

NO. 85091-7

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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In re the Personal Restraint Petition of:

RICHARD J. DYER,

Petitioner.

BY RONALD R. CARPENTER  
Clerk  
[Signature]

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SUPREME COURT  
STATE OF WASHINGTON

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**RESPONDENT'S SUPPLEMENTAL BRIEF**

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ROBERT M. MCKENNA  
Attorney General

GREGORY J. ROSEN, WSBA #15870  
ASSISTANT ATTORNEY GENERAL  
CORRECTIONS DIVISION  
P.O. BOX 40116  
OLYMPIA, WA 98504-0116  
(360) 586-1445  
GregR@atg.wa.gov

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Respondent, Indeterminate Sentence Review Board (ISRB or Board) respectfully submits this supplemental brief pursuant to the Court's letter Order of October 20, 2011.

## **I. ISSUE PRESENTED**

Pursuant to RCW 9.95.100, the Board holds a hearing to determine if offenders under its jurisdiction who committed their crimes prior to July 1, 1984, have shown that their rehabilitation is complete and that they are a fit subject for release. As this Court has held, RCW 9.95.100 expressly prohibits the Board from releasing any inmate prior to the expiration of that inmate's court-ordered maximum term unless the Board finds that the inmate is completely rehabilitated and a fit subject for release.

The Board's most recent decision in Dyer's case, which is the basis of his current petition in this Court, determined that he did not meet his burden under RCW 9.95.100, denied him parole, and added time to his minimum term. The issue presented to this Court is whether the Board abused its discretion when denying parole to Dyer, who stands convicted of two First Degree Rapes, and who remains an untreated sex offender.

## **II. STATEMENT OF THE CASE**

### **A. Case Law Relating To Parole**

The granting or denial of parole rests exclusively within the discretion of the Board. *See January v. Porter*, 75 Wn.2d 768, 774, 453 P.2d 876 (1969). Parole is not a right but a mere privilege conferred as an act of grace by the state through its own administrative agency. *See id.*

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This Court has held that “a prisoner, who is sentenced prior to the enactment of the Sentencing Reform Act, is ‘subject entirely to the discretion of the Board, *which may parole him now or never.*’” See *In re Ecklund*, 139 Wn.2d 166, 175, 985 P.2d 342 (1999), quoting *In re Powell*, 117 Wn.2d 175, 196, 814 P.2d 635 (1991) (emphasis in the original). In making decisions regarding parole, the Board is endowed with a “high degree of discretion.” *Ecklund*, 139 Wn.2d at 174.

Washington courts are “*not* a super Indeterminate Sentence Review Board, and they will not interfere with a Board determination unless the Board is first shown to have *abused its discretion* in setting a prisoner’s discretionary minimum term.” *In re Whitesel*, 111 Wn.2d 621, 628, 763 P.2d 199 (1988) (emphasis in the original), citing *In re Myers*, 105 Wn.2d 257, 264, 714 P.2d 303 (1986).

**B. The Standard For Parole Under RCW 9.95.100**

The statute governing the standard for parolability decisions expressly confers broad discretion on the Board to make those decisions:

The board **shall not**, however, until his maximum term expires, release a prisoner, **unless in its opinion his rehabilitation has been complete and he is a fit subject for release.**

RCW 9.95.100 (partial) (emphasis added). RCW 9.95.009(3) requires the Board to:

**[G]ive public safety considerations the highest priority** when making all discretionary decisions on the remaining indeterminate population regarding the ability for parole, parole release, and conditions of parole.

(Emphasis added.)

**C. Facts Of Dyer's Crimes Of Conviction**

This Court summarized the facts of Mr. Dyer's two First Degree Rape convictions in its most recent decision in his case:

A jury convicted Dyer on two counts of first degree rape against two women, *Ms. A* and *Ms. B*. On January 27, 1980, *Ms. A* accepted a ride from two men in downtown Bremerton at 2:30 a.m. *Ms. A* sat in the front seat between the driver, who she later identified as Dyer, and a second man. When she realized Dyer was not driving to the designated destination, she attempted to grab the wheel and stomp on the brakes. Dyer forced her into the backseat where he subdued her with punches to the stomach. The second man drove the car to a remote location where Dyer undressed *Ms. A*. After the second man declined, Dyer raped *Ms. A* then bound *Ms. A* with a rope and held her to the rear floorboard while she was still naked.

