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No. 97973-1

IN THE SUPREME COURT OF WASHINGTON

IN RE PERSONAL RESTRAINT PETITION OF:

ADAM BETANCOURT,

PETITIONER.

PETITIONER'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The Indeterminate Sentence Review Board (ISRB) abused its discretion when it denied parole based, in part, on the length of Adam Betancourt's "original sentence." The ISRB's *Decision and Reasons (Decision)* states that Mr. Betancourt "is determined to be not releasable" because, among other listed reasons, he "(h)as served less than ½ of the sentence imposed." *Decision*, p. 2. In addition to specifically including the percentage of sentence served as one of the cited factors justifying the denial parole, the *Decision* doubles down on this factor when it cites the prosecutor's opposition on similar grounds:

The Grant County Prosecutor's office submitted a letter stating their office recommended the *original sentence* of 600 months *be adhered to* and stated they oppose any *reduction* in this.

Decision, p. 6 (emphasis supplied). The length of a sentence is not a legitimate consideration. At a minimum, remand for a new hearing is required.

There is a bigger problem with the *Decision*. No evidence supports the conclusion that Betancourt is more likely than not to reoffend if conditionally released.

The statute does not direct the ISRB to make an informed, but otherwise unstructured professional judgment. To the contrary, the legislature required reliance on risk assessment instruments in order to avoid the well-documented problem that unstructured predictions of

dangerousness are incorrect two out of three times. Monahan, John, *The Clinical Prediction of Violent Behavior* 47 (1981); Mossman, Douglas, *Assessing Predictions of Violence*, 62 *J. Consulting & Clinical Psychol.* 783, 790 (1994). While Betancourt acknowledges that this Court's review is deferential and the ISRB's finding of a likelihood of danger need only be supported by some evidence, the ISRB's decision must be based on the statutory formulation: whether the prospective parolee is a future danger as determined by scientifically accepted risk assessment instruments.

Read together, the risk assessment instruments administered by a DOC psychologist set forth in her psychological evaluation established that Mr. Betancourt was a low risk to reoffend. *Evaluation*, p. 11, 13. No facts cited in the *Decision* contradicted or even undermined that conclusion. Instead, the *Decision* simply relied on Betancourt's past bad behavior to deny parole. Because the evidence here was insufficient to overcome the presumption of release, this Court should direct the ISRB to release him.

"In the context of an early release determination pursuant to RCW 9.94A.730, where the record does not establish a likelihood to reoffend, the statute requires a release on appropriate conditions, not a second bite at the apple." *Matter of Brashear*, 6 Wash. App. 2d 279, 290, 430 P.3d 710 (2019).

II. FACTS

At the age of 16, Adam Betancourt participated with two peers in the murders of an elderly couple in Grant County, Washington. He was sentenced to 600 months in prison long before the recognition that “children are different.” In 2018, after serving more than 20 years in prison, the ISRB conducted a parole hearing pursuant to RCW 9.94A.730.

A. The Crimes

In the early morning hours of May 21, 1997, Adam Betancourt, Donald Lambert (age 15) and Marcus “David” Wawers (age 15), armed themselves and walked to the home of an elderly couple. After they entered the victims’ bedroom and found them both lying in bed, Mr. Betancourt and Mr. Lambert both began shooting at the victims. All three co-defendants then ran from the home. Once outside, Mr. Betancourt and Mr. Lambert reloaded. They observed someone walking inside the house and both boys fired at this figure, later to be identified as the female victim.¹

¹ The DOC evaluation noted that at the time of the crime, due to both his age and the environment he was raised in, Betancourt “appeared to be lacking key developmental/environmental supports that often protect an individual from bad choices/behaviors during these vulnerable times.” *Evaluation*, p. 11-12.

