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COA No. 51106-1-II
Kitsap County Superior Court No. 81-1-00394-8

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

In re the Personal Restraint of

ROBERT FRAZIER,

Petitioner

REPLY BRIEF OF PETITIONER

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I. REPLY TO STANDARD OF REVIEW

Mr. Frazier respectfully requests that this Court reverse the decision of the Indeterminate Sentence Review Board because they violated his constitutional rights by revoking his parole based on the exact same conduct that a federal court judge found to be egregious government misconduct. The Respondent cites that the ISRB “gives public safety considerations the highest priority when making all discretionary decisions on the remaining indeterminate population regarding the ability for parole” in arguing that the Board is seen “as a guarantor of the public’s safety.” Response, at 9. Following that argument, then the Board had a duty to punish and ensure that the corrections officers involved in this case not be allowed to continue infringing on the rights and safety of parolees. The Respondent fails to remember that ultimately in this case, Mr. Frazier was found not guilty of any and all public safety concerns and the only action for which he was found guilty was caused by the corrections officers falsely accusing and arresting him for crimes he did not commit. Therefore, a public safety argument falls short in this particular case. The Respondent emphasizes that the standard of review in this case is for abuse of discretion. It is clear from the Petition that the Board did abuse its discretion in finding Mr. Frazier guilty of a crime for which the criminal

charges were dismissed based on the egregious misconduct of the corrections officers involved in the case. Furthermore, Mr. Frazier argued abuse of discretion throughout the original petition. The respondent cites often to the Dyer case but fails to distinguish that that case specifically focused on the Board's ability to determine if a person has been rehabilitated enough to be eligible for parole release when it stated "the courts are not a super [ISRB] and will not interfere with a[n ISRB] determination *in this area...*" as opposed to Mr. Frazier's case where the Board was deciding if his already granted parole should be revoked based on new criminal conduct. Response, at 10.

II. ARGUMENT

A. SUPPRESSION OF EVIDENCE IN A CRIMINAL CASE SHOULD EXTEND TO EVIDENCE CONSIDERED BY THE ISRB IN A PAROLE REVOCATION HEARING

The Respondent argues that because the federal charges dismissed pursuant to Brady v. Maryland as a result of the Community Correction's Officers egregious misconduct were only related to the firearm charges, that it cannot apply to the remaining conduct considered by the Board. Response, at 11. To support that argument, the Respondent asserts that Mr. Frazier's attorney recognized that by having him plead guilty to one charge and challenging the others. Id. This argument falls short for many reasons. First, the State case was also dismissed in order for charges to be

filed in federal court and the State case included the Assault charge against the Community Corrections Officers. Second, Mr. Frazier's attorney challenged other allegations that did not involve the firearm, including failing to reside at his DOC approved residence and possessing methamphetamine. Third, and most important, the Order dismissing the federal charge went into a lengthy discussion about the egregious and severe government misconduct that the Community Corrections Officers carried out with regard to the investigation and handling of the Confidential Informant in this case. The fact remains that if the Community Corrections Officers had not pursued Mr. Frazier based on an unreliable informant that the federal judge determined they did unconstitutionally, then they would have never been attempting to arrest Mr. Frazier, which resulted in the assault the Board found him guilty of. The premise for all resulting actions and conduct came from the act that the federal court deemed misconduct resulting in dismissal of that case.

The Respondent next argues that the dismissal of the criminal case should not apply to the Board decision because of the difference in the burden of proof and because the exclusionary rule does not apply to Board hearings. Response, at 11-13. First, the Respondent argues that collateral estoppel does not apply to Board proceedings pursuant to Standlee v.