The second man drove to a residence. Once inside, Dyer led *Ms. A* to a bedroom where he tied her to a bed on her back. Dyer gagged her with cotton. The men also taped cotton over her eyes. The second man quickly raped *Ms. A* and was not seen or heard by her thereafter. Dyer applied contraceptive foam to *Ms. A* and proceeded to rape her eight times throughout the night. At one point, Dyer flipped her from her back to her stomach and raped her in the new position. Twice she was untied and forced to bathe. In the morning, Dyer washed *Ms. A*'s clothes, bathed, and dressed her. After rebinding her, Dyer drove *Ms. A* into the woods and released her.

Later that year, two men offered a ride to another woman, *Ms. B*, in downtown Bremerton around 11:00 p.m. *Ms. B* twice refused the offer while walking her dog. The car left but shortly reappeared and *Ms. B* was forced inside. En route to their destination, the driver who *Ms. B* later identified as Dyer paused to tape cotton balls over *Ms. B*'s eyes.

The two men took *Ms. B* to a residence. Once inside, *Ms. B* was undressed and tied to a bed. After the second man left, Dyer applied contraceptive foam to *Ms. B* and raped her repeatedly. At one point, Dyer flipped her from her back to her stomach and raped her in the new position. Dyer forced *Ms. B* to shower with him. In the

morning, he washed *Ms. B's* clothes, bathed, and dressed her. He then drove *Ms. B* to a park and released her. Prior to leaving, Dyer gave *Ms. B* a wristwatch that was later identified as the wristwatch *Ms. A* last during her struggle in Dyer's car.

Based on these incidents, Dyer was convicted of two counts of first degree rape. In 1982, the court sentenced Dyer to two maximum terms of life imprisonment to run concurrently.

*In re Dyer (Dyer II)*, 164 Wn.2d 274, 281-82, 189 P.3d 759 (2008).<sup>1</sup>

#### **D. Dyer's Procedural History In This Court**

In *Dyer II*, this Court summarized the Board's history with Mr. Dyer in pertinent part:

Since his incarceration, the ISRB has determined Dyer not parolable five times. In 1994, the ISRB found Dyer not parolable based, in part, on a 1993 psychological evaluation that found Dyer's risk of reoffense was "very high" and his depth of sexual deviancy was "high." Resp. of ISRB to PRP, App. 5, at 3. In 1995, the ISRB found Dyer not parolable and added 60 months to his minimum term. The ISRB based its decision in part on a 1994 psychological evaluation diagnosing Dyer with posttraumatic stress disorder (PTSD) and sexual sadism. It concluded, "[W]ithout treatment, the risk of reoffense remains high." *Id.* App. 6, at 3. The ISRB noted that "Mr. Dyer is an untreated, convicted rapist who denies his culpability and is therefore not amenable or receptive to

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<sup>1</sup> Although Dyer's Brief states that he is not challenging his underlying convictions, he nevertheless attempts to leave this Court with the impression that he was wrongfully convicted of his two First Degree Rape convictions. For example, instead of citing the majority's recitation of the facts of Dyer's crimes, he instead quotes from Justice Sanders' dissent in *Dyer II* (without stating that his excerpt is derived from a dissent) that disputed Dyer's two victims' identification. See Petitioner's Supplemental Brief (Brief) at 1-2. In addition, Dyer also cites Justice Sanders' dissent from this Court's 2001 opinion as to the issue of extended family visits in Dyer's case. ("There is also substantial evidence undermining the veracity of Dyer's second wife and her allegations.") See Brief at 2 and *In re Dyer*, 143 Wn.2d 384, 409, 20 P.3d 907 (2001). However, as this Court's majority opinion noted: "[a]lthough Dyer has not been retried on the reversed counts of rape, burglary, and unlawful imprisonment, **Dyer admitted in 1982 to his prison classification counselor that he had 'only victimized his wife'** and not the two other rape victims." *Dyer*, 143 Wn.2d at 388 (emphasis added).

treatment.” *Id.* In 1998, the ISRB again found Dyer not parolable and added 60 months to his minimum term.

....  
In 2002, the ISRB again found Dyer not parolable and added 60 months to his minimum term. The ISRB stated, “A central difficulty for the Board is that Mr. Dyer remains an untreated sex offender.” Resp. of ISRB to PRP, App. 11, at 3. The ISRB noted that DOC’s sex offender treatment program (SOTP) requires “full candor” and Dyer was not eligible for SOTP because he continued to maintain his innocence. *Id.*

*See Dyer II*, 164 Wn.2d at 282-83.