B. As a Child, Mr. Betancourt Endured Trauma and Abuse

As the psychological evaluation and ISRB decision both recite, Mr. Betancourt endured abuse and trauma as a child. Throughout his childhood, Betancourt was repeatedly beaten by his stepfather, a raging alcoholic who would begin assaulting him as soon as his mother left for work. She was also physically abused as were his sisters. Betancourt “recalled one time where he woke up at a neighbor's house two days after a particularly bad incident and didn't know how he had gotten there.” The evaluation starkly summarized: “Mr. Betancourt's family life was characterized by poverty and few resources or activities outside of surviving,” adding:

Mr. Betancourt found inclusion in team sports and joined every team that he could to avoid going home. He found a few protective coaches and teachers who tried to help him. He enjoyed team sports because he was recognized for his skills, contributed to the team and the team felt like a family. His wrestling coach was a particularly helpful mentor because he [the coach] believed he [Betancourt] was not dumb, stupid or worthless.

Evaluation, p. 5.

Mr. Betancourt's Behavior in Prison Changed as He Matured

After conviction and a sentence totaling 50 years, Adam Betancourt entered prison as a child who was “chronologically and emotionally in the middle of completing important developmental processes.” *Id.* at 11. During his first decade in prison, Betancourt committed a number of infractions, including the use of drugs. The

evaluation explained: “Mr. Betancourt reported that over the years when he was first imprisoned, he was angry, alone, and figured he would never get out. His behavior reflected these beliefs and involved frequent verbal defiance of authority, refusing to comply, and drug infractions.” Betancourt’s use of drugs culminated and ended in 2009 when he “swallowed two small balloons, one with methamphetamine in it and the other with heroin. The balloons broke and he overdosed on the drugs.” *Decision*, p. 4.

After that incident, Betancourt’s behavior changed dramatically. He began distancing himself from the gang and was fully out by 2015. He completed Substance Abuse Treatment in 2016. He has abstained from the use of drugs since that date. A victim awareness class and a “mentor inside” made him realize that his “negative actions in prison were continuing to harm people.” According to the DOC psychologist, Mr. Betancourt “has managed to better self-regulate his behavior over the last seven years.” *Evaluation*, p. 7.

As the *Evaluation* further noted Mr. Betancourt has participated “in almost every program available to him” in prison including numerous rehabilitative, vocational skills, and education classes. As a result, he has earned numerous certificates. He has worked as a custodian, stock clerk, maintenance helper, welder, print press operator and food packer/handler. His counselor noted Mr.

Betancourt is not a problem on the living unit. He is helpful to staff and communicates well with staff and other inmates.” *Evaluation*, p. 4.

Mr. Betancourt reports he has now completely turned away from all drug activity and started a combatting gang violence program. He states that he is occasionally harassed by gang members but is practiced at saying, "You stay on your side and I'll stay on my side," and is left alone. He also does not communicate with some of his nieces because their husbands are gang members. *Evaluation*, p. 7.

At the parole hearing, Mr. Betancourt explained what had changed since he came to prison and what caused the change. RP 47-49. He said he had a mentor inside who explained to him that his negative actions in prison were continuing to harm people. He said a Victim Awareness Class he took was instrumental, as well. He stated prior to that he did not consider what the victims or survivors might feel. He now feels deeply remorseful for what he did and the pain he caused the family members. “He knew he had to change his direction away from drugs when he realized how much his gang activity and drug activity was controlling his life.” *Evaluation*, p. 7.

The *Evaluation* concluded that Mr. Betancourt has learned skills of self-regulation during his time in prison through cognitive-behavioral programming and natural maturation. “His behavior and

relationships have improved and are positive. He has several marketable skills which should enable him to find work. He is engaged to be married to a professional career woman with whom he has been transparent. They plan to marry when he is released. He has a solid extended family support system which he and they have managed to maintain over long distance and long term. He is pleasant and cooperative and receives positive supervisory reviews. "His faith is a source of strength and stability." "He has succeeded in paths to good time recovery and is continuing in that process." *Evaluation*, p. 8.

C. After Administering Several Risk Assessment Tools, Mr. Betancourt was Determined to be a Low Risk to Reoffend

In accordance with the statutory directive, the DOC psychologist administered and scored three risk assessment instruments. On the Hare Psychopathy Check List-Revised (PCL-R), which was described as the "gold standard of predicting future risk," and Betancourt "scored in the very low (non-psychopath) range for psychopathy. His risk for reoffending is low based upon the absence of psychopathy indicators and antisocial personality disorder is unlikely." *Evaluation*, p. 10.

