

NO. 37993-7

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

EVERETTE BURD,

Appellant,

v.

HAROLD CLARKE,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This is an appeal by a former Washington State prisoner Everett Burd following entry of a superior court order denying his motion for summary judgment and granting Mr. Clarke's¹ cross-motion for summary judgment. CP 473-475. Mr. Burd seeks a writ of mandamus forcing the Department of Corrections (hereinafter "the Department")² to assess Mr. Burd as a possible Dangerous Mentally Ill Offender (DMIO) under RCW 72.09.370. See Appendix A. He pursues this action in order to present at trial an alternative to involuntary commitment under RCW 71.09. Opening Brief at 11, 18. His civil commitment trial is scheduled for later this year.

Mr. Burd *was* an inmate in the Department's custody. While he was in the Department's custody, his counselor referred him for an evaluation under RCW 72.09.370, the DMIO statute, which provides in part:

The secretary shall identify offenders *in confinement* or partial confinement who: (a) Are reasonably believed to be dangerous to themselves or others; and (b) have a mental disorder. In determining an offender's dangerousness, the secretary shall consider behavior known to the department and factors, based on research, that are linked to an increased risk for dangerousness of mentally ill offenders

¹ Mr. Clarke is the former Secretary of the Department of Corrections. Mr. Eldon Vail is the current Secretary of the Department of Corrections and has been since November, 2007.

² The Department of Social and Health Services will be referred to as "DSHS."

and shall include consideration of an offender's chemical dependency or abuse.

RCW 72.09.370(1) (emphasis added).

Although Department officials at first referred Mr. Burd for a DMIO evaluation, the evaluation was not completed after the King County Prosecutor's Office confirmed it would be filing probable cause documents detaining Mr. Burd in Department of Social and Health Services (DSHS) custody under RCW 71.09. Mr. Burd was released from the Department custody on the expiration of his total confinement and has been in DSHS custody since July 20, 2006. *See* Opening Brief at 9.

Following cross-motions for summary judgment and oral argument, the superior court granted the Department's cross-motion and denied Mr. Burd's motion, dismissing the mandamus petition. CP 473-475. Mr. Burd argued that the Department has an obligation to conduct the DMIO assessment pursuant to RCW 72.09.370 because the assessment was not completed while he was in the Department's custody. Mr. Burd argued RCW 72.09.370 does not have any exceptions for individuals that have become the object of civil commitment proceedings under RCW 71.09. CP 257-271; CP 443-450. In response, the Department argued RCW 72.09.370 does not compel a DMIO assessment on offenders no longer in Department custody; therefore, Mr. Burd's mandamus petition

was moot upon the expiration of Mr. Burd's period of total confinement under his judgment and sentence. CP 413-423; CP 451-458; 465-469. Nor does Mr. Burd have any entitlement to a DMIO determination by the Department.

II. COUNTER-STATEMENT OF THE ISSUES

1. Mr. Burd is no longer in Department custody. He is now in the custody of DSHS under pre-trial orders prior to an involuntary commitment trial under RCW 71.09. RCW 72.09.370 allows offenders to receive a DMIO assessment while under Department custody. Is Mr. Burd's mandamus petition now moot?

2. Mr. Burd is petitioning for mandamus to compel a DMIO assessment and services to assist him in presenting evidence of an alternative to involuntary commitment at his trial under RCW 71.09. Does Mr. Burd have an entitlement to a DMIO determination compelling the extraordinary remedy of a writ of mandamus where the allocation of such services are discretionary with the Department?

III. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.

This was an action Mr. Burd originally filed in the State Supreme Court, seeking a writ of mandamus compelling the Secretary to provide a DMIO assessment after Mr. Burd was released from the Department

custody. After oral argument before the Court Commissioner, the matter was remanded to Thurston County Superior Court. The Superior Court heard the parties' motions for summary judgment and found that the petition was moot and should be dismissed. CP 473-475.