In *In re Dyer (Dyer I)*, 157 Wn.2d 358, 139 P.3d 320 (2006), this Court remanded Dyer’s case to the Board for a new parolability hearing, and ordered that the Board make its determination based on the evidence and testimony presented, and not on speculation and conjecture. *See Dyer I*, 157 Wn.2d at 369. The Board subsequently conducted another parolability hearing after which it determined that Dyer did not meet his burden under RCW 9.95.100 to show that he was completely rehabilitated and a fit subject for release. *See Dyer’s Exhibit M, Board’s December 5, 2006 Decision and Reasons.*<sup>2</sup>

Dyer filed another personal restraint petition challenging that denial of parole. This Court affirmed the Board’s decision, concluding that Dyer failed to demonstrate his complete rehabilitation, that the Board did not abuse its discretion by denying parole and adding 80 months to his minimum term based on the objective fact that Dyer is an untreated sex offender. *Dyer II*, 164 Wn.2d at 288, 297. The Court also held that the

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<sup>2</sup> “Dyer’s Exhibit ” refers to the Exhibits attached to Dyer’s Personal Restraint Petition.

Board properly adhered to its statutory mandate to make public safety its paramount consideration and did not violate Dyer's constitutional rights. *Id.* at 297.

**E. The Board's March 2010 Decision**

On January 13, 2010, the Board conducted its most recent parolability hearing in Dyer's case. On March 15, 2010, the Board issued a decision in which it again denied parole. *See* Dyer's Exhibit N, Board's March 15, 2010 Decision and Reasons. Dyer filed a personal restraint petition directly in this Court, alleging several claims, including the claim that the Board abused its discretion when denying him parole.<sup>3</sup> The Board's decision correctly noted that "little has changed since the Board last saw Mr. Dyer." *See id.* at 7. The Board noted that Dyer continues to deny his offenses, and stood before the Board as a convicted sex offender whose crimes involved considerable violence and cruelty towards his victims. *Id.* The Board also noted that Dyer "remains an untreated sex offender." *Id.* The Board acknowledged Dr. Patricia Periera's recent psychological evaluation, which scored Dyer as high on the psychopathy scale, and assessed him as a high risk for violence and re-offending. *See id.* at 8. The Board noted that Dr. Periera's scoring on some scales was at odds with the previous evaluations, but found that it could not ignore the results of her evaluation. *Id.* The Board also found noted consistency

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<sup>3</sup> Dyer also filed a motion for this Court to retain his petition, and the Court granted that motion. Dyer's motion to supplement the record under Rule of Appellate Procedure 9.11 remains pending.

with a 1994 psychological evaluation of Dyer which had found a high risk of re-offense and observed and that the depth of sexual deviancy could not truly be assessed with an uncooperative client. *Id.*

The Board's decision noted that it was statutorily directed not to release a prisoner before the expiration of their maximum term, unless in its opinion, his or her rehabilitation had been complete and that he or she was a fit subject for release, citing RCW 9.95.100. *Id.* The Board's decision also cited RCW 9.95.009(3), which requires that the Board give public safety considerations the highest priority when making all discretionary decisions on the remaining indeterminate population regarding the ability for parole, parole release, and conditions of parole. *Id.* The Board determined that the nature of Dyer's offenses coupled with his lack of treatment and indications of high psychopathy "create considerable concerns about public safety should he be released." *Id.* The Board concluded by requesting that Dyer receive a forensic psychological evaluation before his next parolability hearing to determine whether he meets the criteria for civil commitment.<sup>4</sup> *See id.* at 9.

#### **F. Standard of Review**

An offender may seek relief by way of a personal restraint petition if he demonstrates that the Board failed to follow its own rules making minimum term determinations. *See In re Cashaw*, 123 Wn.2d 138, 150,

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<sup>4</sup> Although the Board's decision incorrectly cited RCW 71.05, the Board intended to reference RCW 71.09, the statute which pertains to civil commitment of sexually violent predators.