On the Violence Risk Assessment Guide, an instrument which only considers historical or "static" factors, Betancourt's score suggests a moderate risk of reoffense. *Id.* However, because the assessment only of risk factors tends to "over-represent the negative factors in risk management, and poorly reflect factors that may mitigate risk, the

SAPROF (Structured Assessment of Protective Factors) was also administered. Combined with the VRAG, the two tests “present a more accurate picture of the current function of the subject.” “Mr. Betancourt scored in the moderate-high range of protective factors. These were evenly distributed between internal (historical and dynamic factors), motivational (be a positive member of society), and external factors (voluntary and imposed support systems.)” “Other significant mitigating factors that indicate possible reduction in risk include: increasing age, decreased frequency of institutional misbehavior, and criminogenic-related cognitive treatment also apply to Mr. Betancourt.” *Id.* at 11.

Taking into account “Mr. Betancourt's very low score on the PCL-R, his moderate score on the VRAGR and the moderate-high score on protective factors which are dynamically based, the result is on a more probable than not combined score of low level of risk to reoffend violently.” The *Evaluation* summarized:

Overall, the results of this evaluation suggest that Mr. Betancourt is at "low" risk to reoffend violently in the community as measured by the instruments and clinical evaluation done on this date. Measures utilizing primarily static factors place him at a low to low-moderate risk. Records documenting improved functioning and maturation over time (combined with results from the SAPROF) suggest that, for this particular individual, the overall risk level could be viewed as more in the "low" range. Taking into account maturational and dynamic risk factors is consistent with the legal and clinical findings elaborated on earlier in this report.

Evaluation, p. 13. Finally, the *Evaluation* added that conditions of parole would further reduce Betancourt's already low risk of reoffense.

Evaluation, p. 14.

D. The ISRB Denied Release

The ISRB denied release. It listed the following reasons:

- Has not participated in sober support groups
- Used drugs while incarcerated
- Introduced drugs into the facility in 2009
- 32 serious infractions with the last in 2009
- Has served less than ½ of the sentence imposed
- Continues to incur negative behavior observations

Decision at 2. The *Decision* cites to two of the three risk assessment instruments, failing to mention that a number of “dynamic” “protective” factors make Betancourt a “low” risk to reoffend. Although the *Decision* cites to Betancourt's drug use and infraction history, it also notes that he has completed numerous rehabilitative programs, has desisted from drug use since 2009, and has not committed a serious infraction in over a decade.

At no point does the *Decision* contest or even discuss the conclusion that risk assessment instruments show that Betancourt is a low risk to reoffend. At no point does the *Decision* conclude or even explain why Betancourt's prior drug use and infraction history render the risk assessments invalid.

III. ARGUMENT

A. Introduction

Adam Betancourt was convicted in adult court of a crime committed when he was 16 years old. Because his sentence is more than 20 years and because he did not fall into any of the disqualifying categories identified in RCW 9.94A.730 (a conviction for a crime committed after age 18 or a recent serious infraction), he was eligible for a parole hearing where a presumption of release applies. RCW 9.94A.730(3). Under the law, a juvenile is subject to a presumption of parole after serving 20 year, regardless of the length of their sentence or the nature or number of the crimes of conviction.

At a parole hearing, the statutory presumption of release applies unless “the board determines by a preponderance of the evidence that”, despite conditions of release, “it is more likely than not that the person will commit new criminal law violations if released.” RCW 9.94A.730(3). The prediction of future dangerousness was not simply left the judgment of the ISRB. Instead, the statute directs “an examination of the person” using “methodologies that are recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the person will engage in future criminal behavior.” *Id.* The board shall order the person released under such affirmative and other conditions as the board determines

appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released. RCW 9.94A.730(3).