B. MR. BURD'S INCARCERATION.

Mr. Burd was convicted in 1997 of attempted rape in the first degree. Opening Brief at 5. The superior court sentenced Mr. Burd to 90 months total confinement, followed by 36 months of community custody. Id. He served the maximum sentence of total confinement imposed for the 1997 conviction, and the Department released Mr. Burd from its custody in July 2006. Opening Brief at 3. Because Mr. Burd has completed the maximum sentence of total confinement on the 1997 conviction, the Department does not have any authority to further detain him in prison.

Mr. Burd's 1997 judgment and sentence imposes on him a 36 month term of community custody. Opening Brief at 5. However, this term of community custody is currently tolled during Mr. Burd's continuing detention at the Special Commitment Center (SCC). RCW 9.94A.625(3).

Mr. Burd's motion for summary judgment was accompanied by an evaluation conducted by the Department in July 2004. The evaluation recounts Mr. Burd's extensive history as a sexually deviant predator,

dating back to when he was a child. This includes his 1997 offense for first degree attempted rape. CP 288. The July 2004 evaluation recounts another evaluation of Mr. Burd from 2002 that described Mr. Burd as “among the most dangerous inmates I worked with.” He most certainly will offend again violently and sexually. CP 284.

C. THE DMIO PROGRAM.

Under RCW 72.09.370, Department Policy 630.590 governs the DMIO program. The current policy, implemented in July 2007, directs that offenders being considered for involuntary commitment under RCW 71.09 should not be referred to the DMIO program. CP 436-437. The DMIO policy requires the offender be currently committed to a Department facility before a DMIO referral may be made. Those offenders in the community on supervision are not eligible for any DMIO consideration. *Id.* In support of his petition, Mr. Burd references Department Policy 350.520 in effect before July 2007. Opening Brief at 10.

The Department presented the testimony of Dr. Thomas Saltrup, the Director of Behavioral Health Services for the Department. Dr. Saltrup testifies that once the Department identifies an offender as a possible DMIO candidate, their cases and histories are presented to the DMIO Committee for review. CP 425. The Committee determines

whether the offender should receive DMIO services based on available documentation. CP 432. If the Department designates the offender as a dangerous mentally ill offender, the Department's determination and supporting documentation are added to the offender's central file and law enforcement is notified of the offender's upcoming release date from prison. The Department's designation of a DMIO remains part of the offender's record for up to five years after his or her release from total confinement under the judgment and sentence. CP 433. The offender may refuse to participate in any DMIO services offered; the offender can later opt to accept those services within the five years period following release from total confinement. CP 433-34. Participation is voluntary. *Id.*

When an offender is found to be a DMIO approaching his release date, the Department gathers a transition team that includes a re-entry specialist from the community and facility, DSHS, the regional support network where the offender is to be released, the community corrections officer, the Division of Alcohol and Substance Abuse of DSHS, the mental health care manager, the offender, and any other identified person. CP 425. The offender's correctional counselor is generally required to submit the proposed release plan to the transition team no later than 120 days before the inmate is to be released from total confinement. CP 431.

The funding for the DMIO program is provided by the Mental Health Division of DSHS. CP 425. In order to receive any funding, the inmate must participate in the treatment and recovery benefits and any funds received are to be used for additional services to assist the inmate in reintegration, including: further mental health treatment; housing; and vocational training. *Id.* The amount of funding is not guaranteed and it is impossible to know how much money, if any, the inmate will receive until the team has evaluated that person's needs and available resources. *Id.* Any funding may be provided for up to five years after the inmate's release; however, it can be limited in some circumstances. *Id.* This program does not provide any secured supervised living situations. *Id.*

IV. STANDARD OF REVIEW

On appeal, an order granting summary judgment is reviewed de novo. *Wilson v. Steinbach*, 98 Wn. 2d 434, 437, 656 P. 2d 1030 (1982). In determining the merits of a petition for a writ of mandamus, the determination of a duty to act is a question of law reviewed de novo. *Paxton v. Bellingham*, 129 Wash. App. 439, 445, 119 P. 3d 373 (2005) (citing *River Park Square, LLC v. Miggins*, 143 Wash. 2d 68, 76, 17 P. 3d 1178 (2001)). The party seeking summary judgment must show that no genuine issue of material fact exists and that they are entitled to judgment as a matter of law by "pointing out" to the court that there is an absence of

evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2543, 91 L.Ed. 2d 265 (1986).