866 P.2d 8 (1994); *In re Shepard*, 127 Wn.2d 185, 192, 898 P.2d 828 (1995). Otherwise, all Board decisions are subject to review only for an abuse of discretion. The Board abuses its discretion when it “fails to follow its own procedural rules for parolability hearings or acts without consideration of and in disregard of the facts.” *See Dyer II*, 164 Wn.2d at 286, quoting *Dyer I*, 157 Wn.2d at 363 (citing *In re Addleman*, 151 Wn.2d 769, 776-77, 92 P.3d 221 (2004)). To find that a parolability decision was arbitrary and capricious, this Court must find that the Board acted willfully and unreasonably. *See Dyer II*, 164 Wn.2d at 286, citing *Benn-Neth v. ISRB*, 49 Wn.App. 39, 42, 740 P.2d 855 (1987).

### III. ARGUMENT

#### A. **Dyer Fails To Show That The Board Abused Its Discretion When It Denied Him Parole**

In *Dyer II*, this Court held it to be settled law that the Board may consider the offender’s failure to obtain treatment, and that a lack of rehabilitation is a permissible reason to impose a minimum sentence considered exceptional under the Sentencing Reform Act (SRA) Guidelines. *See Dyer II*, 164 Wn. 2d at 288, citing *Ecklund*, 139 Wn.2d at 176. The Court noted that the Board **must** deny parole if the inmate was un-rehabilitated or otherwise unfit for release, citing RCW 9.95.100. *Id.* (emphasis added). The Court made clear that the Board “may base its decision to deny parole, in part, upon the fact that the offender refuses treatment that requires him or her to take responsibility for criminal behavior.” *Id.*, citing *Ecklund*, 139 Wn.2d at 177. The Court held that:

Dyer has not taken responsibility for his crimes, which prevents him from obtaining the treatment the ISRB deems necessary for his full rehabilitation. Therefore the ISRB acted within its discretion to deny Dyer parole.

*Id.*

This Court should reach the same conclusion here as *Dyer II*. As the Board's decision correctly noted, little has changed since the Board last saw Dyer in October 2006. *See Dyer's Exhibit N at 7*. Dyer remains an untreated sex offender. *Id.* at 7-8. As such, Dyer's implicit contention that he is now completely rehabilitated and a fit subject for release, without ever having apparently participated in a sex offender treatment program, is meritless.

The ultimate goal of sex offender treatment is that the offender will not reoffend. Because Dyer has chosen to deny his guilt, despite being convicted in 1982 of two first degree rapes, the consequence of his choice is that he renders himself unamenable for the treatment which might ultimately permit him to be found parolable. "Dyer, like Ecklund, refuses to admit his guilt, which also prevents him from obtaining the necessary rehabilitative treatment." *Dyer II*, 164 Wn.2d at 288 n.4. Although Dyer castigates the Board for its decision not to parole him, it is Dyer, and not the Board, who bears the express statutory burden, as all prospective parolees do, to demonstrate that he is completely rehabilitated and a fit subject for release. *See RCW 9.95.100*. He has not met his burden to date, and thus has not been paroled by the Board. As RCW 9.95.100 unequivocally states, the Board is **prohibited** from releasing an offender

(“the Board **shall not**”) unless the offender meets the demanding standard in RCW 9.95.100. That statute expressly **prohibits** the Board from paroling an inmate prior to the expiration of his court-imposed maximum sentence unless he demonstrates that he is completely rehabilitated and a fit subject for release. *See* RCW 9.95.100 (emphasis added).<sup>5</sup>

Dyer inappropriately attempts to shift his burden as a prospective parolee to demonstrate his parolability under RCW 9.95.100, and instead, seeks to place a burden upon the Board to show his lack of parolability. *See* Petitioner’s Supplemental Brief (Brief) at 9-10. This Court should reject Dyer’s attempt. The Legislature unequivocally placed the statutory burden on prisoners to demonstrate to the Board’s satisfaction that they met the criteria for parole in RCW 9.95.100; the Legislature did not require that the Board show why a prisoner was not parolable. As this Court held in *Dyer II*:

Furthermore, settled law establishes that the ISRB may consider the offender’s failure to obtain treatment. **Lack of rehabilitation is a permissible reason to impose**

