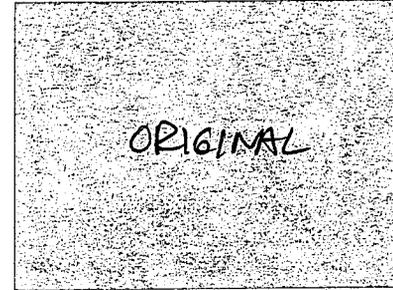


Washington Supreme Court No. 79872-9



IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:

RICHARD J. DYER,

Petitioner.

PERSONAL RESTRAINT PETITION WITH LEGAL ARGUMENT
AND AUTHORITIES

By:

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TABLE OF CONTENTS

I. STATUS OF PETITIONER/PROCEDURAL HISTORY1

II. OVERVIEW3

III. GROUNDS FOR RELIEF4

IV. STATEMENT OF THE CASE.....5

 A. SOURCES OF INFORMATION.....5

 B. FACTS PRESENTED AT TRIAL.....5

 C. PROCEDURAL HISTORY BEFORE THE ISRB10

 D. THE EFFECT OF THE SUPREME COURT’S 2006 RULING13

 E. NEW INFORMATION SINCE 2001 HEARING16

 F. THE DECEMBER 5, 2006 DECISION AND REASONS.....22

V. ARGUMENT23

 A. THE ISRB ONCE AGAIN ABUSED ITS DISCRETION23

 B. THE APPROPRIATE REMEDY IS AN ORDER DIRECTING
 THE ISRB TO PAROLE DYER29

 C. THE ISRB’S DECISION VIOLATES RCW 9.95.009(2).....35

 D. TO THE EXTENT THE ISRB RELIED ON RCW 9.95.009(3),
 ITS DECISION VIOLATES THE EX POST FACTO CLAUSE41

 E. THE BOARD’S DECISION VIOLATES THE FEDERAL
 EQUAL PROTECTION CLAUSE.....43

 F. UNDER THE BOARD’S REASONING, RCW 9.95.009(2)
 VIOLATES THE EX POST FACTO CLAUSE.....45

G. UNDER THE BOARD'S REASONING, RCW 9.95.009(2) IS VOID FOR VAGUENESS UNDER THE DUE PROCESS CLAUSE	46
H. THE BOARD'S DECISION IN THIS CASE VIOLATES SUBSTANTIVE DUE PROCESS	47
I. THE BOARD'S ACTIONS AMOUNT TO CRUEL AND UNUSUAL PUNISHMENT	48
VI. REQUEST FOR RELIEF.....	49
VII. OATH.....	49

TABLE OF AUTHORITIES

Cases

Addleman v. Board of Prison Terms, 107 Wn.2d 503, 730 P.2d 1327
(1986)..... 37, 44

Almaghazar v. Gonzales, 457 F.3d 915 (9th Cir. 2006)..... 31

Brown v. Palmateer, 379 F.3d 1089 (9th Cir. 2004)..... 42

Cissell Mfg. Co. v. U.S. Department of Labor, 101 F.3d 1132 (6th Cir.
1996)..... 30

Coalition for the Homeless v. DSHS, 133 Wn.2d 894, 949 P.2d 1291
(1997)..... 35

Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982
(1977)..... 24

Davis v. Shalala, 985 F.2d 528 (11th Cir. 1993) 32

Faucher v. Sec'y of Health & Human Servs., 17 F.3d 171 (6th Cir.
1994)..... 32

Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437
(1992)..... 44

Gonzales v. Thomas, -- U.S. --, 126 S. Ct. 1613, 164 L. Ed. 2d 358
(2006)..... 31

Group Health etc. v. King Co. Med. Soc., 39 Wn.2d 586, 237 P.2d
737 (1951)..... 35

Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999) 47

Holohan v. Massanari, 246 F.3d 1195 (9th Cir. 2001) 31

Hunter v. North Mason High School, 12 Wn. App. 304, 529 P.2d 898
(1974), aff'd 85 Wn.2d 810, 539 P.2d 845 (1975)..... 45

Hunterson v. DiSabato, 308 F.3d 236 (3rd Cir. 2002)..... 47

<u>In re Dyer</u> , 143 Wn.2d 384, 20 P.3d 907 (2001).....	3, 8, 9, 24
<u>In re Earl</u> , 48 Wn. App. 880, 740 P.2d 853 (1986).....	45
<u>In Re Powell</u> , 117 Wn.2d 175, 814 P.2d 635 (1991).....	46
<u>In re Smith</u> , 109 Cal. App. 4 th 489, 134 Cal. Rptr. 2d 781 (2003).....	34
<u>In re Storseth</u> , 51 Wn. App. 26, 751 P.2d 1217 (1988).....	43, 44
<u>INS v. Orlando Ventura</u> , 537 U.S. 12, 123 S. Ct. 353, 154 L. Ed. 2d 272 (2002).....	31
<u>Lynce v. Mathis</u> , 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997).....	42
<u>Marino v. Travis</u> , 13 A.D.3d 453, 787 N.Y.S.2d 54 (2004).....	34
<u>Mickens-Thomas v. Vaughn</u> , 321 F.3d 374 (3 rd Cir.), <i>cert denied sub.</i> <i>nom. Gillis v. Hollawell</i> , 540 U.S. 875, 124 S.Ct. 229, 157 l.Ed.2d 136 (2003).....	33
<u>Mickens-Thomas v. Vaughn</u> , 355 F.3d 294 (3 rd Cir. 2004).....	33, 42
<u>Middle Rio Grande Conservancy Dist. v. Norton</u> , 294 F.3d 1220 (10 th Cir. 2002).....	33
<u>Nielson v. Sullivan</u> , 992 F.2d 1118 (10 th Cir. 1993).....	32
<u>NLRB v. Food Store Employees Union</u> , 417 U.S. 1, 94 S.Ct. 2074, 40 L.Ed.2d 612 (1974).....	30
<u>Ohlinger v. Watson</u> , 652 F.2d 775 (9 th Cir. 1980).....	45
<u>Personal Restraint of Addleman</u> , 151 Wn.2d 769, 92 P.3d 221 (2004)....	35
<u>Personal Restraint of Dyer</u> , 157 Wn.2d 358, 139 P.3d 320 (2006) ... <i>passim</i>	
<u>Personal Restraint of Haynes</u> , 100 Wn. App. 366, 996 P.2d 637 (2000).....	43
<u>Personal Restraint of Locklear</u> , 118 Wn.2d 409, 823 P.2d 1078 (1992).....	38, 44

<u>Personal Restraint of Myers</u> , 105 Wn.2d 257, 714 P.2d 303 (1986)	37,
.....	38, 47
<u>Powell v. Ducharme</u> , 998 F.2d 710 (9 th Cir. 1993), <u>cert. denied</u> , 516 U.S. 825, 116 S. Ct. 91, 133 L. Ed. 2d 47 (1995).....	46
<u>Rivera v. Sullivan</u> , 923 F.2d 964 (2 nd Cir. 1991).....	32
<u>Seavey v. Barnhart</u> , 276 F.3d 1 (1 st Cir. 2001)	30, 31
<u>State v. Ames</u> , 89 Wn. App. 702, 950 P.2d 514 (1998).....	48
<u>State v. Bartholomew</u> , 101 Wn.2d 631, 683 P.2d 1079 (1984).....	48
<u>State v. Fain</u> , 94 Wn.2d 387, 617 P.2d 720 (1980).....	48
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	48
<u>State v. Keller</u> , 143 Wn.2d 267, 19 P.3d 1030 (2001).....	36, 43
<u>State v. Manussier</u> , 129 Wn.2d 652, 921 P.2d 473 (1996)	48
<u>State v. Morin</u> , 100 Wn. App. 25, 995 P.2d 113 (2000).....	48
<u>State v. Roberts</u> , 142 Wn.2d 471, 14 P.3d 713 (2000)	48
<u>Trantino v. New Jersey State Parole Bd</u> , 166 N.J. 113, 764 A.2d 940 (N.J., 2001)	27, 33, 34
<u>Zhao v. Gonzales</u> , 404 F.3d 295 (5 th Cir. 2005)	31

Statutes

RCW 9.94A.310	23
RCW 9.94A.360	23
RCW 9.94A.400	23
RCW 9.94A.712	39, 40
RCW 9.95.009	passim

RCW 9.95.080	36
RCW 9.95.100	passim
RCW 9.95.420	39, 40

Other Authorities

Charles M. Borduin et al., <u>Multisystemic Treatment of Adolescent Sexual Offenders</u> , 34 Int'l J. Offender Therapy & Comp. Criminology 105, 111 (1990)	28
Jonathan Kaden, <u>Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination</u> , J. Crim. Law & Criminology (Fall, 1998).....	27
Mack E. Winn, <u>The Strategic and Systematic Management of Denial in Cognitive/Behavioral Treatment of Sexual Offenders</u> , 8 Sexual Abuse: J. Res. & Treatment 25, 26 n.14 (1996)	27
Richard J. Pierce, Jr., <u>Administrative Law Treatise</u> , (4 th Ed. 2002) § 18.1	30
William L. Marshall & Howard Barbaree, <u>The Long-Term Evaluation of a Behavioral Treatment Program for Child Molesters</u> , 26 Behav. Res. & Therapy 499, 500 n. 103 (1988).....	28

Rules

WAC 381-60-160.....	15
---------------------	----

Constitutional Provisions

U.S. Const., Amend 14 (Due Process).....	5, 37, 47
U.S. Const., Amend. 14 (Equal Protection).....	passim
U.S. Const., Amend. 8 (Cruel & Unusual Punishment)	5, 48
U.S. Const., Art. I § 10 (Ex Post Facto).....	passim
Wash. Const., Art. I § 14 (Cruel & Unusual Punishment).....	5, 48

I. STATUS OF PETITIONER/PROCEDURAL HISTORY

Petitioner Richard Dyer, through his attorney David Zuckerman, hereby applies for relief from confinement at the McNeil Island Corrections Center in Steilacoom, Washington. He is in custody serving a sentence upon conviction of a crime.¹

1. Petitioner was sentenced in Kitsap County Superior Court.
2. Petitioner was initially convicted of three counts of Rape in the First Degree, one count of Unlawful Imprisonment, and one count of Burglary in the First Degree. On direct appeal, the Court of Appeals set aside the convictions for Unlawful Imprisonment, Burglary in the First Degree and one of the Rape convictions, leaving the other two Rape convictions intact.
3. The judge who originally imposed sentence after trial was Robert J. Bryan. On remand after appeal, the Honorable Karen B. Conoley signed an amended judgment and sentence.
4. Petitioner's lawyers at trial and the original sentencing were Anthony Savage and James L. Reese of Seattle, Washington. Petitioner's lawyer at the resentencing was Zenon Olbertz of Tacoma, Washington.
5. Petitioner appealed from the decision of the trial court to the Washington Court of Appeals, Division II, represented by Anthony Savage of Seattle, Washington. The decision of the appellate court was unpublished: State v. Dyer, No. 6162-7-II (August 14, 1984). As noted

¹ The format of this section tracks Form 17 of the Rules of Appellate Procedure.

above, the Court of Appeals reversed three of the five counts of conviction. The Supreme Court denied Dyer's petition for review.