V. SUMMARY OF ARGUMENT

Mr. Burd's petition for mandamus is moot because he is no longer under the Department's custody. Therefore, Mr. Burd cannot argue a current duty under RCW 72.09.370 compelling the Department to provide him with DMIO services. In addition, the extraordinary remedy of mandamus does not lie for compelling the Department in its discretionary allocation of services under this program. The superior court was correct in dismissing the petition for a writ of mandamus and that decision should be upheld.

VI. ARGUMENT

A. **THIS MATTER IS MOOT BECAUSE MR. BURD IS NO LONGER IN PRISON.**

Mandamus is an extraordinary writ. *Walker v. Munro*, 124 Wash.2d 402, 407, 879 P.2d 920 (1994). Mandamus is appropriate only "where there is a specific, *existing* duty which a state officer has violated and continues to violate. . . ." *Walker*, 124 Wn.2d at 408 (emphasis added). There must be a clear duty to act. *Gerberding v. Munro*, 134 Wn.2d at 195; *In re Dyer*, 143 Wn.2d 384, 398, 20 P.3d 907 (2001). The Court will not issue a writ unless the duty exists *at the time* the writ is

sought. *Walker*, 124 Wn.2d at 409 (emphasis added). A petitioner may not obtain a writ where the duty sought to be compelled is not yet capable of performance. *Id.* As the Supreme Court explained:

The duty to be enforced by mandamus must be one which exists at the time when the application for the writ is made. The writ will not issue in anticipation of a supposed omission of duty, but 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)).

The Department does not currently supervise Mr. Burd and has not had custody of him since July 2006. His confinement at the Special Commitment Center tolls the term of community custody. RCW 9.94A.625(3). Mr. Burd's claim overlooks whether the Department has any current duty under RCW 72.09.370 that would support his mandamus petition. Mr. Burd repeatedly argues the Secretary has an obligation to identify offenders that meet criteria. Opening Brief at 8, 12, 13. The statute provides in part:

(1) The secretary shall identify offenders *in confinement* or partial confinement who: (a) Are reasonably believed to be dangerous to themselves or others; and (b) have a mental disorder. In determining an offender's dangerousness, the secretary shall consider behavior known to the department and factors, based on research, that are linked to an

increased risk for dangerousness of mentally ill offenders and shall include consideration of an offender's chemical dependency or abuse.

(2) *Prior to release* of an offender identified under this section, a team consisting of representatives of the department of corrections, the division of mental health, and, as necessary, the indeterminate sentence review board, other divisions or administrations within the department of social and health services, specifically including the division of alcohol and substance abuse and the division of developmental disabilities, the appropriate regional support network, and the providers, as appropriate, shall develop a plan, as determined necessary by the team, for delivery of treatment and support services to the offender upon release. The team may include a school district representative for offenders under the age of twenty-one. The team shall consult with the offender's counsel, if any, and, as appropriate, the offender's family and community. The team shall notify the crime victim/witness program, which shall provide notice to all people registered to receive notice under RCW 9.94A.612 of the proposed release plan developed by the team. Victims, witnesses, and other interested people notified by the department may provide information and comments to the department on potential safety risk to specific individuals or classes of individuals posed by the specific offender. The team may recommend: (a) That the offender be evaluated by the county designated mental health professional, as defined in chapter 71.05 RCW; (b) department-supervised community treatment; or (c) voluntary community mental health or chemical dependency or abuse treatment.

RCW 72.09.370(1)(2) (emphasis added).

Here, Mr. Burd essentially argues he should be brought back into the Department's custody to allow for the DMIO assessment and to allow the DMIO committee to create a plan for his unlikely release from DSHS

custody for an unknown period of time. This argument would place the Department in the untenable position of returning Mr. Burd to prison to provide him an assessment despite the completion of his total confinement under his judgment and sentence. Mr. Burd served his prison sentence and the Department cannot bring him back into its custody, absent his release and subsequent violations by him.

