISHED OPINION

STAAB, J. — Ronald Buzzard appeals the superior court's dismissal of his petition for a writ of mandamus to the Department of Corrections (DOC) and the Indeterminate Sentencing Review Board (ISRB). Because Buzzard has failed to show a mandatory duty to act on the part of either DOC or the ISRB, we affirm the dismissal of his writ.

BACKGROUND

Ronald Buzzard previously pleaded guilty to first degree rape of a child. He was sentenced to 123 months to life and released to community custody after about 12 years in prison. After violating his terms of community custody, Buzzard's release was revoked, and he was returned to DOC's custody to serve a new 24-month minimum term.

While serving his minimum term, the ISRB conducted a releasability hearing. During the hearing, the ISRB discussed Buzzard's "index offense" as well as his

subsequent violations. It also discussed Buzzard's activities while in prison, community concerns, and where he would live if released. Buzzard was given an opportunity to speak about a statement made by his counselor and discuss what he was currently doing and had previously done for his mental health. Additionally, Buzzard admitted to his index offense for the first time and addressed what he believed "went wrong" that resulted in him violating his terms of community custody.

The ISRB extended Buzzard's minimum term by 24 months. As part of its decision, it recommended Buzzard receive sex offender treatment, noting that he had not previously been eligible but likely now was due to his admission of his index offense. The End of Sentence Review Committee (ESRC) also recommended Buzzard's sex offender classification be increased from a level 1 to a level 3.

Following the ISRB's decision, Buzzard filed a writ of mandamus against the ISRB requesting that the superior court order his immediate release from custody. He argued that the ISRB did not have authority to order him to complete sex offender treatment a second time and the ESRC improperly raised his sex offender risk level from a level 1 to a level 3.

The ISRB and DOC together filed a motion to dismiss Buzzard's petition, arguing that Buzzard failed to establish a mandatory duty and he had a plain, speedy, and adequate remedy at law—a personal restraint petition. The superior court granted the motion and dismissed Buzzard's petition, finding Buzzard failed to establish a mandatory

duty and the ISRB's decisions were discretionary. The court did not make a finding regarding whether Buzzard had a plain, speedy, and adequate remedy at law.

Buzzard appeals.

ANALYSIS

Buzzard argues that the superior court erred in dismissing his petition for a writ of mandamus against the ISRB and DOC. We disagree. Buzzard has failed to show a mandatory duty and failed to show that his sex offender notification was raised improperly.

"A writ of mandamus is a rare and extraordinary remedy because it allows courts to command another branch of government to take a specific action, something the separation of powers typically forbids." *Colvin v. Inslee*, 195 Wn.2d 879, 890-91, 467 P.3d 953 (2020).

An applicant for a writ of mandamus must establish three elements for a writ to issue: "(1) the party subject to the writ is under a clear duty to act; (2) the applicant has no 'plain, speedy and adequate remedy in the ordinary course of law'; and (3) the applicant is 'beneficially interested.'" *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003) (citations omitted) (quoting RCW 7.16.170). The burden of establishing these elements is on the petitioner. *Colvin*, 195 Wn.2d at 894.

"A writ of mandamus can only command what the law itself commands." *Id.* at 893. Where there is no legal requirement for a government official to take a specific

action, a writ cannot require it. *Id*. As a result, "'mandamus may not be used to compel the performance of acts or duties which involve discretion on the part of a public official.'" *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010) (quoting *Walker v. Munro*, 124 Wn.2d 402, 410, 879 P.2d 920 (1994)).

Writs of mandamus are subject to different standards of review depending on the issue addressed. *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 648, 310 P.3d 804 (2013). The question of whether the party to whom the writ is issued is under a clear duty to act is a question of law that is reviewed de novo. *Id*. at 649. But the question of whether there is a plain, speedy, and adequate remedy in the ordinary course of the law is a discretionary decision this court reviews for abuse of discretion. *Id*. This court reverses discretionary decisions only if they were manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Id*.