6-8. Since petitioner's conviction, he has asked a court for relief from his sentence in the following proceedings:

On July 3, 1986, petitioner filed a personal restraint petition in the Washington Court of Appeals, Division II, No. 10055-0-II, to require the Board of Prison Terms and Paroles to re-set his minimum term in view of the reversal of three of his convictions, and in a manner consistent with the Sentencing Reform Act (SRA). Petitioner was represented by attorney James K. Sells of Bremerton, Washington. The Board agreed to this relief.

On October 28, 1986, petitioner filed an "amended personal restraint petition" challenging the new exceptional minimum term set by the Board. The Chief Judge issued an order dismissing the petition on May 15, 1987, in cause number 10584-5-II. The Supreme Court issued a Ruling Denying Motion for Discretionary Review on September 2, 1987, in cause number 53969-3.

In 1990, Dyer filed a habeas petition in the United States District Court, Western District of Washington, challenging his conviction and amended minimum term. He was represented by James Sells. On January 22, 1991, the Honorable Carolyn R. Dimmick dismissed the petition with prejudice. Cause number C90-809D. The Ninth Circuit Court of Appeals denied Dyer's pro se appeal in an unpublished opinion, Dyer v. Ducharme, No. 91-35211 (9th Cir., March 18, 1992).

In December 1996, Dyer, through attorney David Horton of Silverdale, Washington, petitioned the Washington Supreme Court for a writ of mandamus. He asked the Court to compel the Department of Corrections to allow him to participate in extended family visits. The case was transferred to the Court of Appeals as a personal restraint petition, which was denied on January 13, 1999. The Supreme Court accepted review and affirmed in a published decision. In re Dyer, 143 Wn.2d 384, 20 P.3d 907 (2001) (“Dyer I”).

On January 13, 1998, Dyer filed a pro se personal restraint petition challenging the Board’s failure to release him after a parole hearing in 1995. The Chief Judge of the Court of Appeals, Division II, issued an Order Dismissing Petition. In re Dyer, No. 22841-6-II (July 20, 1998). The Supreme Court denied Dyer’s motion for discretionary review.

On January 24, 2003, Dyer filed a personal restraint petition challenging the Board’s failure to release him after a parole hearing in 2002. The Washington Supreme Court reversed the Board’s decision in Personal Restraint of Dyer, 157 Wn.2d 358, 139 P.3d 320 (2006) (“Dyer II”).

This petition challenges the subsequent Board decision denying parole and increasing Dyer’s minimum term.

Dyer is not seeking to proceed at public expense.

II. OVERVIEW

In 2002, the ISRB issued a Decision and Reasons denying parole and adding 60 months to Dyer’s minimum term. In its 2006 decision in

Dyer II, this Court found that the ISRB abused its discretion in denying parole. It carefully examined all of the reasons proffered by the Board, found that none of them could justify its decision, and remanded for a new hearing.

On remand, all the new information before the Board was overwhelmingly favorable. Nevertheless, the Board once again denied parole, this time adding 80 months to Dyer's minimum term. The reasons given were identical to those that this Court found insufficient. The ISRB acknowledged in a single sentence that this Court had remanded for a new hearing, but did not discuss the substance of this Court's ruling in any manner.

Clearly, this Court must once again reverse, since there is nothing to distinguish the Board's new decision from the 2002 decision. This time, however, Dyer urges the Court to remand with instructions to grant parole. It is pointless to simply inform the Board that it has abused its discretion since it has demonstrated its willingness to repeat the same abuse regardless of the Court's instructions.

Dyer is raising various constitutional claims to preserve them for potential federal review. There may be no need to reach them, however, if the Court decides the case on non-constitutional grounds.

III. GROUNDS FOR RELIEF

- 1) The ISRB abused its discretion in denying parole and increasing Dyer's minimum term by 80 months.

- 2) The ISRB's decision violates RCW 9.95.009(2) because it is not "reasonably consistent" with the Sentencing Reform Act (SRA).
- 3) The ISRB relied on RCW 9.95.009(3), which requires it to give "highest priority" to public safety, in violation of the federal ex post facto clause.
- 4) The ISRB's decision violated Dyer's Fourteenth Amendment right to Equal Protection.
- 5) As applied by the ISRB, RCW 9.95.009(2) violates the federal ex post facto clause.
- 6) As applied by the ISRB and this Court, RCW 9.95.009(2) is void for vagueness under the federal due process clause.
- 7) The ISRB's decision violated Dyer's Fourteenth Amendment right to substantive due process.
- 8) The ISRB's history of decisions in this case amounts to cruel and unusual punishment in violation of the Eighth Amendment and Article I, section 14.

IV. STATEMENT OF THE CASE

A. SOURCES OF INFORMATION

Because Dyer's case was so recently before this Court, Dyer has moved for the Court to consider the record from the previous PRP. He has attached relevant portions of new materials presented to the ISRB since the last hearing.

B. FACTS PRESENTED AT TRIAL

Dyer is not challenging his underlying convictions in this PRP. However, as discussed below in sections IV(F) and V(A), the ISRB relied heavily on the supposed facts of the crime (including counts that were overturned on appeal). It also held Dyer's "denial" of guilt against him. For those reasons, Dyer will point out some of the weaknesses in the State's case.

Dyer stands convicted of the rape of two strangers. Both counts turned on the victims' eyewitness identification testimony, with no confirming DNA, blood-typing, or fingerprint analysis. The Court of Appeals described the first rape as follows:

On January 27, 1980, after accepting a ride from two men at 2:30 a.m. in Bremerton, Ms. A was kidnapped and raped. The men drove her somewhere near a pond where the driver undressed and raped her the first time. He then made her lie naked on the floorboards as they drove to a house. Before leaving the car to go into the house he put a coat over her head so that she could see very little. In the house she was tied hands and feet to a bed with ropes that were already there. The driver replaced the coat over her head with cotton balls and taped them over her eyes. Ms. A was able to see little of the rapist or her surroundings for the rest of the night. When the other man left, the driver undressed, applied contraceptive foam to Ms. A, and raped her a second time. The sexual assaults continued throughout the night. At one point the driver untied her, turned her from her back to her stomach, and raped her in the new position. In the morning he gave her a bath and dressed her in her clothes which had been washed and dried. Ms. A was then driven to a rural area and released.

State v. Dyer, No. 6162-7-II (August 14, 1984) Unpublished Opinion at 2.

The Court described the second rape as follows:

Late at night on August 23, 1980, Ms. B was walking alone in downtown Bremerton. After twice refusing an offer of a ride from two men, she was forced into their car and driven to a dump area. The car got stuck and, after trying unsuccessfully to escape, Ms. B helped the driver get it free. The three then drove back to the main road where the driver stopped and put cotton balls secured with tape over Ms. B's eyes. She remained blindfolded throughout the night. Ms. B was then taken to a house, undressed by the driver and tied hands and feet to a bed. When the other man left, the driver applied contraceptive foam to her and raped her repeatedly as she lay on her back and then on her stomach. The next morning the driver washed and dried her clothes, gave her a bath and dressed her. Ms. B was released in a park.

Id. at 3.

Dyer testified at trial and denied any involvement in these crimes. (RP 1043). His defense was misidentification.

On the day that the rapist released her, Ms. A gave the following descriptions:

1. The perpetrator was five-two or five-three, with no mustache (RP 475).
2. The rapist's house was approached on a gravel road (RP 480-81); it had two wooden steps outside the front door (RP 485); it was new, had no yard and had only gravel around the house (RP 488); the outside of the house was tan or yellow (RP 602); one turned right from the hallway of the house to go into the bedroom (RP 486); and there was a counter arrangement between the kitchen and living room. (RP 491).
3. The rapist drove a Comet. Ms. A knew this because she saw the word "Comet" on the back as it drove away. (RP 498-99).

Defendant presented the following evidence:

1. He was five foot seven inches tall (RP 1038) and had worn a mustache since his days in military service. (RP 1041-42).
2. His house had an asphalt driveway (RP 1057); it did not have a tan or yellow exterior (Exs. 12, 114); one turned left from the hall into the bedroom (RP 1053); and there was no bar or counter between the kitchen and living room. (RP 1055).
3. In January of 1980, he owned a Mercury Meteor. (Ex. 102).

The day after the incident, the police drove Ms. A through Dyer's neighborhood in an attempt to locate the house, and she did not recognize it. (RP 609-10). When shown Dyer's house on September 25, 1981, (after Dyer was charged) she could not positively identify it. (RP 602).

When Ms. B. was interviewed by the Kitsap County Sheriff's office on August 24, 1980, she said that she would be unable to identify her assailant. (RP 648). Her initial description of him to the Sheriff (Ex. 112) was only that the man was white with a mustache and short hair.