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<sup>5</sup> Dyer’s reliance on three California cases for the proposition that “some evidence” must support the decision of the Board that the inmate constitutes a current threat to public safety is unavailing. *See In re Rosenkrantz*, 29 Cal.4th 616, 658, 59 P.3d 174, 128 Cal.Rptr.2d 104, (2002), *cert denied*, 538 U.S. 980 (2003), *In re Shaputis*, 44 Ca.4th 1241, 1254, 190 P.3d 573, 82 Cal.Rptr.3d 213 (2008), and *In re Lawrence*, 44 Cal.4th 1181, 1211-12, 190 P.3d 535, 82 Cal.Rptr.3d 169 (2008), and Brief at 8-9. As *Lawrence* makes clear, the governing parole statute in California presumes “that the Board *must* grant parole *unless* it determines that *public safety* requires a lengthier period of incarceration because of the gravity of the offense underlying the conviction,” (citing California Pen.Code § 3041, subd. (b)). *Lawrence*, 44 Cal.4th at 1204 (italics emphasis in the original.) While the California parole statute presumes an inmate will be paroled, the presumption in Washington is that an inmate will not be paroled: “The board **shall not**, however, until his maximum term expires, release a prisoner, unless in its opinion his rehabilitation has been complete and he is a fit subject for release.” RCW 9.95.100 (emphasis added).

**a minimum sentence considered exceptional under the SRA guidelines.** *In re Pers. Restraint of Ecklund*, 139 Wn.2d 166, 176, 985 P.2d 342 (1999). By statute, the ISRB must deny parole if the inmate is unrehabilitated or otherwise unfit for release. RCW 9.95.100. We have adopted the position that “the first step toward rehabilitation is ‘the offender’s recognition that he was at fault.’” *Ecklund*, 139 Wn.2d at 176 (quoting *Gollaher v. United States*, 419 F.2d 520, 530 (9th Cir. 1969)). Accordingly, the ISRB may base its decision to deny parole, in part, upon the fact that the offender refuses treatment that requires him or her to take responsibility for criminal behavior. *Id.* at 177. Similarly here, **Dyer has not taken responsibility for his crimes, which prevents him from obtaining the treatment the ISRB deems necessary for his full rehabilitation. Therefore the ISRB acted within its discretion to deny Dyer parole.**

*Dyer II*, 164 Wn.2d at 288 (emphasis added) (footnote omitted).

The Board also noted in its decision that it was required by RCW 9.95.009(3) to give public safety considerations the highest priority when making discretionary decisions on the remaining indeterminate population regarding the ability for parole, parole release, and conditions of parole. *See Dyer’s Exhibit N at 8.* When denying Dyer parole in March 2010, the Board appropriately applied RCW 9.95.009(3) to his case. *See id.*

The Board applied the proper statutory standards in reviewing Dyer’s parolability. Because Dyer did not bear his statutory burden to show that he is completely rehabilitated and a fit subject for release, the Board did not abuse its discretion when denying him parole in March 2010. *See RCW 9.95.100 and RCW 9.95.009(3).*

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**B. Dyer's Complaints Regarding Dr. Pereira's Psychological Evaluation Lack Merit**

In his Brief, Dyer complains about Dr. Pereira's evaluation, which found him to present a high risk of re-offense, while prior psychological evaluations that were performed by Carson Carter and Dr. David Monson found that he presented a very low risk to re-offend. *See* Brief at 12.

Dyer previously accepted, without question, Mr. Carter and Dr. Monson's favorable psychological evaluations. When Dr. Pereira determined differently, however, he challenges the quality and scoring of her evaluation, asserting that her evaluation is "not objective evidence," and is "based on a mistaken understanding of objective facts concerning the subject." *See* Brief at 11 and 14. As this Court held in *Dyer I*:

Previous psychological evaluations indicating that he posed a risk of reoffending do not constitute evidence that he currently presents a substantial danger to the community if released.

*Dyer I*, 157 Wn.2d at 365. Dr. Pereira's evaluation finds, however, that Dyer currently presents a high risk for violence and re-offending – and thus presents a substantial danger to the community. *See* Dyer's Exhibit U, Psychological Evaluation of Richard Dyer, P. Pereira, Ph.D, June 11, 2009, at 10. In addition, the attack on Dr. Pereira's evaluation by Dyer's retained psychologist, Dr. Brett Trowbridge, is unsurprising and should be given little weight.<sup>6</sup>

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<sup>6</sup> Although Dyer attempts to portray Dr. Trowbridge as an objective evaluator of Dr. Pereira's evaluation, his retained status belies that attempt. In addition, while Dyer correctly represents that Dr. Trowbridge is a former deputy prosecutor, he only served in that capacity from 1983-1986 according to his curriculum vitae.