In a mandamus case, there must be a current legal duty to act that is not being performed to support a claim for a writ. *Walker*, 124 Wn.2d at 409. Under RCW 72.09.370, the claimed duty by Mr. Burd is clearly linked to his own confinement in Department custody, not DSHS custody.³ That Mr. Burd may be supervised by the Department after his release from DSHS custody does not pertain to a current duty to act under RCW 72.09.370. Here, the superior court properly dismissed Mr. Burd's mandamus petition as moot.

³ To respond to the State's showing that there is not a current duty justifying a writ of mandamus, and that his mandamus case is therefore moot, Mr. Burd compares the lack of an in-custody determination by the Department that Mr. Burd as a DMIO to a form of restraint subject to relief under RAP 16.4(b). *See* Opening Brief at 21 (*citing State v. Turner*, 98 Wn.2d 731, 658 P.2d 658 (1983)) in response to a claim of mootness). He also cites cases concerning whether a direct appeal is moot. *Id.* This does not avoid mootness or show a duty justifying a mandamus. Because there is no non-discretionary duty on the Department, the court cannot provide effective mandamus relief and the case is also moot.

B. THE EXTRAORDINARY WRIT OF MANDAMUS DOES NOT LIE TO COMPEL THE DEPARTMENT TO REACH A CERTAIN RESULT IN THE DISCRETIONARY ALLOCATION OF ITS RESOURCES.

When directing the extraordinary writ of mandamus 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 writ is not 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; *Gerberding v. Munro*, 134 Wn.2d 188, 195, 949 P.2d 1366 (1998). The Court “will not usurp the authority of the coordinate branches of government.” *Walker*, 124 Wn.2d at 410; *Burg v. City of Seattle*, 32 Wn. App. 286, 647 P.2d 517 (1982) (mandamus is not available to force city to repair damaged road).

“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)). Because the Secretary does not have a clear duty to provide an assessment, a DMIO determination, services or funding to Mr. Burd, a writ cannot issue.

The writ was not brought for the proper purpose of compelling an agency to perform an existing mandatory duty. Rather, Mr. Burd brought the action so that he may argue to the jury in his civil commitment trial that, someday in the future, he might receive treatment or funding during his term of community supervision and civil commitment would not be necessary. Opening Brief at 11, 18. The Superior Court properly found that mandamus is not available because Mr. Burd is not seeking to enforce an existing mandatory duty. CP 473-475.

Mr. Burd's argument is that the Department needs to protect the community by providing housing similar to that at the SCC, which would remove any discretion the Secretary may have in where to place him and what treatment, if any, to provide. A decision not to provide treatment to a particular offender, made in accordance with the discretion granted by the Legislature and the Department's policy, does not offend any entitlement held by the offender. *Bresolin v. Morris*, 88 Wn.2d 167, 169, 558 P.2d 1350 (1977) (rejecting prisoner's claim of equal protection right to extended drug rehabilitation programs); *State v. Little*, 116 Wn. App. 346, 352, 66 P.3d 1099 (2003) (establishment of drug courts in a limited

number of counties did not violate equal protection). Burd has no right to specific treatment or funding at public expense. *Bresolin*, 88 Wn.2d at 171-72 (citing *Marshal v. United States*, 414 U.S. 417, 421, 94 S. Ct. 700, 38 L. Ed. 2d 618 (1974)).

Furthermore, mandamus is not available to force the Department to expend public funds in one particular manner, such as paying for Burd's treatment, creating a support program in the community, or in securing Mr. Burd's living arrangements.

Mr. Burd is seeking more than just a DMIO assessment and release plan. He is requesting the Department to provide him with treatment and security so he would be taken care of in the community, much like he would at the SCC. When an offender is found to qualify for DMIO funding, he may not necessarily receive allocations for treatment or specific housing. The Committee has the discretion to determine how the funds, if any, will be allocated to the offender. A writ of mandamus is not a proper remedy to compel the Department to provide for treatment or housing because of the discretion involved in such decisions.

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C. MR. BURD FAILS TO DEMONSTRATE ANY ENTITLEMENT TO A DMIO DETERMINATION OR SERVICES AS AN OFFENDER, INCLUDING DMIO SERVICES.