B. The ISRB Improperly Denied Parole Based on the Percentage of the Sentence Served

The length of the sentence imposed is irrelevant to the parole decision. The ISRB is not empowered to determine that 20 years is an insufficient sentence. Nevertheless, the ISRB specifically relied on the percentage of the sentence served as a reason to deny Betancourt release. *Decision*, p. 2 (“Has served less than ½ of the sentence imposed”).² This was not the only reference to the length of Betancourt’s sentence. The *Decision* additionally notes: “The Grant County Prosecutor’s office submitted a letter stating their office recommended the original sentence of 600 months be adhered to and stated they oppose any reduction in this.” A decision to grant parole does not indicate a lack of “adherence” or “a reduction” of the sentence

² Additionally, the ISRB incorrectly states that Betancourt’s “minimum term was set at 300 months on each count, to be served consecutively for a total of 600 months...His maximum term is Life.” Betancourt received a determinate 600 month sentence. The *Decision* also does not note is that the sentence was imposed prior to the advent of the “children are different” doctrine and the requirement that a judge consider and weight the mitigating qualities of youth prior to imposing sentence.

imposed by the court. The legislature could have but did not direct that juveniles be remanded for the imposition of a minimum term.³

“The ISRB 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.” *In re Pers. Restraint of Dyer*, 157 Wash.2d 358, 363, 139 P.3d 320 (2006) (*Dyer I*).

RCW 9.94A.730 expressly contemplates that no eligible juvenile will serve more than 20 years before parole eligibility. The ISRB’s reliance on the portion of the sentence that Betancourt has served is irrelevant. The ISRB is not empowered to question the statutory formulation. “The statute expressly contemplates that the offender will not serve more than 20 years of their sentence unless they are likely to reoffend.” RCW 9.94A.730(3). *Matter of Brashear*, 6 Wash. App. 2d 279, 289, 430 P.3d 710 (2019). Like in *Brashear*, the ISRB’s reliance here on “the portion of [the] sentence served conflicts with its statutory

³ Although the ISRB does not explain, one reason listed for denying parole was that he: “(i)ntroduced drugs into the facility in 2009 which could have resulted in criminal charges.” One inference from the reference to the possibility of criminal charges is that the ISRB improperly sought to impose additional incarceration for that activity. In all, the *Decision* makes multiple references to portion of sentence served and never indicates the ISRB would have denied parole minus this factor. *See State v. Parker*, 132 Wash. 2d 182, 189, 937 P.2d 575, 579 (1997) (where reliance on improper or unsupported factor, court reviewing a sentence will affirm only where record shows same action would have been taken absent that improper consideration).

mandate to consider whether she is more likely than not to reoffend.”

*Id.*⁴

Because the denial of parole rests in part on an improper consideration, at a minimum Betancourt is entitled to a new parole hearing.

C. There Was Insufficient Evidence to Conclude that Mr. Betancourt is More Likely Than Not to Reoffend.

Adam Betancourt participated in a risk assessment evaluation performed by a Department of Corrections (DOC) psychologist. After considering all three instruments administered, the DOC psychologist concluded:

Taking into consideration Mr. Betancourt's very low score on the PCL-R, his moderate score on the VRAGR and the moderate-high score on protective factors which are dynamically based, the result is on a more probable than not combined score of low level of risk to reoffend violently. This is projected to be a more balanced representation of his current risk level based upon both static and dynamic factors.

Evaluation, p. 11 (emphasis in original). Although Betancourt scored in the “moderate” range on the VRAG-R, the evaluator explained: “Scores on the VRAG-R are largely based upon Static Information related to major life events (marital status, age at index crime, elementary school maladjustment, criminal history, etc.) at, or prior to, the time of the offender's Index offense in 1997. As such, scores

⁴ This Court accepted review in *Brashear*, but the case was later dismissed after the ISRB paroled Ms. Brashear.

generated by this instrument are unlikely to change significantly when re-administered over time.”

Because Betancourt was a juvenile at the time of the crime and because the VRAG-R measures only static factors and does not measure the ability to or actual change, the evaluator combined the VRAG-R score by using an additional instrument which takes into account specified “dynamic” factors in order to obtain a “more accurate picture of the current function of the subject.”