First, while Dyer asserts in hyperbolic fashion that there is a “huge discrepancy” between Dr. Pereira’s scoring versus the scoring by Mr. Carter and Dr. Monson’s evaluations, Dyer notes that while the PCL-R test was used in common by Dr. Pereira, Mr. Carter and Dr. Monson, the Static-99 assessment tool was not used by the latter two evaluators, although Dr. Pereira used it. *See* Brief at 12. Moreover, the Board’s decision acknowledged that Dr. Pereira’s scoring on some scales was at odds with previous evaluations, and noted that it was cognizant of variations in his scores on a number of psychological testing scales over the years. *See* Dyer’s Exhibit N at 8-9. As the disclaimer in Dr. Pereira’s evaluation of Dyer stated in the section of her evaluation titled “Psychometric Test Results”:

Caution is indicated in generalizing from the information in this report. Psychological test data alone have not been found adequate as predictors of an individual’s behavior in a setting different from the testing situation. Moreover, interpretations by unqualified individuals may lead to bias, distortions, or misinterpretations.

*See* Dyer’s Exhibit U at 7. Psychological scoring is just one piece of information utilized by the Board when making a parolability determination. Significantly, the Board’s decision to deny Dyer parole also considered other information – including Dyer’s lack of treatment. *See* Dyer’s Exhibit N at 7-8.

Second, the Board’s decision to deny Dyer parole was not “heavily based” on Dr. Pereira’s evaluation as Dyer contends; instead, her evaluation was just one piece of information that was considered by the

Board in its overall decision. *See* Dyer's Exhibit N at 7-9. While the Board clearly considers a psychological evaluation when making a parolability determination, it does not give those evaluations undue weight. Board Member Dennis Thaut noted as much during Dyer's parolability hearing when the Board declined Dyer's attorney's offer to provide a full psychological evaluation from Dr. Trowbridge:

No, I don't think the Board's asking for that. I mean, the issue of [psychological]<sup>7</sup> evaluations has been of concern in this case before. We recognize that there are differences in psychological evaluations; we look at all of them as one piece of information, but not giving you any specific weight over the other one. These are clinical impressions for the most part by a variety of different people that have looked at this case. And from my perspective, to, **too far down that road might take us in a direction that would give it more weight than it deserves in terms of our actual decision making.**

*See* Board's Exhibit 3,<sup>8</sup> Transcript of January 13, 2010 Parolability Hearing, at 11 (emphasis added). The Board's ability to give appropriate weight to Dr. Pereira's evaluation is evidenced by its statement that "[w]e recognize that Dr. Pereira's scoring on some scales was at odds with previous evaluations. We cannot, however, ignore the results of this most recent evaluation." *See* Dyer's Exhibit N at 8.

Third, two prior psychological evaluations determined Dyer presented a high risk for re-offense. A 1993 psychological evaluation by

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<sup>7</sup> Although Exhibit 3 incorrectly transcribed the word "physiological" from the tape of Dyer's hearing instead of the word "psychological," Mr. Thaut actually stated "psychological," not "physiological."

<sup>8</sup> "Board's Exhibit" refers to the Exhibits attached to the Board's Response to Petitioner's Motion to Supplement the Record Under RAP 9.11.

Dr. Helmut Reidel concluded that:

[r]isk of reoffense is estimated to be high, based on the assumption that the jury convictions are accurate and Mr. Dyer is currently in a state of denial . . . Depth of sexual deviancy is also estimated to be high based on the same assumption and on the fact that any sexual deviancy has remained **essentially untreated** during his incarceration.

See Board's Exhibit 4, Psychological Evaluation of Richard Dyer dated March 5, 1993, at 4 (emphasis added). In addition, a 1994 psychological evaluation from Dr. William C. Jones concluded that:

[o]bviously, **without the benefit of specific treatment for sexual deviancy the risk of reoffense remains high**. This is not to say; however, that Mr. Dyer's other wide array of treatment involvement has not been beneficial. The depth of sexual deviancy cannot truly be assessed with an uncooperative client.