Mr. Burd apparently argues the Department must assess him as a DMIO and then provide him treatment and housing in order to protect the community. This is not what the RCW 72.09.370 states and he cannot show that there is any existing duty to provide such treatment should he ever be released from DSHS custody. 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). Mr. Burd cannot show any statutory or constitutional authority that requires the Department to provide him with the funding and treatment he is specifically seeking during his community custody term should he ever be released.

According to the statute, the Department does not have an affirmative duty to provide any sort of funding or treatment. RCW 72.09.370.⁴ The Legislature has not granted the Department unlimited resources with which to provide DMIO services or treatment. In fact,

⁴ RCW 72.09.370 states that individuals designated as DMIO are to have their case presented to a team consisting of a number of stakeholders, mostly DSHS participants, to determine what treatment or funds, if any, will be provided. This team meeting is to occur while the individual is still incarcerated. *Id.* There is no statutory duty for the Department to provide any specific treatment or funding to Mr. Burd warranting the relief he is requesting.

funding for such resources is in the DSHS budget. CP 425 (Saltrup Dec). RCW 72.09.370 only requires the Department to identify incarcerated offenders as being a DMIO; it does not compel that any specific individual be designated as DMIO. The statute allows for a team of representatives from DSHS and the Department of Corrections to create a plan that may address possible release and treatment options. RCW 72.09.370(2). This statute does not say that funding will be provided to the inmate or that any specific resources will be provided. *Id.* Under limited resources, the Department must select which offenders will receive funding and what type of support will be provided.

Mr. Burd's term of community custody does not confer a current duty to conduct a DMIO assessment. RCW 72.09.370(1) states that the Department determines who qualifies as DMIO when the individual is in confinement or partial confinement. The statute does not mandate whom the Department must designate as receiving DMIO services.⁵

⁵ Mr. Burd also cites to outdated Department Policy as support that the Secretary owes a current duty to conduct a DMIO assessment for him. Opening Brief at 10. Even if Mr. Burd were referencing current policy, his reliance on policy directing internal departmental management would not support a mandamus action, including the current policy that the DMIO assessment is to be done when an offender is in a Department facility. "Unlike administrative rules and other formally promulgated agency regulations, internal policies and directives generally do not create law." *Joyce v. Dept. of Corrections*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005) (citing *Melville v. State*, 115 Wn.2d at 40-41). The policies are not an enactment of legislative power, and "they do not have the force of law." *Joyce*, 155 Wn.2d at 323 (citing *State v. Brown*, 142 Wn.2d 57, 62, 11 P.3d 818 [2000]). Mandamus is not a proper mechanism to enforce a policy, as Mr. Burd is attempting to do. Here, Mr. Burd seeks mandamus compelling the

Furthermore, any plan to provide funding or other resources needs to be created prior to the offender's release. RCW 72.09.370(2). Mr. Burd has been released from Department custody. Should he be released from DSHS custody, the Department would still not owe a duty to either assess Mr. Burd or provide funding because he would not be placed back into an institution; he would be in the community. RCW 9.94A.625(3). The Superior Court properly found that Mr. Burd is not entitled to a writ of mandamus because the term of his community custody does not confer such a right. *See* RCW 72.09.370(2).

Mr. Burd fails to cite a single statute that mandates the Department to designate him as a DMIO and provide him with the unspecified services, referred to in his potential opening brief. Arguably, he is seeking a writ requiring the Department to create a treatment plan, for example, with secured housing sufficient to protect the community. This could be a locked facility with round-the-clock monitoring. The statutes giving the Department general authority to supervise offenders do not create a duty to provide such rehabilitative treatment to such offenders. *See Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990) (statutes did not create the duty to provide mental health treatment to a prison inmate); *Bresolin*, 88 Wn.2d at 168-174 (prisoner had no right to drug treatment program after

Department to provide assessments and services for an individual not in Department custody.

legislature amended statute to make program discretionary rather than mandatory); *cf. Pierce County Office of Involuntary Commitment v. Western State Hospital*, 97 Wn.2d 264, 644 P.2d 131 (1982) (state institution had statutory duty to accept all persons presented by county mental health professionals).