Smith, 83 Wn.2d 405, 518 P.2d 721 (1974). Mr. Frazier is not arguing that the Board is precluded from punishing him under collateral estoppel, that was never one of the arguments raised in the Petition. Collateral Estoppel does not apply to Mr. Frazier's case because there was no sentence imposed at the criminal court level because that case was dismissed due to the Brady violations. Furthermore, the Standlee case involved a judge finding, at a bench trial, that he believed the alibi defense presented and acquitting the Defendant based on that, whereas the Parole Board found they did not believe his alibi defense and violated him based on that ruling. This case is not analogous whatsoever as Mr. Frazier was never found guilty or acquitted in the criminal case because the federal judge dismissed the case prior to any evidence being considered based on a violation of his constitutional due process rights under the Fourteenth Amendment. Second, the Respondent argues that the exclusionary rule does not apply to Board hearings. Response, at 12-13. The exclusionary rule applies to government misconduct in the form of illegal searches and seizures under the Fourth Amendment. Evidence is suppressed in those cases to "deter illegal searches and seizures" and only applies in contexts "where its remedial objectives are thought most efficaciously served." Pennsylvania Bd. Of Probation and Parole v. Scott, 524 U.S. 357, 362-363, 118 S. Ct. 2014, 141 L.Ed. 2d 344 (1998). That court held that

excluding evidence under the exclusionary rule in parole revocation hearings would allow a parolee to avoid consequences for noncompliance with parole conditions. Id.

What the Respondent fails to recognize is that Mr. Frazier's argument for suppression is not under the exclusionary rule, the Fourth Amendment, or an illegal search and seizure. Mr. Frazier's argument is suppression based on a violation of his Fourteenth Amendment right to due process and a violation of Brady v. Maryland. The goal of suppression of materials for a Brady violation are to deter egregious government misconduct. In Mr. Frazier's case, the violation that he was revoked for would have never occurred but for the Community Corrections Officers egregious misconduct. In an exclusionary rule violation under the Fourth Amendment, typically the parolee has actually possessed the items being suppressed and committed the violation that is being suppressed. However, in this case, Mr. Frazier never would have even committed the violation in the first place, if it had not been for the Officers' governmental misconduct. Furthermore, a dismissal due to a Brady violation is significantly more rare than suppression of evidence due to a Fourth Amendment search and seizure violation. As discussed in the Petition, this is an issue of first impression as no court has addressed the

suppression of evidence in a Parole Revocation hearing that has been deemed suppressed in a criminal case due to a Brady violation. The Respondent's argument that because the exclusionary rule does not apply to these hearings, that a Brady suppression also should not apply, fails to recognize that the two suppressions address completely different violations of a Parolee's constitutional rights.

The Respondent then argues that because Mr. Frazier plead guilty to the assault violation, that he is precluded from arguing a due process violation that occurred prior to the guilty plea. Response, at 13. Mr. Frazier argues that his guilty plea in the Board hearing was not a knowing, voluntary, and intelligent plea based on the ineffective assistance of counsel arguments contained in the Petition. That lack of knowledge is evident in the arguments that Mr. Frazier presented to the Board to explain those actions. He continued to argue that the assault never would have occurred if the Officers had not been trying to arrest him illegally in the first place. Essentially Mr. Frazier is arguing the equivalent of a motion to withdraw a guilty plea in a criminal case so that he can challenge the due process violations.

Finally, the Respondent argues that the Board does not have to follow the evidence rules and therefore, may consider the evidence

excluded in the criminal case. Mr. Frazier's petition does not involve an evidence rule, it involves an egregious violation of his Fourteenth Amendment constitutional rights, those are two completely different concerns and the latter is provided significantly more protection by the courts.