See Board's Exhibit 5, Psychological Evaluation, December 7, 1994, at 3 (emphasis added). Although Dyer implies that Dr. Perieira's evaluation is a highly aberrant outlier, Drs. Reidel and Jones' evaluations, although performed in the 1990's, also estimated Dyer's risk of re-offense to be high.<sup>9</sup> See above. The Board's decision found that "...[o]n his 2005 evaluation, the Board notes that Mr. Dyer reportedly scored on one test in a manner characteristic of prisoners who might be referred to as  
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<sup>9</sup> Dr. Trowbridge's May 3, 2011 evaluation, which is the subject of Dyer's pending motion to supplement the record, discussed the favorable evaluations of Mr. Carter and Dr. Monson. However, it did not address, or even mention, the prior unfavorable evaluations of Dyer by Dr. Riedel and Dr. Jones. See *id.* at 2 and 3-5. The Board's response to Dyer's motion to supplement argued that the Court should deny the motion, since Dr. Trowbridge's May 3, 2011 evaluation was not before the Board when it issued its March 2010 decision denying Dyer parole.

'psychopathic manipulators.'" See Dyer's Exhibit N at 8 (Board's emphasis).

Dyer's status as an untreated sex offender clearly played a larger role in the Board's decision to deny parole: "[t]o date he remains an untreated sex offender"; "[i]n this case...his lack of treatment...create considerable concerns about public safety should he be released." As this Court held in *Dyer II*:

The ISRB may consider the offender's failure to obtain treatment. **Lack of rehabilitation is a permissible reason to impose a minimum sentence considered exceptional under the SRA guidelines.**

*Dyer II*, 164 Wn.2d at 288.

**C. The Board Did Not Rely On The Unchangeable Facts Of Dyer's Crimes Of Conviction As The Basis For Its Denial Of Parole**

Dyer's contention that the Board's decision to deny parole was based on the facts of his two First Degree Rape convictions is meritless. See Brief at 14-15. A review of the Board's decision will reveal that, while the Board appropriately recounted the facts of Dyer's two crimes of conviction in its decision's "Nature of Index Offenses" section, it did not rely on those facts to deny him parole. See Dyer's Exhibit N at 2-5 and 7-9. Instead, the Board determined that the nature of Dyer's offenses - sexually violent crimes - coupled with his lack of treatment and indications of high psychopathy created considerable concerns about public safety should he be released. See Dyer's Exhibit N at 8. Reading

the Board's decision in its entirety, Dyer was not denied parole based on the unchangeable circumstances of his crimes of conviction.

**D. The Board Presented Adequate Written Reasons To Justify Its Exceptional Minimum Term**

Dyer complains that the Board's decision was not reasonably consistent with the SRA, asserting that while the high end of his standard range under the SRA is 88 months, "he is currently serving a 560-month minimum term, over *six times* the ISRB the SRA range." See Brief at 19. Dyer complains that had he been sentenced on two counts of first degree murder in 1986, his range would have been only 271-361 months. See Brief at 19. This argument is spurious. First, Dyer overlooks the fact that the court-ordered maximum term for his two First Degree Rape convictions is Life. See Dyer's Exhibit A, Amended Judgment and Sentence, *State v. Dyer*, Kitsap County Superior Court Cause Number 81-1-00398-1, at 2. RCW 9.95.100 is unequivocal: the Board "**shall not release a prisoner prior to the expiration of his maximum sentence unless it finds that prisoner to be completely rehabilitated and a fit subject for release.**" (Emphasis added.) See also *Cashaw*, 123 Wn.2d at 143. Second, it is irrelevant what another crime's standard range might be if Dyer fails to bear his burden under RCW 9.95.100 to demonstrate that he is parolable. If he is not paroled, then the obvious result is that the Board must impose additional confinement time: "[i]t is self-evident that if the inmate is not parolable . . . then the minimum term is necessarily extended." *Ecklund*, 139 Wn.2d at 174, quoting *In re Ayers*, 105 Wn.2d

161, 167, 713 P.2d 88 (1986) (*italics in the original*). Third, despite Dyer's contention that the Board's addition to his minimum term was not reasonably consistent with the SRA, this Court made clear in *Dyer II* that the Board may consider the offender's failure to obtain treatment under the SRA:

**Lack of rehabilitation is a permissible reason to impose a minimum sentence considered exceptional under the SRA guidelines.** *In re Pers. Restraint of Ecklund*, 139 Wn.2d 166, 176, 985 P.2d 342 (1999).

...  
Dyer has not taken responsibility for his crimes, which prevents him from obtaining the treatment the ISRB deems necessary for his full rehabilitation. Therefore the ISRB acted within its discretion to deny Dyer parole.