In *Melville*, the family of homicide victims brought a lawsuit against the Department alleging that it should have provided anger management treatment to an offender who was in Department custody for seven months and, upon his release from custody, shot and killed his ex-wife and child. *Melville*, 115 Wash. 2d at 35. His ex-wife's new husband sued, alleging the Department owed a duty to provide anger management classes and attempted to argue that had the Department provided such mental health care, Mr. David would have agreed to take it. *Id.* He also argued that such treatment would have prevented the tragedy. *Id.*

The plaintiffs in *Melville* argued RCWs 72.08.101⁶, 72.09.050, and 72.09.010 directed the Department to provide mental health treatment. *Id.* These statutes generally require the Department to provide programs for offenders while in a facility. *Melville*, 115 Wash. 2d at 35. The Court found that these statutory requirements did not specifically create a duty to provide any specific program or treatment to protect members of the

⁶ RCW 72.08 no longer exists, as the Court noted in the *Melville* opinion. *Melville*, 115 Wash. 2d at 37.

community. *Melville*, 115 Wash. 2d at 38. It also found that providing voluntary treatment options could not impose an enforceable legal duty. *Id.*

Nor does Mr. Burd have an entitlement to DMIO services that would give him a better legal footing at his civil commitment trial. *See* Opening Brief at 11, 18.⁷ Participation in the DMIO treatment plan is entirely voluntary and the offender can withdraw from that plan when he wants to. CP 428-438. It also would not provide sufficient community safeguards as Mr. Burd suggests.⁸ Mr. Burd's claims that there is a legal duty owed to provide a specific treatment plan to protect the community, while giving Mr. Burd the opportunity to voluntarily withdraw from such a plan, makes no sense, especially in light of *Melville*.

Mr. Burd attempts to analogize his arguments for mandamus to procedural rights related to the Departments' consideration of an offender's proposed release plan to community custody. He cites to *In re Personal Restraint of Liptrap*, 127 Wn. App. 463, 111 P.3d 1227(2005),

⁷ Individuals in DSHS custody at the SCC are in a secure facility with mental health care available. *See Turay v. Seling*, 108 F. Supp. 2d 1148, 1151 (W.D. Wash., 2000). The individuals confined at SCC are receiving treatment for their mental illness toward the eventual goal of re-integration into society, if they choose to participate and make sufficient progress. This includes Mr. Burd, who fails to demonstrate the need for a DMIO assessment in light of the services that continue to be available to him at SCC.

⁸ Although Mr. Burd argues the Department must provide him a specific release plan that would control Mr. Burd to the extent that he would not be at any risk to the community, no such plan exists. As Dr. Saltrup testifies, the DMIO program does not provide any housing that would be locked or provide constant supervision to the degree that Mr. Burd would be monitored sufficiently to protect the community. CP 425.

and *In re Dutcher*, 114 Wn. App. 755, 757, 766, 60 P.3d 635 (2002). See Opening Brief at 17-20. Mr. Burd's attempt to analogize his claim for mandamus to these published cases fails because these cases do not hold that an offender has a right to receive certain rehabilitative services prior to his release from prison. These cases pertain to the Department's responsibility to investigate an offender's proposed release plans prior to their earned release date. These cases do not suggest that an offender should be brought back into custody for an assessment by the Department, nor do they compel the Department to assess Mr. Burd and develop a specific plan under RCW 72.09.370, as Mr. Burd contends.

VII. CONCLUSION

For the foregoing reasons, the Secretary requests that the judgment of the trial court dismissing Mr. Burd's petition with prejudice be affirmed.

RESPECTFULLY SUBMITTED this 21st day of January, 2009.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the RESPONDENT'S BRIEF on all parties or their counsel of record as follows:

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

TO:

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Attorneys for Everette Burd

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

EXECUTED this 21st day of January, 2009 at Olympia, WA.

Karen Thompson
KAREN THOMPSON

APPENDIX A

RCW 72.09.370**Dangerous mentally ill offenders — Plan for postrelease treatment and support services — Rules.**

(1) The secretary shall identify offenders in confinement or partial confinement who: (a) Are reasonably believed to be dangerous to themselves or others; and (b) have a mental disorder. In determining an offender's dangerousness, the secretary shall consider behavior known to the department and factors, based on research, that are linked to an increased risk for dangerousness of mentally ill offenders and shall include consideration of an offender's chemical dependency or abuse.