In conclusion, Mr. Frazier's Petition is based on an egregious violation of his Fourteenth Amendment due process rights under Brady and its progeny, not under the Fourth Amendment exclusionary rule. Finally, while Mr. Frazier admitted to assaulting the officer in his guilty plea, he did not have effective representation of counsel to adequately advise him about the consequences of that guilty plea. Furthermore, the Board hearing never should have been allowed to happen once the federal court judge dismissed the case based on the exact same conduct and allegations; this is particularly true because the egregious government misconduct arose from the Board's own corrections officer actions. The Board should not be allowed to punish a parolee after a criminal court has deemed its own probation officer's actions egregious enough to dismiss criminal charges against the parolee for the exact same conduct. Allowing the Board to do so essentially negates and voids the purpose of the criminal court dismissal by allowing a second opportunity to punish the

parolee based on government misconduct. Therefore, Mr. Frazier respectfully requests that this Court find the Board violated his Fourteenth Amendment due process rights by revoking his parole using evidence obtained as a direct result of the Community Corrections Officers illegal and unconstitutional actions.

B. INEFFECTIVE ASSISTANCE OF COUNSEL WHERE THE BOARD DID NOT PROVIDE COUNSEL THE ABILITY TO EFFECTIVELY REPRESENT MR. FRAZIER BY DENYING A REQUEST FOR A CONTINUANCE

First, the Respondent argues that the Board itself could not violate Mr. Frazier's right to counsel. Mr. Frazier argued in the Petition that the Board violated his right to be represented by Counsel who is effective when it denied the continuance Counsel requested to allow him the necessary time to prepare. Counsel himself stated on the record that he could not effectively represent Mr. Frazier if the hearing proceeded that day and therefore, the Board allowed Mr. Frazier to receive ineffective assistance of counsel when it denied his attorneys motion to continue the hearing. This is particularly true because Mr. Frazier did not object to the continuance and also requested that the hearing be continued knowing that it would take longer for his due process rights to occur.

Second, the Respondent argues that because the Sixth Amendment right to effective counsel rests in criminal proceedings, that it does not

apply to Parole Board Proceedings. Response, at 15-17. The Respondent goes so far as to argue that the Court in Grisby v. Herzog and Gagnon v. Scarpelli addressed supplying a Parolee with Counsel but that Counsel does not have to be effective. Id. Under the Respondent's argument, when Counsel is appointed to a Parolee, it is sufficient for them to stand there and do nothing and that contradicts the holdings in those cases finding that Counsel should be appointed in cases where the assistance of Counsel is particularly necessary to assist the Parolee. While the Respondent argues that Mr. Frazier did not provide any case law stating that if Counsel is appointed, the right to effective Counsel applies, the Respondent also provides no case law stating that the standard for effective representation of Counsel in a parole revocation hearing is different than the standard provided in the Strickland case. Under the Respondent's argument, anytime the Court holds that Counsel is necessary, they would then also need to specify that Counsel must be effective and what the standard for effective representation in that circumstance would be. There are no cases decided by any appellate court in the State of Washington or the United States, which set that precedent. The Respondent is arguing for an absurd standard to be applied in Parole revocation proceedings that would result in an extra step for appeals courts anytime they deem Counsel is necessary in a case. When the Respondent addressed the Grisby court's ruling that

the Sixth Amendment right to counsel does to attach in post conviction hearings, the Respondent fails to recognize that the Court was referring to the Sixth Amendment right to appointed Counsel in every case. Grisby v. Herzog, 190 Wn. App. 786, 362 P.3d 763 (2015). That Court was not addressing whether or not Counsel was effective but rather whether Counsel was necessary at all. Id. The Respondent is asking this Court to make an absurd ruling that when Counsel is appointed in parole revocation hearings, that Counsel need not be effective. Mr. Frazier respectfully requests that this Court protect his right to effective representation.

C. THE PETITION INCLUDED SUFFICIENT EVIDENCE OF A POTENTIAL BIAS BY THE BOARD MEMBER DECIDING MR. FRAZIER'S CASE TO APPLY THE APPEARANCE OF FAIRNESS DOCTRINE

The Respondent argues that there is insufficient evidence to show that Ms. Ramsdell-Gillkey was not impartial under the appearance of fairness doctrine. Response, at 17-19. Ms. Ramsdell-Gilkey claimed that Officer Rongen's wife immediately recused herself from any involvement in the case and yet in Exhibit 23 provided in the Response, the Chair of the Board, Kecia Rongen, did not recuse herself from involvement in this case until September 9, 2016. That was almost a full year after the incident occurred and Mr. Frazier was under detainer from the Board for a violation hearing. This e-mail was sent just less than a month after the