Dyer was not considered a suspect in these crimes until September, 1981, when his second wife, Ethel Achord, reported to the police that Dyer had raped her. As the dissent explained in Dyer I:

There is also substantial evidence undermining the veracity of Dyer's second wife and her allegations. For example, in dissolution proceedings her claims that he had not paid child support since the divorce were directly contradicted by receipts, court pleadings, and her own subsequent testimony. A number of factual inconsistencies existed in her testimony as well regarding the alleged rape itself, which she failed to report for a year, and then only after he announced his intention to wed Renetta [Dyer].

Dyer I, 143 Wn.2d at 409.

In January, 1982, Ms. B. traveled from Texas, where she then lived, to testify at Dyer's trial. (RP 641). In the interim, she made no further efforts to identify her assailant. The detectives never offered her a photographic montage or line-up to determine whether she would identify Dyer. (RP 652). On January 22, 1982, Ms. B. was seated in the hall outside the courtroom ready to testify when she saw the defendant, in handcuffs, being led into the courtroom by two policemen. (RP 639). Based on this episode, defendant moved to suppress her in-court identification. (RP 555-558). The court denied the motion. (RP 665). Ms. B then testified that she recognized Dyer as the man who raped her. (RP 705).

At trial, doctors testified that they found sperm in vaginal samples from Ms. A and Ms. B. RP 239; 245-46. The sperm was not tested to see whether it could have come from Dyer. In 2001, in view of Substitute Senate Bill 5896, Dyer requested DNA testing to prove that he was not the perpetrator. Unfortunately, any evidence that could have contained genetic material had been destroyed by that time.² App. A to 2003 PRP³ (5/3/01 letter from David Zuckerman to John Dolese); App. B to 2003 PRP (8/24/01 letter from David Zuckerman to Russell Hauge); App. C to 2003 PRP (9/5/01 letter from Christian Casad to David Zuckerman).

² The Sheriff's Office had destroyed all evidence in its possession, and the clerk's office did not maintain the vaginal swabs, or any clothing of the victims, as exhibits.

³ Instead of resubmitting all appendices from the prior PRP, Dyer has filed a motion for the Court to consider the record from that cause number, 76730-1.

C. PROCEDURAL HISTORY BEFORE THE ISRB

On September 15, 1986, the ISRB set Dyer's minimum term at 240 months. It recognized that the SRA standard range was only 63-88 months. The ISRB imposed an exceptional sentence based on the aggravating factor of "deliberate cruelty" and on the prosecutor's and judge's sentencing recommendations.

In 1995 and 1998, the ISRB considered Dyer for parole under RCW 9.95.100. Both times he was found not parolable and his minimum term was extended by 60 months.

On September 26, 2001, DOC psychologist Carson E. Carter prepared a report at the Board's request. He noted that "Mr. Dyer had a distinguished career in the army, spending 9 years in that service until he was honorably discharged in 1976." App. C at 2. During his two tours of duty in Vietnam he received numerous medals and awards. Id. He then began a successful career as a supervisor at the Puget Sound Naval Shipyard. In prison, Dyer "has programmed extensively in a highly successful manner." Id. "Mr. Dyer suffers from no serious mental illness, but he does suffer the lingering effects of PTSD, much like many war veterans." Id. In the clinical interview, Dyer "did not appear to be overly controlled nor did he appear glib or deceptive; he was articulate in a simple, modest manner." Id. at 3.

Carson Carter administered several psychological tests. "On both the Minnesota Sex Offender Screening Tool-Revised (MSOST) and the Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR) Mr.

Dyer received low scores. **His scores are typical of sex offenders who present a low risk to reoffend.**” Id. at 3 (bold type in original).

On the Hare Psychopathy Checklist-Revised (PCL-R) Mr. Dyer received a **very low score** indicating a **low risk** of committing another violent offense within six months after his release from custody. His score was 5, which is the lowest score this psychologist has ever interpreted on this test.

Id. at 4 (bold type in original). Carter’s “Summary and Conclusions” end as follows:

Mr. Dyer has a legitimate home address, realistic plans for the future, and employable skills; he is prepared to take his place in society as a productive citizen. If we are gauging risk, he has met the criterion for a less restrictive environment. According to the file data, interview and tests, this person could be considered for community supervision with less concern for the community than many of the offenders who are released into society.

Id.

Apparently in response to questions from Hearing Officer Richard LaRosa concerning Carson Carter’s credentials, Psychologist David Monson prepared a memo to the ISRB dated November 9, 2001. App. D. It includes the following:

Mr. Carter has been doing risk assessments and psychological evaluations in prisons for thirteen years and has become very expert in his field. He consulted with me, as his supervisor on the evaluation he did on Mr. Dyer and I completely support his conclusions and recommendations.

On October 1, 2001, the Department of Corrections prepared a Classification Referral, which was “presented as a .100 progress hearing

report.” It indicates that Dyer completed the following offender change programming: Anger/Stress Management, Victim Awareness, Non-Violent Conflict Resolution, Moral Reconciliation Therapy, and Industrial Safety. “A SSASI evaluation conducted on 11-16-00 indicated no specific problems in chemical dependency.” “A LSI-R reassessment conducted on 09-28-01 indicates a score of 12 low risk level with 11.7% likelihood to re-offend.” App. F to 2003 PRP.

On December 4, 2001, Dyer attended a .100 hearing. Dyer’s counselor Larry Cook testified that Dyer worked as a recreation assistant and that he “receives exemplary work reports from all the recreation supervisors.” App H to 2003 PRP at 5. In fact, “everything about his attitude and behavior in the unit has been exemplary.” Id. Cook confirmed Dyer’s family support. Id. at 6-7. He was aware that Dyer runs a business outside the prison with the help of attorneys. Id. at 7. “Mr. Dyer has completed all the available offender change programs that are available here at McNeil Island.” Id. To Cook’s knowledge, Dyer had never refused any counseling offered to him. Id. at 7.

In response to questioning from Board member Martinez, Dyer stated that he was not guilty. Id. at 12. He explained that he was doing his best to “keep a life going” in the prison.

I earn an income, I support my family. I think I’m an active member of society as best as I can be behind these chain link fences. I don’t think criminal thoughts, I don’t like to walk the yard with people that have criminal thoughts.

Id. at 12. Dyer detailed his treatment for Vietnam-related posttraumatic stress syndrome since 1986. Id. at 19.

On January 30, 2002, the Board issued a Decision and Reasons. It found Dyer not parolable and added 60 months to his minimum term. App. J to 2003 PRP at 1. The “central difficulty,” according to the ISRB, was that “Mr. Dyer remains an untreated sex offender.”

The matter of this being a sort of “Catch 22” was extensively discussed with Mr. Dyer and his counsel today. Completion of a sex offender treatment course generally requires what is called full candor by the treating authorities, and Mr. Dyer continues to maintain his innocence.

Id. The ISRB also discussed how old psychological reports had found a high risk of reoffense while newer ones found a low risk. The ISRB suggested that this might be due to Dyer’s “ability to learn how to take psychological tests” and his “high level of manipulation and sophistication.” Id. at 4.

D. THE EFFECT OF THE SUPREME COURT’S 2006 RULING

In Personal Restraint of Dyer, 157 Wn.2d 358, 139 P.3d 320 (2006) (Dyer II), this Court found that the ISRB abused its discretion in denying parole in 2002. The Court first noted that the ISRB must “attempt to make decisions reasonably consistent with [the SRA] ranges, standards, purposes and recommendations.” Id. at 360, quoting RCW 9.95.009(2). Undue emphasis on the facts of the crime rather than on the general seriousness level for the crime undermines this principle. Id. at 360 and n.2.

The Court then summarized the many offender change programs in which Dyer has successfully engaged. Id. at 360. It also noted that “Dyer has not been permitted to enter the sex offender therapy program because he denies committing the rapes for which he was convicted.” Id. at 361. The record reflected that Dyer had completed all offender change programs available to him at McNeil Island and that “everything about his attitude and behavior in the unit has been exemplary.” Id. at 361. The Court also summarized the findings of DOC psychologist Carson Carter, who found Dyer to have a very low risk to reoffend. Id. at 361, 366. The Court noted that Dyer suffers from PTSD, but found that he was dealing with it appropriately. Id. at 366-67.

The Supreme Court noted that the Board has set out factors that can support a finding of nonparolability:

1. Active refusal to participate in available program or resources designed to assist an offender to reduce the risk of reoffense (e.g., anger management, substance abuse treatment).
2. Serious and repetitive disciplinary infractions during incarceration.
3. Evidence of an inmate's continuing intent or propensity to engage in illegal activity (e.g., victim harassment, criminal conduct while incarcerated, continued use of illegal substances).
4. Statements or declarations by the inmate that he or she intends to re-offend or does not intend to comply with conditions of parole.
5. Evidence that an inmate presents a substantial danger to the community if released.

Personal Restraint of Dyer at 364, quoting WAC 381-60-160. “Although this list of reasons that may support an ISRB finding of nonparolability is not exhaustive, the list should guide the ISRB's decisions.” Id. “In the present case, the record from the hearing does not support any of these factors.” In particular, Dyer “does not actively refuse to participate in the sex offender treatment programs; rather he is rendered ineligible for treatment in that program because he denies his guilt.” Id. at 364. Further, older psychological evaluations indicating that Dyer posed a risk to the community could not satisfy factor 5 when Dyer’s “current psychological report shows that he poses little danger to the community if paroled.” Id. at 365.

While Dyer had the burden of establishing his parolability, “the ISRB must base its decision on the evidence presented at the hearing.” Id. The current psychological evaluations – which took into account the lack of sex offender treatment – indicated a low risk to reoffend. Although Dyer suffered from PTSD due to his service in Vietnam, he had addressed it through appropriate therapy and support groups. Id. at 366-67.