(2) Prior to release of an offender identified under this section, a team consisting of representatives of the department of corrections, the division of mental health, and, as necessary, the indeterminate sentence review board, other divisions or administrations within the department of social and health services, specifically including the division of alcohol and substance abuse and the division of developmental disabilities, the appropriate regional support network, and the providers, as appropriate, shall develop a plan, as determined necessary by the team, for delivery of treatment and support services to the offender upon release. The team may include a school district representative for offenders under the age of twenty-one. The team shall consult with the offender's counsel, if any, and, as appropriate, the offender's family and community. The team shall notify the crime victim/witness program, which shall provide notice to all people registered to receive notice under *RCW 9.94A.612 of the proposed release plan developed by the team. Victims, witnesses, and other interested people notified by the department may provide information and comments to the department on potential safety risk to specific individuals or classes of individuals posed by the specific offender. The team may recommend: (a) That the offender be evaluated by the **county designated mental health professional, as defined in chapter 71.05 RCW; (b) department-supervised community treatment; or (c) voluntary community mental health or chemical dependency or abuse treatment.

(3) Prior to release of an offender identified under this section, the team shall determine whether or not an evaluation by a county designated mental health professional is needed. If an evaluation is recommended, the supporting documentation shall be immediately forwarded to the appropriate county designated mental health professional. The supporting documentation shall include the offender's criminal history, history of judicially required or administratively ordered involuntary antipsychotic medication while in confinement, and any known history of involuntary civil commitment.

(4) If an evaluation by a county designated mental health professional is recommended by the team, such evaluation shall occur not more than ten days, nor less than five days, prior to release.

(5) A second evaluation by a county designated mental health professional shall occur on the day of release if requested by the team, based upon new information or a change in the offender's mental condition, and the initial evaluation did not result in an emergency detention or a summons under chapter 71.05 RCW.

(6) If the county designated mental health professional determines an emergency detention under chapter 71.05 RCW is necessary, the department shall release the offender only to a state hospital or to a consenting evaluation and treatment facility. The department shall arrange transportation of the offender to the hospital or facility.

(7) If the county designated mental health professional believes that a less restrictive alternative treatment is appropriate, he or she shall seek a summons, pursuant to the provisions of chapter 71.05 RCW, to require the offender to appear at an evaluation and treatment facility. If a summons is issued, the offender shall remain within the corrections facility until completion of his or her term of confinement and be transported, by corrections personnel on the day of completion, directly to the identified evaluation and treatment facility.

(8) The secretary shall adopt rules to implement this section.

[2001 2nd sp.s. c 12 § 362; 1999 c 214 § 2.]

Notes:

Reviser's note: *(1) RCW 9.94A.612 was recodified as RCW 72.09.712 pursuant to 2008 c 231 § 56, effective August 1, 2009.

***(2) The term "county designated mental health professional" as defined in RCW 71.05.020 was changed to "designated mental health professional" by 2005 c 504 § 104.

Intent--Severability--Effective dates -- 2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Application -- 2001 2nd sp.s. c 12 §§ 301-363: See note following RCW 9.94A.030.

APPENDIX A

Intent -- 1999 c 214: "The legislature intends to improve the process of identifying, and providing additional mental health treatment for, persons: (1) Determined to be dangerous to themselves or others as a result of a mental disorder or a combination of a mental disorder and chemical dependency or abuse; and (2) under, or being released from, confinement or partial confinement of the department of corrections.

The legislature does not create a presumption that any person subject to the provisions of this act is dangerous as a result of a mental disorder or chemical dependency or abuse. The legislature intends that every person subject to the provisions of this act retain the amount of liberty consistent with his or her condition, behavior, and legal status and that any restraint of liberty be done solely on the basis of forensic and clinical practices and standards." [1999 c 214 § 1.]

Effective date -- 1999 c 214: "Sections 1, 2, and 4 through 9 of this act take effect March 15, 2000." [1999 c 214 § 12.]