Board received notice of the dismissal of the federal charges. Response, Exhibit 22. This shows that Officer Rongen's wife was likely made aware that the federal charges against Mr. Frazier were dismissed due to her husband's egregious misconduct almost a full month before she recused herself. During that time frame she had plenty of opportunity to speak with other members of the Board about her anger that her husband may have been sanctioned for his actions in Mr. Frazier's case. Even if she did not speak with the other Board members about Mr. Frazier's and her husband's case, she was the Chair of the Board and that alone is sufficient evidence that any member of the Board could have made a credibility determination of her husband based on their interactions with her during their service on the Board. This is particularly important in Mr. Frazier's case because the entire violation rests on egregious governmental misconduct of the Chair of the Board's husband. His credibility in this case is the most important piece of evidence for the Board member to consider.

The cases cited in the Response support Mr. Frazier's argument. First, in King County Water Dist. The court stated "the doctrine applies to invalidate a decision taken where an interest is shown which might have substantially influenced a member even though that interest did not

actually affect his decision.” King County Water Dist. V. Review Bd., 87 Wn.2d 536, 541, 554 P.2d 1060 (1976). Therefore, Mr. Frazier does not need to show that Ms. Ramsdell-Gilkey was actually influenced by her interactions with Officer Rongen’s wife, but that the potential that she could have been substantially influenced by that in making a credibility determination of Officer Rongen during the hearing. Id. In the Hoquiam case, that Board member not only recused herself from further hearings, but also recused herself from any discussion of the case whatsoever and there is no evidence provided that Officer Rongen’s wife did not engage in further discussions about the case not on the record. Hoquiam v. PERC, 97 Wn.2d 481, 646 P.2d 129 (1982). The Post case cited by the Respondent holds that a party must show evidence of a potential bias by the decision-maker in order for the appearance of fairness doctrine to apply and Mr. Frazier has shown evidence of a potential bias by the decision-maker and therefore, the appearance of fairness doctrine does apply. State v. Post, 118 Wn.2d 596, 618-19, 826 P. 2d 172 (1992).

It is interesting that the Respondent analogizes the recusal in Mr. Frazier’s case to a judge recusing herself in a criminal courthouse when the Respondent has premised its entire Response on the argument that the Board is not the equivalent of a criminal court. Response, at 19. To

address the Respondent's argument with regard to a recusal resulting in an entire court being unable to hear a matter, typically when a judge recuses herself in a criminal case, the other judges are not aware of the reason for the recusal and it is not made obvious the relationship between the recused judges and the parties as it is in Mr. Frazier's case with Officer Rongen and the chair sharing the last name. It is also possible that in a criminal case, if a similar scenario exists, then either attorney may argue for a change of venue due to the possible influence that will have on the other judges in that court.

Mr. Frazier has provided sufficient information to show that there is the potential for Ms. Ramsdell-Gilkey to not be able to remain impartial in his case due to the credibility determination she had to make of Officer Rongen after having served under his wife on the Board for the previous year. Therefore, Mr. Frazier respectfully requests this Court find that the Board violated his due process right to a hearing by a fair and impartial decision-maker.

III. CONCLUSION

For the foregoing reasons, this Court should grant Mr. Frazier's petition and reverse the ISRB ruling against Mr. Frazier as it was obtained in violation of Mr. Frazier's constitutional rights.

DATED this 24th day of February 24, 2018.

Respectfully submitted,

GAUSE LAW OFFICES, PLLC

A handwritten signature in black ink, appearing to read "Andrea Kim". The signature is written in a cursive, flowing style.

Andrea Kim, WSBA #46339
Attorney for Petitioner

GAUSE LAW OFFICES, PLLC

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