The Supreme Court found no other factors that could weigh against parole. The Board’s conclusions that Dyer was manipulative and had learned how to take psychological tests were mere “speculation and conjecture.”⁴ Id. at 367-68. Likewise, the Board’s speculation that Dyer

⁴ The Court noted that Dyer’s psychological predictions of risk gradually changed over the years from “high” to “moderate” to “low” and that these changes corresponded with his completion of various offender change programs. Id. at 367 n.6. In other words, the evaluations appeared to reflect the success of Dyer’s programming.

would encounter more stress upon release from prison and react violently to it was “unsupported by the evidence in the record and is undermined by Dyer's participation in offender change programming and commitment to obtaining PTSD treatment outside of prison.” Id. at 368. Further, the ISRB could not rely on “the unchangeable circumstances of Dyer’s crimes, the same facts that justified the imposition of Dyer’s original exceptional sentence.” Id. at 365, 367-8. See also id. at 360 n.2 (“[T]he dissent’s emphasis on the facts of Dyer’s crimes disregards the legislature’s mandate that an offender’s confinement under the indeterminate system and the SRA remain reasonably consistent.”) “Despite its statutory mandate to consider whether a prisoner demonstrates his rehabilitation is complete, the ISRB dismissed evidence of Dyer’s rehabilitation in prison evidently based on the facts of his underlying crimes.” Id. at 368. The Court explained that the ISRB must focus on a prisoner’s rehabilitation and not merely on the facts of his crime. Id. at 368.

Although the Supreme Court did not directly order the ISRB to release Dyer, it concluded that “a review of the evidence and testimony presented at the parolability hearing suggests Dyer met his burden to have conditions of release on parole established.” Id. at 369.

E. NEW INFORMATION SINCE 2001 HEARING

The only new information considered by the Board at the 2006 hearing was entirely favorable.

As noted above in section IV(C), Dr. David Monson concurred in Carson Carter’s 2001 psychological report. Dr. Monson performed his

own evaluation in 2005 and prepared a new report for the Board. As he notes, Dyer has no criminal history other than the instant offenses. App. E at 2. Dyer “served nine years in the Army, including two tours in Vietnam, and was repeatedly decorated for gallantry and heroism. . . . After being incarcerated he started a housing construction company that he runs from inside the prison.” Id. The report details Dyer’s extensive programming at p. 2. Dyer has had no infractions since 1995. Dyer “maintains close contact with his wife and children . . . and has achieved the extraordinary feat of supporting his family financially throughout his incarceration through his outside business.” Id. at p. 3. The various psychological tests indicate a low risk of reoffense. Id. at p. 3-5. Dr. Monson concludes as follows:

For the past sixteen years Mr. Dyer has been a model inmate, with only one infraction nine years ago, maintaining a stellar work history, programming through all the classes available to him and, extraordinarily, financially supporting his family. He has good community support and a good intact plan. In addition, the psychological testing indicates a low risk to reoffend. Mr. Dyer appears to be an appropriate risk for community placement.

Id. at p. 5.

At the new .100 hearing, the ISRB considered a DOC Facility Plan prepared by the counselor on August 30, 2006. Since his last .100 hearing, Dyer completed the following new programs: Restorative Retelling Story Group in December 2002 and Family Dynamics on June 10, 2003. Dyer also received a new certificate of completion for the Love and Forgiveness Couples Seminar that took place in July, 2006. Dyer

maintained his good behavior and continues to score as "minimum custody." App. L.

Dyer presented a letter from psychotherapist Leonard Shaw dated September 16, 2006. Shaw, who has extensive experience working with prisoners, has been involved with Dyer for many years.

Since my July 1998 letter to the board, Richard and I have continued to have monthly phone consultations and he has been moved to MICC. I have twice conducted my Love and Forgiveness Seminar at McNeil and Richard and his wife Renetta attended both times.

Richard continues to be a positive force in the prison with staff and inmates. He continues to support his family financially and emotionally. All of his children are in college or planning to go. Richard has developed into one of the most remarkable, altruistic, caring human beings I have ever known.

App. M at 1. In the attached 1998 letter, Shaw explained how Dyer had not only worked on his own issues, but had encouraged many other prisoners to deal with their problems.

The Board also received letters from Dyer's family supporting his release. Apps. G, H, J, K. His wife, Renetta Dyer, writes:

It is very difficult to put in to words how much Richard means to me and how important he is to myself and to our children. He is an integral part of our lives. We exchange cards and letters frequently and talk on the phone at least once a day. We make all decisions concerning our family together. Richard and I have been married 25 years. Even from prison the love and support we exchange has bonded us in a wonderful way. With his continued love and support I have gone from being on public assistance, through nursing school and am now a registered nurse with a career in obstetrical nursing.

App. J at 1. Dyer's son Matthew writes that Dyer has been a "strong father figure" even though he has been incarcerated throughout Matthew's life. App. K. Matthew's older sister Lisa begs for her father to be released so that he could "walk me down the aisle at my wedding and spoil my children." App. H. The eldest daughter, Stephanie, explains how Dyer put her through college. Her "lifelong wish" is to see him released. App. G. Dyer's own letter to the Board explains in detail how he has maintained his family ties while in prison. App. I. He has done more to support his family – emotionally and financially – than many fathers who are not incarcerated. He concludes as follows:

My family is my first priority and I work hard to maintain an active, positive role within it. Upon my release I plan to continue this. If I had the chance I would take long walks with my wife, have family dinners, walk my daughters down the aisle on their wedding day and watch my grandchildren grow. On behalf of myself and my family, I am asking you for that chance.

App. I at p. 3. Dyer has managed to support his family financially through his successful real estate business, financial investments, and Veteran's benefits. Id. at p. 3.

At the .100 hearing on October 18, 2006, the ISRB had Dyer's new counselor, Houston Wimberly, read at length from the latest facility plan. App. N at 3-5. See also App. L. When asked about his personal knowledge, Wimberly stated that "he's been an excellent person, very polite." App. N at 6.

In my presentation, undersigned counsel reminded the ISRB that this Court had specifically rejected Dyer's denial of guilt as a factor that could weigh against parole. Id. at 8. Nevertheless, the ISRB's first question to Dyer was "[H]ow did you come to be charged with those crimes?" Id. at 8. Dyer began to explain how, during the course of some contentious divorce proceedings, his wife had accused him of raping her, and how the police then decided he must be guilty of two other unsolved rapes. Id. at 8-9. The ISRB pressed Dyer to describe minute details of the crimes he maintained he had not committed. Id. at 9-10. Ms. Costa then asked:

So why do you think that you've been in, you were convicted of these crimes. You were sent to prison and that over years the board has not found you paroleable?

Id. at 10. Dyer responded: "Geez I don't know. I can't answer for them."

Id.

Mr. Thaut, a new ISRB member, then introduced himself to Dyer and explained that "the facts of the case" were what the ISRB was "most concerned about." Id. at 11. He "commended" Dyer for his good behavior in prison, but explained that what he "would be most interested in" would be sex offender treatment. He recognized that "obviously the sex offender treatment program can't treat someone who didn't . . . commit an offense." Id. He asked Dyer, "Is there anything else in your mind that you could tell us that might indicate, that might help us to determine what your level of risk would be if you were returned to the community?" Dyer responded that he did not see himself as a threat

because he was not guilty, but indicated his willingness to pursue any programs the Board thought would be helpful. Id. Mr. Thaut responded, “We’re not the Department of Corrections.” Id.

Mr. Thaut then acknowledged that “this is old ground . . . we’re replowing here and nothing has changed in that.” Id. at 12. He explained that Dyer could not participate in sex offender treatment without admitting guilt and that this made the ISRB’s decision difficult. “It’s a tough decision to make when we don’t have these (unintelligible). And I don’t know that we’re going to get beyond that. . . . I don’t see that changing.” Id.

Dyer then explained his progress in treatment for PTSD, which arose from his two tours in Vietnam. Id. at 12-13.

And uh, uh, I didn’t realize how it controlled my life, the post traumatic stress disorder did. The way I was uh, the empathy for other people’s pains. I always thought of them from my point of view . . . I became a therapy junkie . . . it’s kind of like an onion. I was peeling away all these different pieces from me. And uh, the more that people would tell their stories, I realized other people had the problems I had. And, um, that helped a lot, to realize I wasn’t alone in the combat thing.

Id. at 13. Dyer explained how Gestalt Therapy and the Toastmaster’s program helped him learn to release his feelings. “Cause a lot of people think if men, if they burst into tears they’re weak, but they’re not. They’re healing.” Id. at 14.

In closing, Ms. Costa reiterated that the ISRB’s main concerns were that Dyer was “convicted of very horrendous crimes” but continued

to maintain his innocence. Id. at 14-15. Undersigned counsel responded that, since the Board had focused so much on the facts of the crime, I could give the Board more information about why Dyer was wrongfully convicted. Id. at 17. Ms. Costa responded, “We are not here to decide the case.” Id.

I then noted the recent studies indicating that prisoners who went through the sex offender treatment program were actually somewhat more likely to reoffend than those who did not. Ms. Costa responded that “recidivism is not the only factor that is considered in terms of whether somebody is successful or not.” Id.

I concluded by reminding the Board that the DOC psychologists were well aware of the facts of the crime and Dyer’s lack of sex offender treatment, yet they found him a low risk to reoffend. I noted that “[t]he facts of the crime will never change.” Id. at 17-18.

F. THE DECEMBER 5, 2006 DECISION AND REASONS

On December 5, 2006⁵ the ISRB issued its decision. App. P. It denied parole and extended Dyer’s minimum term by 80 months – 20 more than the previous extension. This brings up Dyer’s minimum term to an even 500 months.⁶ The central reason for this decision is identical to the one proffered the last time: Dyer is an untreated sex offender and is therefore unsafe to be released.

⁵ Although this date appears on the document, undersigned counsel did not receive a copy until December 26.

⁶ As discussed above, Dyer’s minimum term was set at 240 months in 1986. 60 months were added in each of 1995, 1998, and 2002, and then another 80 months in 2006.

The difficulty the Board has with Mr. Dyer's continual denial is that it makes him not amenable to treatment. . . . Amenability to and application of treatment are entirely up to the offender. The result of such treatment, one hopes, is that the offender will not reoffend.

App. P at 12. The only discussion of this Court's 2006 decision is the following: "In July 2006, the Washington Supreme Court remanded Mr. Dyer's case to the ISRB for a new parolability hearing." *Id.* at 3.