The *Evaluation* concluded Betancourt had a “moderate-high” number of “protective factors,” “internal,” “external,” and “motivational.” The psychologist added: “Other significant mitigating factors that indicate possible reduction in risk include: increasing age, decreased frequency of institutional misbehavior, and criminogenic-related cognitive treatment also apply to Mr. Betancourt.” *Evaluation*, p.11.

Considering all three instruments, the “result is on a more probable than not combined score of low level of risk to reoffend violently. This is projected to be a more balanced representation of his current risk level based upon both static and dynamic factors.”

Evaluation, p. 11.

Despite the fact that Betancourt was determined to be a low risk to reoffend based on the use of accepted future risk instruments, the ISRB denied parole.

The *Decision* does not question the validity of the instruments used or the result obtained by the psychologist. The *Decision* also does not suggest that the result was due to false, misconstrued, or misunderstood facts. Instead, in addition to aforementioned “percentage of sentence served,” the ISRB denied release because Betancourt had a number of infractions between 1997 and 2009; he previously used drugs; although he completed substance abuse treatment he has not participated in “sober support groups” in prison. *Decision*, p. 2.

Although Betancourt’s infraction and drug use history are relevant to the ISRB’s parole decision, the *Decision* treats those facts as entirely historical. In fact, the *Decision* never explains how those historical facts provide a nexus to Betancourt’s current risk of recidivism. Instead, like with the portion of the sentence served factor, the *Decision* treats those past facts apparently as a reason meriting additional punishment beyond the 20 years served.

Likewise, the *Decision* acknowledges that Betancourt has not had a serious infraction or used drugs for over a decade and has completed several chemical dependency treatments. In addition, the

Decision does not question that Betancourt's rehabilitative efforts were and are genuine.

The law mandates reliance on risk prediction instruments because unstructured profession judgments are simply not reliable. Moreover, unstructured, and otherwise idiosyncratic judgments do not become reliable by virtue of having made those predictions numerous times. *See e.g., Coble v. State*, 330 S.W.3d 253, 278 (Tex. Crim. App. 2010) (rejecting unstructured risk prediction methodology of psychiatrist with years of training and experience. "These factors sound like common-sense ones..., but are they ones that the forensic psychiatric community accepts as valid? Have these factors been empirically validated as appropriate ones by forensic psychiatrists? And have the predictions based upon those factors been verified as accurate over time?"). There is large body of research indicating that, even under the best of conditions, so-called clinical predictions of long-term future dangerousness are wrong in at least two out of every three cases. This is precisely why the statute requires reliance on scientifically accepted risk prediction instruments.⁵

⁵ In Bernard Diamond's article *Psychiatric Prediction of Dangerousness*, he specifically hypothesizes why professionals are likely to over-predict dangerousness: If the professional under-predicts danger, and the parolee later commits a violent act, he will be subjected to severe criticism. If, on the other hand, he over-predicts danger, he will suffer no consequence from such faulty prediction, for his prediction might have come true had there not been continued imprisonment. Inevitably, this will sometimes result in doing the

The ISRB was not free to disregard the risk predictions in favor of unstructured guesswork, no matter how experienced the members of the Board.

D. Where Insufficient Evidence Supports the ISRB’s Dangerousness Conclusion, This Court Can Order Release

The ISRB will likely rely on pre-SRA parole decisions to argue that this Court’s review is narrow with a heavy dash of deference. But, RCW 9.94A.730 is much different than the pre-SRA parole statute, RCW 9.95.100.

Pre-SRA parole hearings involve significant and largely unbounded discretion. For example, *In re Personal Restraint of Whitesel*, 111 Wash.2d 621, 763 P.2d 199 (1988), reviewed a pre-SRA parole decision and held that it is not the role of this court to substitute its discretion for that of the ISRB. However, that decision was discretionary.⁶

Under the statute applicable here, the decision whether to parole an individual is not a matter of “grace,” and cannot be based on a myriad of subjective facts and determinations. Instead, it must be

“safe” thing: predicting dangerousness, if there are even the most minimal reasons to justify it. 123 U. of Penn. L. Rev. 439, 447 (1974).