The superior court dismissed Buzzard's writ of mandamus based on a determination that Buzzard had failed to establish a clear duty to act on the part of either the ISRB or DOC. Buzzard was initially sentenced to an indeterminate sentence pursuant to RCW 9.94A.507, which provides for sentencing for certain sex offenders. Under RCW 9.95.420 and RCW 9.95.425, the ISRB had authority to determine whether Buzzard was releasable and whether to revoke his release when he violated his terms of community custody. *See also Matter of Forcha-Williams*, 200 Wn.2d 581, 593, 520 P.3d 939 (2022) ("[T]he authority to decide when a sex offender is released is vested with the

[ISRB].”). RCW 9.94A.507(5)-(6); RCW 9.95.420, .010, .011. There is nothing in these statutes and Buzzard points to no authority indicating the ISRB had a mandatory duty to release Buzzard.

Buzzard also argues that the ISRB did not have authority to order him to complete sex offender treatment a second time.[1] Regardless of whether the ISRB would have authority to order such treatment, there is no indication in the record that it did order such treatment. Rather, the ISRB *recommended* Buzzard be rescreened for sex offender treatment. Further, were Buzzard to submit to such treatment, there is no indication that this would be his second time completing it as the ISRB also explicitly stated that Buzzard had not previously been eligible for such treatment.[2]

[1] Although the ISRB claims that this argument and the argument regarding the ISRB’s authority to raise his sex offender risk notification level from level 1 to level 3 are being raised for the first time on appeal, they were both mentioned in Buzzard’s initial petition and so we address them.

[2] In his petition, Buzzard cites to exhibit 2 to support his contention that he had previously completed such treatment. However, exhibit 2 simply contains a letter from Buzzard’s counselor stating Buzzard had successfully completed his counseling obligation. It does not support Buzzard’s contention that he had previously completed sex offender treatment.

Buzzard additionally argues, for the first time on appeal, that WAC 381-90-090(3) was violated because he was not afforded his right to write a statement on his change of registration level. This argument has not been properly preserved and we decline to address it. *See* RAP 2.5(a).

Additionally, Buzzard claims that the ISRB improperly raised his sex offender notification level from a level 1 to a level 3. He claims that the ESRC had a mandatory duty, created by RCW 9.95.420(1)(a), (c), to permit him to participate in "actuarial testing" prior to determining his sex offender notification risk level and that he was not permitted to review the ESRC's report prior to his releasability hearing.

The statute requires the ESRC to, in certain situations as part of determining whether to release an offender, conduct an examination of the offender "incorporating methodologies that are recognized by experts in the prediction of sexual dangerousness, and including a prediction of the probability that the offender will engage in sex offenses if released." RCW 9.95.420(1)(a), (c). In this case, the record supports that such an examination and inquiry did occur at Buzzard's releasability hearing as the ISRB discussed several matters including a release plan, counseling on the record, and provided Buzzard with multiple opportunities to respond and participate. Assuming the ISRB was under a clear duty to act, Buzzard fails to demonstrate how it failed to comply with this duty.

Further, Washington law permits the ESRC to "[c]lassify the offender into a risk level for the purposes of public notification." RCW 72.09.345(5). Buzzard cites no statutory authority supporting his contention that this increase was improper or that the

ESRC was under a mandatory duty to keep his risk level at level 1. Accordingly, these arguments also fail.[3, 4]

The superior court did not err in dismissing Buzzard's petition for a writ of mandamus.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Pennell, J.

[3] Although the ISRB and DOC also argue that this court should affirm the dismissal of Buzzard's writ of mandamus because he had a plain, speedy, and adequate remedy at law, the superior court did not make any conclusions on this point.

[4] Buzzard also raises additional arguments including that the ISRB's actions violated his constitutional rights to due process, equal protection, a fair hearing, to present a defense, and protection from double jeopardy. He also challenges the evidence relied on by the ISRB and makes statements about witness bias and ER 401. However, none of these arguments explain how either the ISRB or DOC were under a clear duty to act. Accordingly, we decline to address these issues.

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CASE # 389308
Ronald Buzzard, Jr. v. I.S.R.B., et al
FRANKLIN COUNTY SUPERIOR COURT No. 2225001811

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:ko
Attach.
c: **Email** Hon. John Knodell