V. ARGUMENT

A. THE ISRB ONCE AGAIN ABUSED ITS DISCRETION

This Court found that the ISRB abused its discretion in its 2002 decision. It follows with greater force that the ISRB abused its discretion in 2006 because the only changes during those four years were positive ones for Dyer. He demonstrated four more years of exemplary behavior in prison, maintained his close family ties, and obtained yet another DOC psychological evaluation finding him to be a low risk to reoffend. As discussed below, every point raised in the new Decision and Reasons was rejected by this Court.

First, the Board acknowledged that the standard range under the SRA is 63-88 months. App. P at 2. By adding 80 months, the ISRB increased his minimum term to 500 months. To put this in perspective, the SRA standard range for two counts of first-degree murder in 1986 (the year the Board applied SRA standards to Dyer's case) was only 271-361 months. RCW 9.94A.310, .360(10), .400 (1986). "Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of

the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life.” Coker v. Georgia, 433 U.S. 584, 598, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977). The ISRB never made any attempt to explain how Dyer’s new minimum term could be “reasonably consistent” with the SRA, nor did it acknowledge this Court’s warning that it had disregarded RCW 9.95.009(2) the last time around.

The next four pages of the Decision and Reasons discuss at great length the supposed facts of Dyer’s crimes. App. P at 3-6. As discussed above, the ISRB also devoted much of the hearing to the facts of the crimes, insisting that Dyer attempt to explain them even though he denied committing them. (When defense counsel offered to explain the weaknesses in the State’s case, however, the ISRB abruptly cut him off.) The ISRB never acknowledges this Court’s repeated warnings in Dyer II that it must not continue to focus on the unchanging details of the underlying crimes. Petitioner could devote much time to explaining why the ISRB’s summary of the facts is inaccurate, but that seems unnecessary given this Court’s prior ruling.⁷ The ISRB frankly relied on Dyer’s

⁷ Dyer will briefly address a few points in this footnote. According to the ISRB, “[f]ile materials describe two divorces that alleged physical violence perpetrated by Dyer against his spouses.” This point was appropriately addressed by the three-justice dissent in Dyer I. The only “evidence” of violence against Dyer’s first wife, Janet Cutting, was an ex parte restraining order entered against Dyer in 1972. “However, there is nothing in the record suggesting that there was any factual predicate for this routine ex parte order, nor does an order which prohibits future conduct imply such conduct necessarily occurred in the past. To the contrary, the record shows that Mr. Dyer was in fact serving his country in Vietnam at the time.” Id., 143 Wn.2d at 402. The only evidence of violence against Dyer’s second wife, Ethel Achord, is a conviction that was overturned and therefore should not be considered. Id. at 402-03. “There is also substantial evidence undermining

overturned convictions as well as those that were affirmed on appeal. Such information may not be considered under the SRA. State v. Crutchfield, 53 Wn. App. 916, 924, 771 P.2d 746, 751 (1989), overruled on other grounds State v. Chadderton, 119 Wn.2d 390, 832 P.2d 481 (1992). In view of RCW 9.95.009(2), it should not be considered by the ISRB either. See Dyer I, 143 Wn.2d at 402-03 (dissent).

In contrast to its lengthy discussion of the crimes and virtually any other negative allegation that has ever surfaced about Dyer from any source, the ISRB gave only the briefest summary of his positive programming in prison. Id. at 8. Further, although DOC personnel have described Dyer's behavior over the last two decades as exemplary (see section IV, above), the ISRB gave only the following grudging acknowledgement: "In recent years, he has demonstrated more control of his behavior." Id. at 8-9.

the veracity of Dyer's second wife and her allegations." Id. at 409. The ISRB's statement that Dyer admitted that he "victimized" Ms. Achord could only have come from a 1982 report of classification counselor Richard Watson. "He [Dyer] stated during the interview that he only victimized his wife, and that nobody else was involved." App. B. The counselor does not purport to quote Dyer; the word "victimized" is the counselor's characterization. Dyer may have merely explained that, of the three alleged victims in his case, he had sexual relations only with his wife. In any event, even if Dyer had actually said that he "victimized" his wife, that does not "necessarily indicate an act of domestic violence" much less a rape. See Dyer I at 403. The ISRB also suggested that "file materials" indicate "some incest and sexual deviancy among [Dyer's] siblings." App. P at 6. This could only refer to a reference in the presentence report to Donald Dyer's conviction for incest and statutory rape. App. A. The same document explains that Donald and the other older brothers did not even live with Richard Dyer when he was young. "While the other three brothers were always in trouble . . . Richard never experienced any difficulties in his youth." Id. Richard himself said he would always "veer away" from these brothers because he did not wish to be like them. See App. A.

The ISRB then summarized all psychological evaluations going back to 1993. App. P at 9-11. The ISRB dwells on only the most negative comments in each report. As noted above, Carson Carter's 2001 report was overwhelmingly positive. The ISRB criticizes it, however, because "when scoring the MNSOST-R, under length of sexual reoffending history the reviewer scores him as having a sex offending history of less than one year." Id. at 10. It is puzzling why the ISRB views this as a drawback, since Dyer's only two convictions are for incidents that both occurred in 1980. Similarly, in discussing Dr. Monson's new report, the ISRB spends most of its time on Monson's brief note that Dyer's score on a certain personality test resembled that of "psychopathic manipulators." App. P at 10-11. It does not mention that such people tend to commit "milder" crimes. See App. E at 4. Nor does it discuss Dr. Monson's favorable findings on *six* other tests of personality and risk, or his strong recommendation for release. App. E at 4-5. The ISRB disregards this Court's warning that it could not continue to ignore the positive recommendations of the more recent psychological evaluations. See Dyer II at 365-67.

In fact, the rather lengthy Decision and Reasons dredges up nearly every negative comment ever made about Dyer from any source during the last 35 years. There is no acknowledgement of Dyer's extraordinary accomplishments in prison, of his glowing reviews by DOC staff, or of the highly favorable nature of all psychological reports prepared within the last nine years. The purpose of the document seems to be to justify

detention rather than to present any sort of fair synopsis of Dyer's case. Such a one-sided approach is itself an abuse of discretion. See Trantino v. New Jersey State Parole Bd, 166 N.J. 113, 122, 764 A.2d 940, 945 (N.J., 2001) (reversing, in part, because of "Board's selective reliance on only that limited testimony that possibly could support a denial of parole").

The ISRB spent another page of the Decision and Reasons on something that is perhaps a side issue. Undersigned counsel had brought to the ISRB's attention a 2006 study by the Washington State Institute for Public Policy (WSIPP). App. F. It compared the recidivism rate for two groups of sex offenders: those willing to participate in the SOTP but not accepted, and those willing to participate and accepted. The study found a low rate of recidivism for both groups but, surprisingly, found that those who completed the program were *more* likely to reoffend. The ISRB noted that a different report by WSIPP found a higher rate of recidivism for offenders unwilling to participate in the SOTP, and suggested that Dyer belongs in that category. App. P at 11. In fact, as this Court noted in Dyer II, Dyer has always been willing to participate in the program. He has been refused admission, however, because he denies guilt.⁸ This clearly

⁸ Although the Washington Department of Corrections insists on an admission of guilt in its sex offender treatment programs, the notion that sex offender treatment must include an admission of guilt has been challenged. Some studies have investigated the possibility of treating a sexual offender "without a direct focus on the offender's ownership of the offense of which he was convicted." Jonathan Kaden, Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination, J. Crim. Law & Criminology (Fall, 1998), at 372, quoting Mack E. Winn, The Strategic and Systematic Management of Denial in Cognitive/Behavioral Treatment of Sexual Offenders, 8 Sexual Abuse: J. Res. & Treatment 25, 26 n.14 (1996). "These studies suggest that cognitive and behavioral therapies can effectively reduce the risk offenders pose to a community, though the offender is not directly held accountable for his offense as part of therapy." Kaden at

places him within the low risk category. Strangely, at the .100 hearing, the Chair of the ISRB stated that “recidivism is not the only factor that is considered in terms of whether somebody is successful or not [in the SOTP].” App. P at 17. It is hard to understand how else success should be measured. Perhaps insight for the sake of insight might benefit prisoners in some psychological way, but it should not be a requirement for parole unless it correlates with a prisoner’s safety to be released. The Chair’s comment suggests that the ISRB’s focus on Dyer’s “denial” is not entirely based on safety concerns, but rather on a philosophical opposition to releasing someone who will not admit his guilt.

The ISRB concludes its discussion in the Decision and Reasons with a flat statement that Dyer can never be considered rehabilitated until he admits guilt and completes treatment. App. P at 12. It does not support this with the opinion of any psychologist or study. As noted above, WSIPP’s findings were to the contrary, and the DOC psychologists find Dyer to be rehabilitated despite the lack of SOTP treatment.

The ISRB’s reasoning is identical to that rejected by this Court in Dyer II. Mr. Thaut himself acknowledged at the hearing that “this is old ground we’re plowing” and that he did not “see anything changing.” App. P at 12. There was no suggestion at the hearing or in the Decision and

372, citing Charles M. Borduin et al., Multisystemic Treatment of Adolescent Sexual Offenders, 34 Int’l J. Offender Therapy & Comp. Criminology 105, 111 (1990), and William L. Marshall & Howard Barbaree, The Long-Term Evaluation of a Behavioral Treatment Program for Child Molesters, 26 Behav. Res. & Therapy 499, 500 n. 103 (1988). “Clients of multisystemic treatments [that do not require an admission of guilt] demonstrated lower recidivism rates than those in individual therapy.” Kaden at 372-73.

Reasons that the ISRB even read this Court's decision.⁹ The only message it appeared to receive from Dyer II was that it was supposed to hold another hearing. That, of course, would have happened in any event had Dyer never filed his personal restraint petition.

Thus, the ISRB disregarded this Court's ruling in Dyer II and once again abused its discretion.