⁶ In addition to the statutory directive, this Court has explained that when the ISRB sits in a juvenile parole case the ISRB fulfills the constitution obligation that ordinarily applies at sentencing. *State v. Scott*, 190 Wash. 2d 586, 597, 416 P.3d 1182, 1187 (2018). So, while the ISRB is part of the executive branch, in juvenile-board cases it also acts in at least a quasi-judicial role.

based on “methodologies that are recognized by experts in the prediction of dangerousness.” Where those accepted methodologies result in a singular determination that the individual is a low risk to reoffend, insufficient evidence supports the denial of parole. Moreover, this Court is not required to simply defer to a subjective judgment.

This Court should adopt the reasoning of *Brashear*, which held: “In the context of an early release determination pursuant to RCW 9.94A.730, where the record does not establish a likelihood to reoffend, the statute requires a release on appropriate conditions, not a second bite at the apple. RCW 9.94A.730(3).” *Brashear*, 430 P.3d at 716. *See also In re Martinez*, 210 Cal. App. 4th 800, 828, 148 Cal. Rptr. 3d 657, 679 (2012) (directing parole board to release petitioner subject to whatever conditions it deems appropriate). This is consistent with the longstanding rule that when a statute places a burden of proof on a party and the evidence is insufficient as a matter of law, the remedy is reversal and a new hearing or trial is “unequivocally prohibited” and dismissal is the remedy. *State v. Hickman*, 135 Wash. 2d 97, 103, 954 P.2d 900, 903 (1998).

Where a due process liberty interest in parole is at stake—the separation of powers doctrine does not preclude the judiciary's review of the executive's exercise of discretion. The United States Supreme Court explained that a State creates a protected liberty interest when

it places substantive limitations on official discretion. *Hewitt v. Helms*, 459 U.S. 460, 466 (1983). Accord *Matter of Cashaw*, 123 Wash. 2d 138, 144, 866 P.2d 8 (1994).

Mr. Betancourt is not asking this Court to determine whether Mr. Betancourt currently poses an unreasonable risk of reoffense. He is not seeking to empower this Court to reweigh the evidence. Instead, he asks whether the *Decision* reflects some methodologically accepted evidence meeting the statutorily mandated standard. If not, then the presumption of release controls. Put another way, when the statutory factor is not supported by some evidence in the record and thus is devoid of a factual basis, a reviewing court should grant the prisoner's petition and should order the ISRB to vacate its decision denying parole. Otherwise, the ISRB can subvert the due process of law without any meaningful remedy. Betancourt urges this Court follow the California Supreme Court decision *In re Lawrence*, 44 Cal. 4th 1181, 1213, 190 P.3d 535 (2008), and its progeny which rejected a separation of power challenge for a statute similar to the one at issue here and developed a standard of review focusing upon the existence of some evidence supporting the determination required by statute. That court conclude that the “some evidence” review standard does nothing more than ensure that the Board has “complied with the

statutory mandate and have acted within their constitutional authority.”

Also helpful here is *Trantino v. New Jersey State Parole Bd.*, 166 N.J. 113, 197, 764 A.2d 940, 990, *modified*, 167 N.J. 619, 772 A.2d 926 (2001), where the New Jersey Supreme Court reversed a parole board decision and ordered an inmate’s release: “It is the absence of that proof that entitles Trantino to parole, not sympathy or compassion for him. No matter how much we may abhor the admitted killing of those two officers, the law must apply.” The same is true here. When the evidence reflecting the inmate's present risk to public safety leads to but one conclusion a court may overturn a contrary decision by the Board. In that circumstance the denial of parole is arbitrary and capricious and amounts to a denial of due process.

IV. CONCLUSION

This Court should grant this petition and either direct the ISRB to release Mr. Betancourt or conduct a new hearing in accordance with this Court’s opinion.

DATED this 31st day of August 2020.

Respectfully Submitted:
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