*Dyer II*, 164 Wn.2d at 288 (emphasis added). In addition, this Court has provided the following instruction as to RCW 9.95.009(2):

The plain meaning of this statutory language is that the ISRB's practices and criteria **need not mirror the SRA practices and criteria for imposing an exceptional sentence**. As interpreted in *Addleman*, the import of RCW 9.95.009(2) is that the ISRB has the discretion to consider the rehabilitative aims of the indeterminate sentencing system when it makes discretionary decisions.

*In re Locklear*, 118 Wn.2d 409, 414, 823 P.3d 1078 (1992) (emphasis added) (footnote omitted).<sup>10</sup> The Board's decision to deny Dyer parole was not an abuse of its discretion given the adequate written reasons set out in its decision, which included Dyer's continued status as an untreated sex offender. See Dyer's Exhibit N at 7-9 and *Dyer II*, 164 Wn.2d at 288.

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<sup>10</sup> The Respondent agrees with Dyer's assertion that this Court has not overruled *Locklear*. See Brief at 18.

Dyer further also argues “if it believes Dyer to be dangerous, the State has the option of filing for civil commitment. *See Addleman*, 151 Wn.2d at 782, n.6 (dissent of J. Johnson).” *See* Brief at 19. The Board cannot file such a petition. A civil commitment petition can only be filed by the Attorney General’s Office or a Prosecuting Attorney’s Office. *See* RCW 71.09.030(2)(a) and (b). And if the Attorney General’s Office or a Prosecuting Attorney, in the exercise of their discretion, chooses not to file a petition seeking Dyer’s civil commitment as a sexually violent predator under RCW 71.09, the Board will remain tasked with determining Dyer’s parolability under RCW 9.95.100.

Dyer notes that the Board’s decision requested that a forensic psychological evaluation be performed in Dyer’s case. *See* Brief at 20. However, the Board’s request for a future forensic psychological evaluation to be performed in Dyer’s case was not only to determine whether he meets the criteria for civil commitment, but also noted that it “would be extremely helpful in determining whether Mr. Dyer continues to present a danger to the community.” *See* Dyer’s Exhibit N at 9. In essence, a forensic psychological evaluation would permit the Board to perform a more comprehensive determination of Dyer’s risk of re-offense, given the extensive amount of information that is customarily provided in a forensic evaluation.

Finally, Dyer’s contention that the Board “must hold Dyer in prison forever because he denies guilt and therefore is not permitted to  
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engage in the ISRB's treatment program of choice"<sup>11</sup> is misdirected. Brief at 20. If Dyer ultimately serves the entirety of his maximum sentence, it is because he failed to meet his statutory burden under RCW 9.95.100 to show that he is completely rehabilitated and a fit subject for release. As noted above, Dyer's two rape convictions have a maximum term of Life, as imposed by the Kitsap County Superior Court. *See* Dyer's Exhibit A.

In sum, Dyer fails to show that the Board's decision to deny parole to an untreated sex offender was an abuse of its discretion - that the Board failed "to follow its own procedural rules for parolability hearings or acts without consideration of and in disregard of the facts." *See Dyer II*, 164 Wn.2d at 286. This Court's decision in *Dyer II* should control the result as to Dyer's current petition.

#### IV. CONCLUSION

For the above stated reasons, the Respondent respectfully requests that this Court affirm the Board's March 15, 2010 decision and dismiss Dyer's personal restraint petition.

RESPECTFULLY SUBMITTED this 15 day of December, 2011.

ROBERT M. MCKENNA

Attorney General



GREGORY J. ROSEN, WSBA #15870

Assistant Attorney General

PO Box 40116

Olympia WA 98504-0116

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<sup>11</sup> While Dyer cites *Dyer I*'s discussion of the "many programs" Dyer has taken, sex offender treatment is not listed among those programs. *See* Brief at 14 n.9, and *Dyer I*, 157 Wn.2d at 367.

**CERTIFICATE OF SERVICE**

I certify that on the date indicated below, I served a true and correct copy of the foregoing RESPONDENT'S SUPPLEMENTAL BRIEF on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
- United Parcel Service, Next Day Air
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705 SECOND AVENUE, SUITE 1300  
SEATTLE, WA 98104

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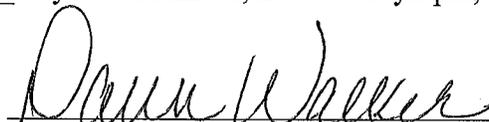
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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 16<sup>th</sup> day of December, 2011 at Olympia, WA.

  
DAWN WALKER  
Legal Assistant