B. THE APPROPRIATE REMEDY IS AN ORDER DIRECTING THE ISRB TO PAROLE DYER

Although this Court declined to order the ISRB to release Dyer in Dyer II, it should do so now in view of the ISRB's intransigence.

Dyer II contains the following discussion of the appropriate remedy:

While a review of the evidence and testimony presented at the parolability hearing suggests Dyer met his burden to have conditions of release on parole established, we cannot make this decision in the first instance. We instead remand to the ISRB for a new parolability hearing during which the ISRB must make its determination based on the evidence and testimony presented, and not on speculation and conjecture.

Dyer II, 157 Wn.2d at 369. It is true, as the Court noted, that courts will not generally reach the merits in the first instance of a matter entrusted to the discretion of an agency.

In most cases, successful prosecution of a review proceeding yields instead a judicial decision setting aside the agency action and remanding the proceeding for further

⁹ Undersigned counsel provided the decision to the ISRB and discussed its import in a brief.

agency action not inconsistent with the decision of the reviewing court.

Richard J. Pierce, Jr., Administrative Law Treatise, (4th Ed. 2002) § 18.1 at 1323. There is at least one exception, however, to that general rule.

A reviewing court can order an agency to provide the relief it denied only in the unusual case where the court concludes that the underlying law and facts are such that the agency has no discretion to act in any other manner.

Id. at 1324.¹⁰ Courts have applied this exception to a wide variety of administrative agencies.

In NLRB v. Food Store Employees Union, 417 U.S. 1, 8, 94 S.Ct. 2074, 40 L.Ed.2d 612 (1974), the U.S. Supreme Court explained that a reviewing court need not remand to the National Labor Relations Board where “crystal-clear Board error renders a remand an unnecessary formality.”

In the setting of asylum petitions before the Immigration and Naturalization Service (INS) the U.S. Supreme Court has stated that the proper remedy for administrative error is to remand to the agency for additional investigation or explanation, “except in rare circumstances.”

¹⁰ Professor Pierce believes there should be another requirement: “the court concludes that a remand to the agency would produce substantial injustice in the form of further delay of the action to which the petitioner is clearly entitled.” Id. Many courts disagree with him on that point, however. See Seavey v. Barnhart, 276 F.3d 1, 11-12 (1st Cir. 2001) (surveying cases). Judge Rosen of the Sixth Circuit has argued in dissent that the usual rule should apply only when the agency’s legal error is revealed to it for the first time by the reviewing court. When, as in this case, the agency’s erroneous legal position has been corrected by a court prior to the agency decision currently on review, the agency forfeits its right to hold further proceedings. Cissell Mfg. Co. v. U.S. Department of Labor, 101 F.3d 1132, 1140-43 (6th Cir. 1996).

Gonzales v. Thomas, -- U.S. --, 126 S. Ct. 1613, 1615, 164 L. Ed. 2d 358 (2006); INS v. Orlando Ventura, 537 U.S. 12, 16, 123 S. Ct. 353, 154 L. Ed. 2d 272 (2002). The Fifth Circuit found such “rare circumstances” to exist in Zhao v. Gonzales, 404 F.3d 295 (5th Cir. 2005). It acknowledged that it could reverse the Board of Immigration Appeals only if had abused its “abundant discretion,” id. at 304, but found that in Zhao’s case no reasonable factfinder could reach a conclusion other than to grant asylum, id. at 306. Further, because the Board had already considered all the evidence, the Court “cautiously conclude[d] that this case exhibits the narrow set of circumstances that requires no remand.” Id. at 311. See also, Almaghazar v. Gonzales, 457 F.3d 915, 923 n.11 (9th Cir. 2006) (“Neither Ventura nor Thomas require us to remand an issue to the agency when the agency has already considered the issue.”)

Similarly, in the setting of Social Security appeals, the usual remedy for administrative error is a remand for further proceedings. Seavey v. Barnhart, 276 F.3d 1 (1st Cir. 2001). Nevertheless, “the court can order the agency to provide the relief it denied” in the “unusual case in which the underlying facts and law are such that the agency has no discretion to act in any manner other than to award or to deny benefits.” Id. at 11. “Put differently, if the evidence and law compelled one conclusion or the other, then the court could order an award of benefits or affirm a denial of benefits.” Id. Many other circuits have adopted this view. Id. at 11-12, citing Holohan v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001) (“[A] remand for further proceedings is unnecessary if the

record is fully developed and it is clear from the record that the ALJ would be required to award benefits.”); Faucher v. Sec'y of Health & Human Servs., 17 F.3d 171, 176 (6th Cir. 1994); Davis v. Shalala, 985 F.2d 528, 534 (11th Cir. 1993) (“This court . . . [may] remand the case for an entry of an order awarding disability benefits where the Secretary has already considered the essential evidence and it is clear that the cumulative effect of the evidence establishes disability without any doubt.”); Nielson v. Sullivan, 992 F.2d 1118, 1122 (10th Cir. 1993). Further, some circuits have ordered relief even where “the entitlement is not totally clear, but the delay involved in repeated remands has become unconscionable.” Id. at 13 “In such cases, our sister circuits have warned the Commissioner that administrative deference does not entitle the Commissioner to endless opportunities to get it right.” Id. (citations omitted). See also, Rivera v. Sullivan, 923 F.2d 964, 970 (2nd Cir. 1991) (court remands for “an immediate award of benefits” – even though agency had not yet considered all issues – because evidence strongly supported petitioner and litigation had already consumed significant time). The same considerations of delay apply here. The ISRB has now denied parole to Dyer four times, and another remand would likely result in another denial and another round of court proceedings.

The Tenth Circuit applied similar reasoning in a case involving the U.S. Fish and Wildlife Service. Although the general rule is that the decision to conduct a full Environmental Impact Statement “is committed to the administrative agency in the first instance,” the court ordered such

action were the agency had dragged its heels and the record was unambiguous. Middle Rio Grande Conservancy Dist. v. Norton, 294 F.3d 1220, 1231 (10th Cir. 2002).

Several courts have applied these principles when reviewing decisions of a parole board. In Mickens-Thomas v. Vaughn, 321 F.3d 374 (3rd Cir.), *cert denied sub. nom. Gillis v. Hollawell*, 540 U.S. 875, 124 S.Ct. 229, 157 L.Ed.2d 136 (2003), the Third Circuit found that the Pennsylvania Parole Board had applied certain rules retroactively, in violation of the federal ex post facto clause, and instructed the Board to give “fair consideration” under the earlier version of the rules. The Board then once again denied parole, relying on old information that it had not previously found to be of concern. Mickens-Thomas v. Vaughn, 355 F.3d 294, 296-309 (3rd Cir. 2004). The Board’s failure to comply with the prior court order “convinces us that it would be futile to further remand Thomas’s parole application to the Board for a fair disposition.” Id. at 310. The court therefore ordered the Board to release the petitioner on parole. Id.

In Trantino v. New Jersey State Parole Board, 166 N.J. 113, 764 A.2d 940 (2001), the New Jersey Supreme Court ordered release where the Board repeatedly denied parole without sufficient justification. As in this case, the Board at Trantino’s latest hearing selective relied on only limited portions of the record and disregarded the substantial evidence of rehabilitation. Id. at 122, 189.

Although the instances are few in which courts have found Parole Board decisions denying parole to be so arbitrary that affirmative judicial intervention to grant parole was necessary, that relief clearly may be encompassed within the province of judicial review.

Id. at 173 (citations omitted).

Similarly, in Marino v. Travis, 13 A.D.3d 453, 787 N.Y.S.2d 54 (2004), the appellate court had previously found the Board's denial of parole to be an abuse of discretion and had remanded for a new hearing. Id. at 454. When the Board subsequently denied release again, the court simply ordered release. Id.¹¹

The California Court of Appeals ordered parole in In re Smith, 109 Cal. App. 4th 489, 134 Cal. Rptr. 2d 781 (2003). The parole board found Smith parolable but the governor reversed that decision. "Since we have reviewed the materials that were before the Board and found no evidence to support a decision other than the one reached by the Board, a remand to the governor in this case would amount to an idle act." Id. at 507. While Smith dealt with a somewhat different parole system than Washington's, its reasoning should apply here. The ISRB has been given a second chance to justify denial of parole and has been unable to identify anything

¹¹ The ISRB may argue that Trantino and Marino are distinguishable because the state statutes required release unless the Board found that there was a likelihood of recidivism. The cases are nevertheless persuasive because even in New York and New Jersey the Boards were entitled to substantial deference and no statutes specifically authorized a court to order parole. In any event, as discussed below in section V(C), this Court should hold that RCW 9.95.009(2) effects a similar shifting of the burden onto the ISRB to justify denial of parole once the prisoner has served more time than he would have under the SRA.

in Dyer's record to support that decision. The Court can readily conclude that remanding for another hearing "would amount to an idle act."

There does not seem to be any published Washington case in which the court ordered parole, but such a ruling would be consistent with this Court's decisions in other cases. Although the Washington courts will not generally interfere with the "work and decisions of an agency of the state," the courts may step in to protect the rights of individuals "where the acts of public officers are arbitrary, tyrannical, or predicated upon a fundamentally wrong basis." Coalition for the Homeless v. DSHS, 133 Wn.2d 894, 914, 949 P.2d 1291 (1997) (ordering DSHS to create an adequate plan to care for homeless children). See also, Group Health etc. v. King Co. Med. Soc., 39 Wn.2d 586, 669, 237 P.2d 737 (1951) (ordering commissioners of public hospital to permit access to certain doctors). The Court should be even more proactive when incarceration is at issue.

Thus, in the unusual setting of this case, there is ample authority for the Court to order the ISRB to grant parole.

C. THE ISRB'S DECISION VIOLATES RCW 9.95.009(2)

As this Court noted in Dyer II, one of the reasons that the ISRB abused its discretion at the 2002 .100 hearing was that it did not give sufficient weight to RCW 9.95.009(2), which requires the ISRB to make decisions "reasonably consistent" with the SRA. There is perhaps some tension between this Court's decision in Personal Restraint of Addleman, 151 Wn.2d 769, 92 P.3d 221 (2004) and Dyer II, which the Court may now wish to clear up. In Addleman, the petitioner argued that RCW

9.95.009(2) placed a significant limitation on an older statute, RCW 9.95.100, which prohibits release unless the ISRB finds a prisoner to be rehabilitated. Addleman relied on fundamental principles of statutory construction.

Each provision must be viewed in relation to other provisions and harmonized, if at all possible. Statutes must be construed so that all language is given effect with no portion rendered meaningless or superfluous.

State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001) (citations and internal quotations omitted). Addleman argued that the two statutory sections could be harmonized as follows: the ISRB may consider rehabilitation at a .100 hearing, but the lack of rehabilitation must be exceptional or compelling before the Board can impose a new minimum term that would amount to an exceptional sentence under the SRA. In other words, as long as the high end of the standard range was not exceeded¹², the ISRB would have broad discretion, just as a judge has when sentencing within the standard range. The ISRB could not hold a prisoner beyond the high end of the range, however, without compelling reasons.

The five-justice majority in Addleman¹³ ruled as follows:

We conclude that between a statutory requirement that a prisoner is not to be released until rehabilitation is complete

¹² The range would of course be adjusted for good time credit. The ISRB would not be limited to DOC's determination of such credit, however, since it also has the power to revoke good time for infractions. RCW 9.95.080.

¹³ This included now-retired Justice Faith Ireland.

and a duty to attempt consistency with the SRA, the statutory requirement trumps the duty to attempt. The two duties, however, are not mutually exclusive but can be exercised in harmony with each another. The ISRB must make reasonable attempts to set its minimum sentences consistent with the SRA but has no duty to parole an unrehabilitated prisoner.

Id. at 775. The majority seemed to imply that subsection .009(2) applied only to the initial setting of the minimum term. Id. at n. 3. By its plain terms, however, RCW 9.95.009(2) expressly applies not only to the initial setting of the minimum term, but also to “parole release under RCW 9.95.100.” See also, Addleman v. Board of Prison Terms, 107 Wn.2d 503, 510-11, 730 P.2d 1327 (1986).

In dissent, Justices C. Johnson, Alexander and Sanders noted that, “in effect, the majority writes RCW 9.95.009(2) out of existence and gives the ISRB full discretion regarding sentencing decisions.” Id. at 780.

We have previously determined that RCW 9.95.009 (2) places a “clear limitation” on the discretion of the ISRB. In re Pers. Restraint of Myers, 105 Wash.2d 257, 262, 714 P.2d 303 (1986).

Id. at 780.

In Myers, the defendant asserted that RCW 9.95.009(2) was void for vagueness under the federal due process clause because defendants could only guess how the ISRB might “attempt” to be “reasonably consistent” with SRA guidelines. Myers, 105 Wash.2d at 266-67, 714 P.2d 303. We rejected this argument based on the express language of RCW 9.95.009(2). Pursuant to the statute, the ISRB is empowered only to impose sentences reasonably consistent with the SRA and has no inherent power to “amend or alter the statutes under which it functions.” Myers, 105 Wash.2d at 264, 714 P.2d 303. By claiming that RCW 9.95.100

trumps the ISRB's duty under RCW 9.95.009(2), the majority is ostensibly delegating this power to the ISRB, which is contrary to the express language of the statute. In effect, the majority writes RCW 9.95.009(2) out of existence and gives the ISRB full discretion regarding sentencing decisions.

Id. at 780 (footnote omitted).

The requirement of reasonable consistency stems not only from the statute but from the constitutional principle of equal protection.

In support of the “reasonably consistent” requirement of RCW 9.95.009(2), we have required the ISRB's procedures and factors relevant to setting minimum terms to be “substantially similar” to the SRA's exceptional sentence procedures and factors. In re Pers. Restraint of Locklear, 118 Wash.2d 409, 416, 823 P.2d 1078 (1992). In Locklear, we recognized that similar treatment of SRA offenders and pre-SRA offenders was required not only by statute but also by principles of equal protection. This determination supports the purpose of RCW 9.95.009(2), which was enacted to “remedy a statutory scheme that otherwise would create gross disparity between sentences set under the indeterminate sentencing scheme and sentences set under the SRA's determinate scheme.” Myers, 105 Wash.2d at 267, 714 P.2d 303.

Id. at 780-81.

Justice Madsen, who concurred only in the result in Addleman, did not express an opinion on this issue.

In Dyer II, Justices Chambers and J.M. Johnson joined the three Addleman dissenters in overturning the ISRB. The majority stressed that the ISRB must “consider the purposes, standards, and sentencing ranges adopted pursuant to [the SRA] and “attempt to make decisions reasonably consistent with [the SRA].” Dyer II at 360, quoting RCW 9.95.009(2).

See also n.2. The majority did not explicitly discuss, however, what factors could justify a parole decision that would yield a sentence *inconsistent* with the SRA. The dissent focused on the language in Addleman that RCW 9.95.100 “trumps” RCW 9.95.009(2). Dyer II at 374.

In this case, the Court could clarify that RCW 9.95.100 can “trump” RCW 9.95.009(2) only if the ISRB can show an exceptional or compelling lack of rehabilitation. Release on parole should be the norm once the sentence exceeds that which would be imposed under the SRA. At the least, the burden of proving rehabilitation or its lack should shift from the prisoner to the ISRB once the SRA sentence has expired.¹⁴

An alternative approach in sex cases is suggested by RCW 9.94A.712, a relatively new portion of the SRA that reinstates to some extent indeterminate sentencing for sex offenders. If Dyer were convicted today of rape in the first degree, the superior court would sentence him to a maximum term of life and a minimum term commensurate with SRA standards. RCW 9.94A.712(3). Dyer would then come before the ISRB when his minimum term expired. RCW 9.95.420(3)(a). To that extent, Dyer would be in the same position he is in now. The ISRB’s standard of review, however, would be quite different from RCW 9.95.100:

The board shall order the offender released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a

¹⁴ The SRA sentence is known for every ISRB prisoner because the ISRB was required to determine it in the late 1980s.

preponderance of the evidence that, despite such conditions, it is more likely than not that the offender will commit sex offenses if released.

RCW 9.95.420(3)(a). In other words, the SRA statute creates a presumption of release, with the burden on the ISRB to overcome that burden by a preponderance of the evidence. Section 420(1)(a) requires the ISRB to obtain an evaluation of the offender prior to the hearing “incorporating methodologies that are recognized by experts in the prediction of sexual dangerousness.”

The Court could give effect to RCW 9.95.009(2) in Dyer’s case by applying the standards that would apply to a prisoner subject to RCW 9.94A.712. Dyer would still have an indeterminate sentence and be subject to the jurisdiction of the ISRB. The Board’s discretion, however, would be significantly limited by the standard set out in RCW 9.95.420(3)(a). While the ISRB could still hold him in prison upon proof that he would likely commit more sex offenses, it could not deny parole based only on its own hunches. This should reduce unfair decisions by the ISRB and facilitate meaningful judicial review.

In this case, for example, the ISRB could not possibly find by a preponderance that Dyer would more likely than not commit new sex offenses if released. See section V(A), above. Further, as discussed above in section V(B), court review of an ISRB hearing under the new standard would not be limited to remanding for a new hearing. Rather, the Court could find that the ISRB did not meet its burden of proof and simply order it to grant parole. That would avoid the sort of merry-go-round that Dyer

seems to be on in this case, with the Court remanding for a new hearing only for the ISRB to commit the same error on remand.

D. TO THE EXTENT THE ISRB RELIED ON RCW 9.95.009(3), ITS DECISION VIOLATES THE EX POST FACTO CLAUSE

In its Decision and Reasons, the ISRB noted that RCW 9.95.009(3) required it to “give public safety considerations the highest priority.” App. P at 7. At the hearing, the Chair stated that this subsection restricted the Board’s authority to grant parole under RCW 9.95.100:

I want to reiterate something . . . and that is that our board, our responsibility, statutorily, is to determine whether or not somebody is rehabilitated and a fit subject for release. *Overriding that* is also the statutory obligation to put public safety first.

App. N at 14 (emphasis added). The first of these quoted sentences clearly describes the standard set out in RCW 9.95.100. The second sentence could only refer to RCW 9.95.009(3), which the Chair believes to “override” the former standard.

The Ex Post Facto Clause of the U.S. Constitution, however, prohibits the Board from applying RCW 9.95.009(3) to Dyer. Subsection 3 was not added until 1990, ten years after Dyer allegedly committed his crimes, and four years after his minimum term was set under RCW 9.95.009(2). See RCWA 9.95.009 (West Group, 1998), Historical and Statutory Notes.

As we recognized in *Weaver [v. Graham]*, 450 U.S. 24, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981)], retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Facto Clause because such credits

are "one determinant of petitioner's prison term . . . and . . . [the petitioner's] effective sentence is altered once this determinant is changed." *Ibid.* We explained in *Weaver* that the removal of such provisions can constitute an increase in punishment, because a "prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Ibid.*

Lynce v. Mathis, 519 U.S. 433, 445-46, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997).

The Third Circuit applied these principles to a change in Pennsylvania's parole statute quite similar to the one at issue here. Mickens-Thomas v. Vaughn, 355 F.3d 294 (3rd Cir. 2004). Prior to 1996, Pennsylvania's statute focused on rehabilitation. The 1996 amendments required that the "board shall first and foremost seek to protect the safety of the public." *Id.* at 298. This change violated the ex post facto clause because it "altered the weight" applied to public safety concerns. *Id.*

The Ninth Circuit applied Lynce to a change in Oregon's parole rules in Brown v. Palmateer, 379 F.3d 1089 (9th Cir. 2004).

The pre-1993 law required that postponement be based upon a psychiatric or psychological *diagnosis* of a *present severe* emotional disturbance. The 1993 amendment eliminated the requirement of a diagnosis and eliminated "present severe" from the definition of the qualifying mental disturbance.

Id. at 1094 (emphasis in original). This retroactive change violated the ex post facto clause because it created a "significant risk" that prisoners would face longer periods of incarceration. *Id.* at 1095-96.

In Washington, RCW 9.95.009(3) altered the weight applied to public safety concerns and created a significant risk that prisoners would serve more time. It therefore violates the ex post facto clause.

Division One of the Washington Court of Appeals rejected this challenge in Personal Restraint of Haynes, 100 Wn. App. 366, 378, 996 P.2d 637 (2000). It reasoned that Haynes had not shown any disadvantage from RCW 9.95.009(3) because the ISRB was “free to emphasize” public safety under prior law. Id. In other words, the court found that RCW 9.95.009(3) did not change the standards for parole. Statutes must be construed, however, so that all language is given effect with no portion rendered meaningless or superfluous. See State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). In fact, subsection 3 was clearly intended to modify subsection 2, which required the ISRB to make decisions “reasonably consistent” with the SRA. The ISRB Chair acknowledged in this case that subsection 3 altered the standard for release. Thus, this Court should reject the reasoning of Haynes.

E. THE BOARD’S DECISION VIOLATES THE FEDERAL EQUAL PROTECTION CLAUSE

The Board’s failure to comply with RCW 9.95.009(2) resulted in a violation of the federal equal protection clause. In In re Storseth, 51 Wn. App. 26, 32-33, 751 P.2d 1217 (1988), the petitioner contended that his right to equal protection was violated because he received more punishment from the parole board than an SRA offender would have received from a court.

The equal protection clause requires that “persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” Harmon v. McNutt, 91 Wn.2d 126, 130, 587 P.2d 537 (1978). RCW 9.95.009(2), as interpreted in Addleman,¹⁵ ensures substantially similar treatment of pre-SRA offenders and SRA offenders by requiring the Board to consider the ranges and standards of the SRA when making confinement duration decisions for pre-SRA offenders, to attempt to make those decisions reasonably consistent with the SRA, and to give adequate written reasons for decisions not in conformance with the SRA.

Id. at 32. When the Board complies fully with RCW 9.95.009(2), there is no equal protection violation. Id. at 33. Because the Board did not comply in Storseth’s case, the court remanded for a new hearing.

The Supreme Court ratified Storseth’s analysis in In re Locklear, 118 Wn.2d 409, 416-18, 823 P.2d 1078 (1992). It recognized that similar treatment of SRA and pre-SRA offenders was required not only by statute, but also by the equal protection clause. Id. at 416.

This result is also compelled by U.S. Supreme Court precedent. In Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992), the Court struck down a law requiring a prisoner found not guilty by reason of insanity, but no longer insane, to prove himself safe to be released.

[T]he Louisiana statute also discriminates against Foucha in violation of the Equal Protection Clause of the Fourteenth Amendment. . . . Louisiana law . . . does not provide for similar confinement for other classes of persons who have

¹⁵ Addleman v. Board of Prison Terms, 107 Wn.2d 503, 730 P.2d 1327 (1986).

committed criminal acts and who cannot later prove they would not be dangerous. Criminals who have completed their prison terms, or are about to do so, are an obvious and large category of such persons. Many of them will likely suffer from the same sort of personality disorder that Foucha exhibits. However, state law does not allow for their continuing confinement based merely on dangerousness. . . . Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason, which it has not put forward, for such discrimination against insanity acquittees who are no longer mentally ill.

Id. at 84-86. The same reasoning applies here. There is no “convincing reason” for discriminating against pre-SRA offenders.

In addition, the equal protection clause is violated when a person is denied a benefit “because of circumstances which are both legally and practically beyond his control.” Hunter v. North Mason High School, 12 Wn. App. 304, 306, 529 P.2d 898 (1974), aff’d 85 Wn.2d 810, 539 P.2d 845 (1975). Applying this principle, both state and federal courts have held that it denies prisoners equal protection of the law to condition their release on the fulfillment of treatment programs they cannot obtain because they are not available, see Ohlinger v. Watson, 652 F.2d 775 (9th Cir. 1980), or because the prisoner cannot afford them, In re Earl, 48 Wn. App. 880, 740 P.2d 853 (1986). Here, the Board has acknowledged that it will not release Dyer unless he completes the SOTP program, yet that program is not available to Dyer.

Thus, the Board’s decision denied Mr. Dyer equal protection.

F. UNDER THE BOARD’S REASONING, RCW 9.95.009(2)
VIOLATES THE EX POST FACTO CLAUSE

The Washington Supreme Court rejected the claim that RCW 9.95.009(2) was an ex post facto law in In Re Powell, 117 Wn.2d 175, 186-87, 814 P.2d 635 (1991).¹⁶ Although the new statute generally extended the earliest date at which parole was possible, this disadvantage was offset by the advantage of having a determinate date set for parole consideration under the standards of the SRA, rather than leaving the matter to the discretion of the prison superintendent and parole board. Id. at 190-91. The Ninth Circuit agreed. Powell v. Ducharme, 998 F.2d 710 (9th Cir. 1993), cert. denied, 516 U.S. 825, 116 S. Ct. 91, 133 L. Ed. 2d 47 (1995). “No longer does the possibility exist that an inmate can be forever denied parole. [A prisoner] is now guaranteed a parole hearing at the end of the discretionary minimum term.” Id. at 714. Clearly, the Supreme Court and Ninth Circuit contemplated a *meaningful* parole hearing, at which the prisoner actually had an opportunity to be released. If the Board is permitted to repeatedly deny parole based on the facts of the crime, however, then RCW 9.95.009(2) works only to the detriment of prisoners, and amounts to an ex post facto law. The Board’s reasoning in this case calls into question the validity of the entire statutory scheme.

G. UNDER THE BOARD’S REASONING, RCW 9.95.009(2) IS VOID FOR VAGUENESS UNDER THE DUE PROCESS CLAUSE

As noted above, this Court rejected a challenge to RCW 9.95.009(2) on the ground that it was void for vagueness in Personal

¹⁶ More precisely, the Court considered SHB 1457, which made RCW 9.95.009(2) applicable to prisoners convicted of first-degree murder.

Restraint of Myers, 105 Wn.2d 257, 262, 714 P.2d 303 (1986). The Court found it clear that the statute was designed to remedy the disparity that might otherwise exist between indeterminate and determinate sentences. If the Board's reasoning in this case, however, is sufficient to justify the exceptional sentence imposed, then the statute is truly void for vagueness. How could any defendant guess that an "attempt" to be "reasonably consistent" with the SRA could include refusing to release him after he had served six times the SRA standard range, maintained good conduct, availed himself of all treatment and educational opportunities, and obtained highly favorable psychological evaluations?

H. THE BOARD'S DECISION IN THIS CASE VIOLATES
SUBSTANTIVE DUE PROCESS

The actions of a parole board may violate substantive due process.

The substantive component of due process recognized by the Fifth Amendment and made applicable to the states by the Fourteenth Amendment could, indeed, be implicated in a [parole] case such as this. In *Foucha v. Louisiana*, 504 U.S. 71, 118 L. Ed. 2d 437, 112 S. Ct. 1780 (1992), the Supreme Court reiterated: "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Id. at 80* (internal quotation omitted).

Hunterson v. DiSabato, 308 F.3d 236, 248 (3rd Cir. 2002). To meet this standard, the Board's conduct must be "egregious enough to shock the conscience or constitute arbitrariness bordering on deliberate indifference to [the prisoner's] rights." *Id.* See also, Hawkins v. Freeman, 195 F.3d 732, 738 (4th Cir. 1999).

Here, the ISRB's history of decisions meets this standard. It is shocking to the conscience to tell a prisoner that he has a right to be considered for parole, but that there is absolutely nothing he can do to be paroled. Such conduct also constitutes deliberate indifference to the prisoners' right to a meaningful parole hearing.

I. THE BOARD'S ACTIONS AMOUNT TO CRUEL AND UNUSUAL PUNISHMENT

The ISRB's actions in this case constitute cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution and cruel punishment under Article I, section 14 of the Washington Constitution.

The Washington Supreme Court has repeatedly recognized "that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment." State v. Roberts, 142 Wn.2d 471, 506, 14 P.3d 713 (2000), citing State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996); State v. Bartholomew, 101 Wn.2d 631, 639-40, 683 P.2d 1079 (1984); State v. Fain, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980); State v. Morin, 100 Wn. App. 25, 29, 995 P.2d 113 (2000); State v. Ames, 89 Wn. App. 702, 710 & n.8, 950 P.2d 514 (1998). Because this is an established principle of state constitutional jurisprudence, no analysis is necessary under the factors set out in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). See State v. Roberts, 142 Wn.2d at 506 n.11.

Whether or not the Board's actions here are unusual, they are certainly cruel. Dyer waited nearly five years for his most recent .100 hearing and expected his good behavior to weigh in favor of release. Instead, he was told that it made no difference. It is cruel for the Board to provide Dyer the hope of parole from year to year, when in reality it has no intention of releasing him under any circumstances. It would be more humane to simply announce that it intends to hold him forever.¹⁷

VI. REQUEST FOR RELIEF

The ISRB should order the ISRB to parole Dyer upon appropriate conditions, no later than 90 days from the date of its decision. In the alternative, the Court should once again find that the ISRB abused its discretion and order it to hold a new hearing.

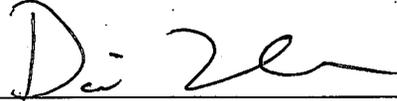
VII. OATH

After being first duly sworn on oath, I depose and say that: I am the attorney for petitioner, I have read the petition, know its contents, and believe the petition is true.

¹⁷ Such a pronouncement would, however, violate other constitutional and statutory provisions.

DATED this 1st day of March, 2007.

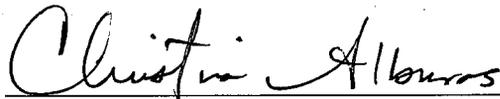
Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Richard J. Dyer

SUBSCRIBED AND SWORN TO before me, the undersigned

notary public, on this 1st day of MARCH, 2007.



Notary Public for Washington

My Commission Expires: 11/09/08

